



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



BC

FILE: [Redacted]
SRC 03 067 51841

Office: TEXAS SERVICE CENTER Date: **DEC 23 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition is now before the Administrative Appeals Office (AAO) at the request of the Director, Texas Service Center. The director's decision will be affirmed, the petition will be denied.

The petitioner is a cable installation firm. It seeks to employ the beneficiary permanently in the United States as a cable television line technician. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director invalidated the labor certification based upon a finding that it had been procured by fraud or willful misrepresentation. The director then denied the petition because it was no longer supported by a valid labor certification, and also because the evidence had not established the petitioner's ability to pay the proffered wage.

On June 30, 2003, the director issued a notice of her intent to deny the petition (NOID), in which recited that she and the U.S Attorney for the Southern District of Florida had on May 23, 2003, announced that a Miami jury had returned guilty verdicts on all criminal immigration fraud charges brought against immigration attorney, Javier Lopera. The NOID stated the attorney's sentencing was set for August 4, 2003. The NOID states:

In the instant case, the beneficiary is working or will work for the petition organization. Documentation provided by the petitioning entity clearly states Mr. Lopera's law firm represented the beneficiary and/or the petition in the Department of Labor DTA=750 process. Since Mr. Lopera's law firm was found guilty of committing immigration fraud, it may be concluded that this petition may contain fraudulent documents. As such, this petition cannot be considered approvable with the documents submitted. For this reason, this office will deny this instant petition for fraud.

Although the director's decision did not advise the petitioner or its counsel that an appeal was available, the petitioner sent a Form I-290B to the AAO, which forwarded the same to the director. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv).

Among the appellate authorities are appeals from denials of petitions for immigrant visa classification based on employment, "except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act." 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.). Authority to invalidate labor certifications is delegated to CIS by DHS Delegation Number 0150.1(X), *supra*.

If a director invalidates a labor certification, the petition will no longer be supported by a labor certification from the Department of Labor, in which case this office will lack jurisdiction to consider an appeal from the director's decision. However, in this case, the director has certified its decision to the AAO asking it to affirm its denial of the petition on the two cited grounds. The AAO will discuss both denial grounds in this decision.

At the outset, this office notes that the director lacked evidentiary support for concluding that the attorney's fraud was attributable to the petitioner. 20 CFR 656.30(d) states:

After issuance labor certification are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a

court, of fraud or willful misrepresentation of a material fact involving the labor certification application.

Without a finding the petitioner itself acted or failed to act for fraudulent or through the willful misrepresentation of a material fact, invalidation of the labor certification would not be warranted under 20 CFR 656.30(d).

Here, nothing counsel has produced pertinent to documents submitted to the Department of Labor show an effort to hide the relationship the beneficiary had with the petitioner's sole shareholder, who is the beneficiary's brother.¹ Through new counsel, the petitioner has indicated, following the labor certification process, that the beneficiary is the brother of the owner of the petitioner. It may be true that, had the relationship been disclosed during the labor certification process, the application would not have been certified. The record of proceedings, however, does not demonstrate that the individual adjudicating the certification specifically raised such disclosure or that the Department of Labor otherwise required one.²

The director's decision to revoke the underlying labor certification based upon fraud will be withdrawn and the matter will be remanded to provide the director with an opportunity to consult with the Department of Labor and/or take any other actions deemed necessary.

The director has also found that the petitioner did not establish, as of the priority date, its continuing ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See*

¹It is also noted that the petitioner has a pending I-140 petition for a position similar to that proffered, for the father of the petitioner's sole shareholder.

²Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart* 374, 00-INA-93 (BALCA May 15, 2000). Where the person applying for position owns the company that is the petitioner, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on March 15, 2001. The proffered wage as stated on the Form ETA 750 is \$14.92 per hour (\$31,033 per year). The Form ETA 750 states that the position requires two years experience.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on February 14, 2000, to have a gross annual income of \$489,999, but did not indicate how many workers it currently employed. According to the tax returns in the record, the petitioner's fiscal years lasts from January 1 to December 31. On the Form ETA 750B, signed by the beneficiary on March 2, 2001, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted the following documents:

- An original certified ETA 750; and,
- A form 1120 return.

The June 30, 2003, NOID recited the regulation at 8 C.F.R. § 204.5(g)(2), requesting a copy of the petitioner's federal tax returns for 2001 and 2002, along with certified copies of W-2 Tax and Wage Statements for 2002 along with Form 941 quarterly returns. It also inquired about the number of I-140 petitions it had sponsored on behalf of other aliens, asking if it still employed any.

In response to the NOID's requests pertaining to the petitioner's ability to pay the proffered wage, counsel submitted:

- The petitioner's Form 1120 return for 2002;
- The petitioner's W-2 statements for 2002; and,
- Counsel's letter dated July 28, 2003, stating that the petitioner has filed three labor certification applications and has three pending I-140 petitions, in two of which counsel represents the parties.

On September 22, 2004, the director issued a decision, certified to the AAO, to deny the petition by finding that the evidence submitted did not establish the petitioner's continuing ability to pay the proffered wage, beginning on the priority date.

The director found that the petitioner had not established its ability to pay the proffered wage for 2001. She found that the petitioner's Form 1120 return for 2001 showed a taxable income of \$2,445, with Schedule L showing the petitioner had -\$957 in current assets and no current liabilities. She also found the petitioner had not submitted evident of having paid the beneficiary a wage or as a contractor in 2001.

The director also found the petitioner had not established its ability to pay the proffered wage for 2003, based upon submitted Forms 941 showing for the first quarter of 2003 it had paid no wages, and for the second quarter had paid wages to two full-time employees and a part-time worker.

The director, however, found the petitioner had established its ability to pay the beneficiary the proffered wage for 2002, based on the petitioner's Form 1099 showing it paid the beneficiary of \$53,314.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not submit any W-2 statements issued to the beneficiary for 2003. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during 2001 or 2003. The petitioner is obligated to demonstrate that, during 2001 and 2003, it could pay the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The pertinent tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$31,033 per year from the priority date.

In 2001, the petitioner's Form 1120 return stated its net income³ to be \$2,445.

The petitioner's Form 941 for 2003 did not list the beneficiary as one of its three employees.

Therefore, for the years 2001 and 2003, the petitioner did not have sufficient net income, or evidence of employment by the petitioner, to establish the petitioner's ability to pay the proffered wage.

³ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's net current assets totaled a negative \$957 for 2001.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The director's decision to invalidate the labor certification based upon fraud is withdrawn. The matter is remanded to the director for further proceedings in accordance with the foregoing concerning the invalidation of the labor certification. The director's decision finding that the evidence does not establish the petitioner's ability to pay the proffered wage is affirmed; the visa petition will be denied.

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.