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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JUL 22 2005
SRC-03-029-55293

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant 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:



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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the visa preference petition and a subsequent motion to reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director.

The petitioner is a convenience store/gas station. It seeks to employ the beneficiary permanently in the United States as an assistant manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 at 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$7.70 per hour, which amounts to \$14,014 annually based on a 35-hour work week. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of February 2000.

On the petition, the petitioner claimed to have been established on June 8, 1998, to have a gross annual income of \$2,082,399, and to currently employ three workers. In support of the petition, the petitioner submitted its corporate tax return for the year 2000¹.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 17, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director requested information about the number of employees receiving officer's compensation, the number of employees being supervised by the beneficiary, and W-2 or 1099 forms for the year 2000 for its staff. Additionally, the

¹ Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date in 2001.

petitioner requested copies of W-2 or 1099 forms issued to the beneficiary as well as the petitioner's 2002 corporate tax return, three months of bank statements, and federally quarterly tax returns.

In response, the petitioner submitted its 2002 Form 1120 Corporate tax return; copies of the petitioner's bank statements for accounts held at different banks showing many insufficient fund returned checks and overdraft fees; copies of the petitioner's quarterly tax reports for all four quarters in 2001 and 2002 reflecting wages paid to [REDACTED] and [REDACTED] but none to the beneficiary; copies of the petitioner's W-2 forms for 2001 and 2000 reflecting wages paid to the same three employees listed on the petitioner's quarterly tax reports; copies of Forms 1099, Miscellaneous Income, issued to a [REDACTED] with a social security number of 171-61-9368 and address in Pakistan in 2000 and 2001; a notarized and sworn affidavit from the beneficiary stating that he has worked for the petitioner since February 2000 but because of his immigration status, has never received W-2s and does not have a social security number; and a letter from the petitioner's president stating that the beneficiary only supervises one clerk and the workers in that position change periodically.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on August 27, 2003, denied the petition. The director stated that the petitioner's income tax returns must be incorrect since the petitioner failed to issue 1099 or W-2 forms to the beneficiary and questioned the legitimacy of nonemployee compensation paid to an individual in Pakistan. The director noted the petitioner's failure to show any wages paid to the beneficiary, the petitioner's "apparent disregard for the rules and regulations of government agencies," and the petitioner's bank statements showing "a great many negative balances and insufficient funds."

The petitioner filed a motion to reconsider stating that the beneficiary's unauthorized employment was not a valid reason for the visa petition to be denied since he filed a concurrently adjustment of status to lawful permanent resident application with the visa petition and a \$1,000 penalty fee under Section 245(i) of the Act. Additionally, the petitioner's counsel asserted that the petitioner's gross and net incomes reflect the petitioner's continuing ability to pay the proffered wage.

The director denied the petitioner's motion to reconsider on October 27, 2003 stating that the petitioner failed to respond to the director's determination in her August 27, 2003 decision finding that the petitioner's tax returns are incorrect since they do not account for wages paid to the beneficiary and questioned the legitimacy of wages paid to an individual in Pakistan.

On appeal, counsel asserts that the director raises irrelevant issues about "payments to a shareholder of the company in Pakistan" and suggests greater irrelevance in determining that a petitioning employer who hires a worker and fails to report wages paid to that worker cannot establish its continuing ability to pay the proffered wage beginning on the priority date. Counsel claims that denying the petition for finding that the petitioner's tax returns do not show sufficient net income because the petitioner failed to report wages paid to an undocumented worker is unprecedented. The petitioner submits its corporate tax returns for 2000, 2001, and 2002, copies of decisions issued by the AAO in the past, and a copy of a memorandum issued by CIS' Office of the General Counsel discussing Section 245(i) of the Act.

[REDACTED] was not listed on the first quarter of 2001 or any quarters in 2000. [REDACTED] was not listed on any quarters in 2001.

Subsequent to filing the appeal, the petition was referred to the Texas Service Center's Fraud Division Unit (TXFDU) who undertook an investigation through liaison research with the Florida Department of Revenue, the Florida Secretary of State, and internal CIS databases. TXFDU made the following determinations, in pertinent part:

[TXFDU] has revealed that the petitioner has submitted a fraudulent document in support of [the instant petition].

* * *

[Internal CIS database] determined [REDACTED] has lived in East Lansing, MI; [REDACTED] PA; Hartford, CT; and State College, PA between 1996 and 2001. . . .

* * *

A letter dated December 18, 2003 from [REDACTED] Records Specialist, Records Management, Florida Department of Revenue was received which indicated that their office was unable to locate any information concerning [REDACTED]

This is an indication that [REDACTED] has never been employed by [the petitioner] and the copy of the IRS Form 1099-MISC used to support [the beneficiary's] petition is fraudulent. It is also an indication that he was never employed in the state of Florida. Although employees were reported for the previous quarters, the company filed no employment reports for the 2nd quarter of 2003 through the 3rd quarter of 2003. This means that the company has not reported employee salaries for the six- (6) months or is out of business. . . .

* * *

A check with the Florida Secretary of State (SOS) has revealed that [REDACTED] is listed as a Vice President of the company. . . .

It appears that the diminishing or absent of wages/salaries figure for an enterprise is evidence that the firm's net income and net assets have declined to the extent that ability to pay no longer exists.

It appears that the business owners of [the petitioner] are using the company as a means to perpetuate the unauthorized stay of foreign nationals in the U.S[.] and using fraudulent documents to obtain a DHS benefit.

The AAO is concerned by TXFDU's findings because there is an implication of fraud. Resources were expended to investigate the legitimacy of the petitioner's representations to government agencies and whether or not fraud was perpetrated in the instant case. The AAO relies upon the expertise of TXFDU and the supporting documentation attached to its investigation results.

The AAO reviewed the record of proceeding against TXFDU's findings. The AAO note that the tax returns contained in the record of proceeding are not IRS- certified copies. However, in 2000 and 2001, the petitioner only represented one 100% shareholder, who is not [REDACTED] and the non-employee compensation paid

to [REDACTED] is not cross-referenced on either the 2000 or the 2001 tax return. Since [REDACTED] is not a reported shareholder on the petitioner's tax returns, the AAO is confused by counsel's appellate assertion that he is a shareholder residing in Pakistan. The AAO is also concerned that TXFDU's findings determined that the petitioner failed to report the non-employee compensation paid to [REDACTED] to the Florida Department of Revenue in either 2000 or 2001 as it is obligated to do and that the Florida Department of Revenue indicated the petitioner might be out of business since it did not report any wages paid to any employee for the two recent reporting quarters. Thus, the AAO understands TXFDU's concern that the record of proceeding could contain fraudulent documentation and evidence that does not accurately portray and reflect the petitioner's financial position³. Evidence and representations made in administrative proceedings must be accurate, honest, and complete.

Thus, the petition will be remanded to the director to obtain IRS-certified copies of the petitioner's tax returns, explanation and rebuttal concerning TXFDU's findings, and confirmation that the petitioning entity is still a viable business. Afterwards, the director will consider the petitioner's continuing ability to pay the proffered wage by analyzing the petitioner's certified net income and net current assets, as well as any established wage payments already made to the beneficiary, and certify adverse findings to the AAO.

The petition is remanded to the director accordingly who may undertake any additional procedural mechanisms available to her including any additional requests for evidence or information from the petitioner⁴.

ORDER: The petition is remanded to the director for entry of a new decision.

³ Fraud results in inadmissibility and permits the director to invalidate a labor certificate. See 8 U.S.C. § 1182(a)(6)(C) and 20 C.F.R. §§ 656.30(d) and 656.31(d). The director is entitled to invalidate the labor certificate based upon a finding of fraud.

⁴ The AAO also notes that the petitioner filed another similar petition on behalf of the beneficiary that the director is holding pending the AAO's decision. The director should make a similar determination in that case.