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MAR 21 2005

FILE:

[REDACTED]  
SRC-00-241-54215

Office: TEXAS SERVICE CENTER Date:

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:

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 employment-based preference visa petition was initially approved by the Director, Texas Service Center. In connection with information concerning the criminal conviction of the petitioner's attorney representative for immigration fraud, the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140) and certified her decision to the Administrative Appeals Office (AAO). The director's decision will be affirmed. The petition will remain revoked.

The petitioner is a marine service provider. It seeks to employ the beneficiary permanently in the United States as an exporter of boat equipment. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The petition was approved on March 6, 2001.

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 by a valid labor certification. She subsequently certified her decision to the AAO.<sup>1</sup>

On certification, counsel submits a brief letter and a letter from another company requesting the utilization of "portability" to "complete the sponsorship process" for the beneficiary.<sup>2</sup> Counsel states that [REDACTED] wishes to sponsor the beneficiary for the same position "based upon the immigration laws and portability" and alternatively reiterates past assertions made. An accompanying letter from [REDACTED] is dated January 15, 2004.

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 first issue in this case is whether or not the director properly invalidated the labor certification based upon a finding that it had been procured by fraud or willful misrepresentation.

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<sup>1</sup> 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*. Since the director invalidated the labor certification, the petition was no longer supported by a labor certification from the Department of Labor. Consequently, this office would typically lack jurisdiction to consider an appeal from the director's decision. Since this is a certification, however, the AAO will review the substantive issues of the director's decision. See 8 C.F.R. § 103.4.

<sup>2</sup> The AAO notes that the initial representative of the petitioning entity is deceased and transferred ownership of the business to the beneficiary and his spouse. Thus, the only executed Form G-28 in this case, Notice of Entry of Appearance of Attorney or Representative, is signed by the beneficiary's wife. The AAO will consider the beneficiary's wife the petitioner's representative.

The director issued a notice of intent to revoke the approved petition on June 30, 2003. The director noted that the petitioner's counsel, Mr. [REDACTED] Mr. [REDACTED] was:

convicted of several [f]ederal offenses relating to the filing of fraudulent immigrant worker visa petitions.

Mr. [REDACTED] fraud scheme consisted of, among other things, obtaining employment based immigrant visas based on non-existent job offers and without the knowledge and authorization of the employers listed on those documents. Due to the size and scope of the fraud perpetrated by Mr. [REDACTED] [CIS] has determined that it should scrutinize all immigrant petitions filed with [CIS] . . . if Mr. [REDACTED] or his law firm [REDACTED] appeared as the attorney of record or if the law firm's address was identified in an application.

\* \* \*

Documentation provided by the petitioning entity clearly indicates that Mr. [REDACTED] law firm represented the beneficiary and/or the petitioner. Since M [REDACTED] 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. The proffered position [sic] credibility now comes into question, whether the petitioner is trying to fill an actual needed position or is just offering a position in order to secure immigration benefits for the beneficiary and family.

The director detailed a list of documents and evidence required to overcome her notice of intent to revoke the petition.

In response, the beneficiary wrote a letter stating that the petitioner's prior owner died on July 27, 2001 and his daughter transferred the business to him, "along with the outstanding debts." The beneficiary also stated the following:

For some time before he died, [the prior owner] was unable to carry his work load, and as a result I had to step in and keep the company going as I did not want the company to fail and I not get my green card. For this reason and because I could not travel abroad without my green card, the job of Boat Equipment Exporter was put on hold.

We, [the beneficiary and his wife], are now the owners of [the petitioner]. Supporting documents are attached, along with a copy of [the prior owner's] death certificate, and a copy of the notarized document of the business transfer to us.

The phone directory page copy shows the Miami Dade Business listing to 2001. We had to close off all the phones for the business at that address when [the prior owner] died, and have them change the number to our home phone number . . . , so that existing customers could reach us. We have not obtained a separate phone number for the company, because we had to get costs down to pay the creditors, but it is something we plan to do in the near future.

The beneficiary, now petitioner's representative, submitted a copy of a contract, dated February 15, 2002, showing transfer of ownership of the petitioning business entity to the beneficiary; a death certificate; a residential lease made out to the beneficiary and his spouse; a letter stating that the proffered position is still available, signed by the

beneficiary's spouse as vice president; amended articles of incorporation showing that the petitioner's address has been changed to the beneficiary's residential address and its officers and directors changed to the beneficiary and his spouse; initial articles of incorporation, minutes of meetings, by-laws, and an application for an employment identification number (EIN); current invoices issued by the petitioner to its customers for repair work; ; organization chart reflecting that all officer positions are held by the beneficiary and his spouse; and the petitioner's corporate tax returns for 2001 and 2002 and W-2 forms issued to the beneficiary from the petitioner in 2002. Finally, the beneficiary's spouse, in her capacity as the petitioner's vice president, submitted a letter stating that the beneficiary could not provide a sworn statement concerning the contents of the ETA 750B because he did not have a copy of it and was waiting for a copy from the Department of Labor (DOL). Subsequently, the beneficiary provided a sworn statement concerning the contents of the ETA 750B along with a copy of the form received from DOL.

On September 16, 2003, the director issued a second notice of intent to revoke the petition requesting evidence that the beneficiary would be performing the duties of the proffered position. The director stated that "[t]he evidence submitted indicates that [the petitioner] is in the business of repairing boats, not exporting boating equipment. A letter from the petitioner also indicates that the beneficiary is currently a marine mechanic for the petitioner."

In response, the petitioner retained new counsel and submitted letters dated in September and October 2003, from marine companies in Trinidad expressing interest in exporting their products to the United States through the petitioner and the beneficiary. Counsel states the following:

Since [the beneficiary] is the person within the company that has the vast experience in boat equipment/parts and import/export, [the beneficiary] has not yet been able to began his work in this area within [the petitioner] because [the beneficiary] does not have travel authorization, which would allow him to fly to Trinidad and perform his tasks in importing of marine parts and accessories. . . . [H]e is not entitled to travel authorization. This is the sole reason that [the petitioner] and [the beneficiary] have not focused the business on this aspect.

The director determined that the evidence indicated that the petitioner is in the business of repairing boats, not exporting boating equipment. Thus, the director found, "[t]he evidence does not establish that the position of Exporter, Boats and Marine Equipment[,] existed at the time of the filing of the ETA-750. The position does not now exist." The director determined that since that position "does not exist and did not exist at the time the ETA-750 was submitted for processing, it must be concluded that the petitioner misrepresented the position as being available." The director concluded that there was no legitimate job offer and no basis for the ETA-750.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The AAO concurs with the director's determination to revoke the immigrant petition based upon fraud and misrepresentation. The petitioner's hiring and retention of a lawyer convicted for immigrant fraud cast reasonable suspicion and doubt upon the instant petition. Thus, the director was correct in requesting evidence of the validity and legitimacy of the employment-based preference petition. The petitioner failed to present evidence that the proffered position of exporter of boat equipment was available at the time of filing. It is noted that the DOL has generated legal guidance on this issue in finding that where a position did not exist before an applicant was hired,

it will not be considered a *bona fide*<sup>3</sup> job offer, “unless the employer can clearly demonstrate that a major change in the business operation caused the position to be created after the alien was hired.” See GAL 1-97, Farmer, Admin. For Regional Management, DOL (Oct. 1, 1996), reprinted in 73 Interpreter Releases 1476-83 (Oct. 21, 1996); *Matter of Neven Shalko Reproductions*, 00-INA-38 (BALCA May 2, 2000). Additionally, the evidence provided to indicate prospective employment was dated after the priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The director had good and sufficient cause to revoke the approval of the petition since it was issued in error and based on fraud and misrepresentation.

The director also determined that the petitioner was incapable of paying the proffered wage beginning on the priority date and continuing. 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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$23,000 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1996 and to have a gross annual income of \$90,000. The record of proceeding contains the petitioner’s Form 1120S, U.S. Income Tax Return for an S Corporation, for 1999, 2001, and 2002. The tax returns reflect the following information for the following years:

	<u>1999</u>	<u>2001</u>	<u>2002</u>
Net income <sup>4</sup>	\$12,451	\$9,765	\$31,334
Current Assets	\$1,654	\$7,451	\$3,374
Current Liabilities	\$208	\$0	\$261
Net current assets	\$1,446	\$7,451	\$3,113

In addition, the record of proceeding contains a Form W-2, Wage and Tax Statements the petitioner issued to the beneficiary in 2002. The Forms W-2 reflect wages of only \$10,100.02, which is \$12,899.98 less than the proffered wage.

The director noted that the petitioner failed to submit evidence concerning its financial status in 1998 or 2000 and that the evidence failed to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date in any other year but 2002.

<sup>3</sup> See 20 C.F.R. §§ 656.20(c)(8) and 656.3.

<sup>4</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

On appeal, counsel states that the petitioner has “seen drastic decreases in revenue because the company and [the beneficiary] were not able to travel outside the US and execute transactions in their specialty, Exporter marine boats and equipment.” The petitioner submits no additional evidence.

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 establish that it employed and paid the beneficiary the full proffered wage in any year but 2002, when it paid partial wages of \$10,100.02, which is \$12,899.98 less than 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). 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 petitioner did not submit evidence of its ability to pay in 1998 or 2000. The petitioner’s net incomes in 1999, 2001, and 2002, of \$12,451, \$9,765, and \$31,334, respectively, only evidence its ability to pay the proffered wage in 2002.

Nevertheless, the petitioner’s net income is not the only statistic that can be used to demonstrate a petitioner’s ability to pay a proffered wage. 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. The petitioner’s total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner’s total assets must be balanced by the petitioner’s liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner’s ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner’s current assets and current liabilities.<sup>5</sup> A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities

<sup>5</sup> According to *Barron’s Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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

are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner failed to provide evidence of its net current assets in 1998 or 2000. The petitioner's net current assets during the years in question, 1999 and 2001, however, were only \$1,446 and \$7,451, respectively, which are all less than the proffered wage. Thus, the petitioner cannot establish its continuing ability to pay the proffered wage out of its net current assets in 1998, 1999, 2000, or 2001.

The petitioner has not demonstrated that it paid any wages to the beneficiary in 1998, 1999, 2000, or 2001. In each year, it has failed to show that its net income or net current assets were greater than the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Counsel merely states the fact that the petitioner's revenues have decreased, which is actually untrue if the petitioner's revenues are accurately reflected on its federal tax returns.

The AAO concurs with the director's decision on the issue of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Despite its ability to pay in 2002, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, or 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Finally, counsel appears to be stating on appeal that the portability provisions of the American Competitiveness in the 21<sup>st</sup> Century Act (AC21), Pub.L.No. 106-313, apply to this petition. AC21 amended the Act enabling qualified beneficiaries to retain eligibility for an employment-based preference visa if they met certain eligibility requirements in the instance of lengthy adjudications and changed circumstances during a petition's pendency. Those eligibility requirements under section 106(c) of AC21 are that (a) the I-485, Application for Adjustment of Status, must be pending (unadjudicated) for 180 days or more; and (b) the new job must be the same as, or similar to, the job described in the labor certification and I-140 petition. Counsel does not detail how the beneficiary is qualified for portability under AC21. The pendency timeframe of the beneficiary's I-485 is irrelevant, since to utilize the portability provisions, a beneficiary needs an approved employment-based visa. In this case, there is no approved employment-based visa and thus the portability provisions do not apply. Moreover, Section 205 of the INA also states that "[s]uch revocation shall be effective as of the date of approval of any such petition." In this case the petition's approval is revoked as of March 6, 2001 and the I-485 was filed in June 2001, making it impossible for AC21 to apply to the facts of this case.

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 on December 17, 2003 is affirmed. The petition is revoked.

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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.