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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **SEP 20 2005**
WAC-03-008-54824

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:

SELF-REPRESENTED

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 was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The petition will be remanded to the director.

The petitioner is an exporter of recycled products. It seeks to employ the beneficiary permanently in the United States as an importer-exporter agent. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner committed fraud for submitting a business license never issued by the city listed on it, San Gabriel, California, and denied the petition accordingly.

On appeal, the petitioner, through former counsel, asserts that the petitioner's business is real and was authorized by the City of San Gabriel, California, and that denial of the petition would adversely impact the petitioner's operations since it needs the beneficiary's expertise and DOL determined there are no qualified US workers for the proffered position. The petitioner is considered self-represented in these proceedings since former counsel is no longer in active status as a licensed attorney in the state of California and no other attorney has submitted a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Representative into the record of proceeding.

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 March 23, 1999. The proffered wage as stated on the Form ETA 750 is \$30.38 per hour, which amounts to \$63,190.40 annually. On the visa petition, filed in October 2002, the petitioner claimed to be established in 1996 and to employ six employees. The petitioner also claimed to have gross annual income of \$240,750 with net annual income of \$114,036.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted its sole proprietor's Forms 1040, U.S. Individual Income Tax Returns, with accompanying Schedules C, Profit or Loss from Business statements, for 1999, 2000, and 2001. The petitioner also submitted a Business Tax Registration Certificate issued by the City of San Gabriel paid for on October 15, 2001; a letter pertaining to the beneficiary's qualifications; the beneficiary's individual income tax returns and W-2 forms issued to the beneficiary from the petitioner reflecting wages paid in the amount of \$24,000 each year; documentation

pertaining to the beneficiary's H-1B status and her spouse's derivative H-4 status; and a document titled "Introduction of Recycling Paper Business" describing the petitioner's business as export and import¹ of "various types of pulp, recycling and waste paper," with the support of "more than fifteen supplier in the United States."

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 12, 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 specifically requested IRS-certified copies of the petitioner's tax returns with complete schedules and attachments; the petitioner's quarterly wage reports; a payroll summary; and a more detailed letter confirming the beneficiary's qualifying employment experience.

In response, the petitioner submitted IRS-certified copies of its sole proprietor's individual income tax returns that corroborate the financial information contained in the copies previously submitted. In addition, the petitioner submitted a W-2 form for 2002 reflecting that the petitioner paid the beneficiary \$24,000 in that year; copies of the petitioner's bank records held at The Bank of East Asia from August 2002 through March 2003 reflecting an ending balance of approximately \$50,000 and at Grand National Bank from August 1999 through February 2002 reflecting an ending balance of approximately \$30,000; copies of statements from the petitioner's checking account held at The Bank of East Asia and Grand National Bank; copies of the petitioner's quarterly wage reports showing wages paid to the beneficiary and one other employee and descriptions of their positions; a letter stating that the petitioner's offer to pay the beneficiary \$30.38 still stands and its prior letter submitted into the record of proceeding stating a wage offer of \$15.60² was a typographical error; and another letter verifying the beneficiary's qualifying employment experience.

Because the evidence submitted was still deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on June 5, 2003, the director again requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director stated the proffered wage is \$58,320³ per year but noted that the petitioner failed to provide its 2002 tax statements and after expenses, the petitioner's net income is insufficient to establish its continuing ability to pay the proffered wage. In addition, the director sought clarification about the petitioner's representation that it employed six employees on its visa petition when its quarterly wage reports reflect only two employees. The director also noted that the petitioner is paying wages of \$24,000, which is less than the proffered wage, and its bank balances fluctuate.

In response, the petitioner submitted its sole proprietor's monthly household expenses and counsel asserted that the sole proprietor's personal assets overcome the deficiency presented in 1999 and 2000, for which its net income was less than the difference between wages actually paid to the beneficiary and the proffered wage. The petitioner submitted its 2002 tax return; previously submitted evidence; a list of the sole proprietor's monthly expenses, which are \$3,007 per month or \$36,084 per year; and evidence of additional cash investments held by the sole proprietor.

¹ The Form ETA 750A was amended to delete the word "import" from its description of business.

² At that pay rate, the annual salary would be \$32,448.

³ This is an erroneous calculation.

On August 27, 2003, the director issued a request for evidence confirming that the sole proprietor, Stacy J. Sun, and Jiqing Sun, the name on bank statements, are the same person; copies of the petitioner's current valid business licenses for city, county, state, and federal; evidence of contracts between the petitioner and its clients; and the petitioner's articles of incorporation.

In response, the petitioner's former counsel asserted that Ms. [redacted] name is [redacted] as illustrated on various corporate documents, and the petitioner submitted copies of its business tax certificate with its business location's city misspelled; copies of contracts between the petitioner and various businesses; and a letter from the petitioner stating that it does not use warehouse labor contracts and only employs two individuals to "serve as contact persons for all transactions of the company in and outside the country" and because it is a sole proprietorship, does not have articles of incorporation.

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 January 29, 2004, denied the petition. The director stated "[a]fter inquiring with the City of San Gabriel licensing department, [Citizenship and Immigration Services (CIS)] was informed that this is not a valid certificate, and that this is not a City of San Gabriel City Business License. The certificate is, in fact, fraudulent." The director noted the penalty of perjury on the visa petition and stated that the petitioner violated the petition's provision to provide truth and accuracy of all information submitted by providing falsified evidence. The director stated that because one document was false, CIS was under no obligation to presume that was the only false document or to verify the authenticity of the remainder of the evidence contained in the record of proceeding.

On appeal, the petitioner's former counsel states that "[t]o further establish that [the petitioner] is an operating company, duly authorized by the CITY OF SAN GABRIEL to conduct business," it submits additional evidence. (Emphasis in original). The petitioner submits a Business License & Occupancy Permit Application prepared on February 3, 2004 by the petitioner and stamped "Temporary License"; a receipt issued by San Gabriel City Hall in the amount of \$187.50 dated February 3, 2004 without identifying the purchaser; a Fictitious Business Name Statement filed in Los Angeles, California on April 29 of an unknown year; and various contracts between the petitioner and third party clients, and documentation from DOL in connection with the certification of the Form ETA 750.

The AAO concurs with the director's findings. Neither the petitioner's former counsel nor the petitioner explain the submission of a fraudulent document, a business license from the City of San Gabriel, into the record of proceeding other than to submit an application for a business license after the date of the director's decision. The director's own inquiry with a city government official verified that the petitioner's initial business of a business license was fraudulent and the evidence submitted on appeal does not overcome that finding. If anything, the fact that the petitioner attempted to obtain a valid business license after the fact belies its initial deception.

A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Additionally, *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. at 591-592 also states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

Because of the fraud committed in this case, the AAO concurs with the director's determination that CIS is under no obligation to verify the authenticity of the remainder of the evidence contained in the record of proceeding and has violated its obligation to provide true and accurate information in all supporting documentation. Thus, the petitioner has not established its eligibility for the immigration benefit sought.

In addition, fraud 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. Thus, the AAO will remand the case to the director and the director can undertake any procedural mechanisms or request any additional information or evidence necessary to invalidate the labor certificate.

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