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U.S. Citizenship  
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Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

APR 26 2006

SRC-01-039-52651

IN RE:

Petitioner:



Beneficiary:

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 R. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director of the Texas Service Center revoked an approval of the preference visa petition and certified her decision to the Administrative Appeals Office (AAO). The AAO affirmed the director's decision. The matter is again before the AAO on a motion to reopen or reconsider. The motion to reconsider will be granted. The director's decision to revoke the approval of the petition is affirmed.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 \$66,414.40 per year. On the Form ETA 750B, signed by the beneficiary on January 13, 1998, the beneficiary did not claim to have worked for the petitioner<sup>1</sup>.

The petitioner's business activity is software applications development and consulting. It sought to employ the beneficiary permanently in the United States as a software engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition.

On May 7, 2004, 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 or that provisions of the American Competitiveness in the Twentifirst Century Act of 2000 (AC21) (Public Law 106-313) salvaged the petition's eligibility and certified her decision to the AAO.

The AAO affirmed the director's decision on July 27, 2005 but admonished the director for consideration of AC21 with respect to the beneficiary's self-employment. On certification to the AAO, however, the petitioner submitted evidence that the beneficiary had terminated his employment with the petitioner and commenced employment in an allegedly similar position. Thus, counsel argued that AC21 did salvage the petitioner's eligibility. The AAO's decision analyzed the net income and net current assets the petitioner reported on its corporate tax returns for 1998, 1999, 2000, 2001, 2002, and determined that despite showing it could pay the

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<sup>1</sup> In determining the petitioner's ability to pay the proffered wage during a given period, 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. The beneficiary did eventually commence employment with the petitioner, the actual alleged commencement date is unclear; however, a W-2 form contained in the record of proceeding demonstrates that the petitioner paid the beneficiary \$33,580 in 2002.

proffered wage in 1998 and 2002, the petitioner's net income and lack of information about the petitioner's net current assets were insufficient to establish the petitioner's continuing ability to pay the proffered wage in 1999, 2000, and 2001.

On motion, counsel submits a brief and previously submitted evidence. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. *See* 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship & Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *See* 8 C.F.R. § 103.5(a)(3).

Since no new evidence was submitted, the motion does not qualify as a motion to reopen. Counsel references two memoranda, one issued [REDACTED] CIS Associate Director for Operations, on May 12, 2005 entitled "Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by [AC21]" and one issued in August 24, 2003 for his premise that an absence of fraud precluded revocation under AC21 and that revocation was inappropriate since the beneficiary ported to another position after 180 days tolled. Technically [REDACTED] were relied upon and discussed by the prior AAO adjudicator; however, since they were not specifically cited, counsel's argument based upon the memoranda will render the motion eligible as a motion to reconsider<sup>2</sup>.

On review, the record of proceeding affirms the director's decision to revoke the approval of the petition and the AAO's prior determination concerning the petitioner's continuing ability to pay the proffered wage. The AAO's prior adjudicator accurately assessed the petitioner's net income and net current assets and determined that the petitioner failed to demonstrate its continuing ability to pay the proffered wage in 1999, 2000, or 2001 out of its net income or net current assets, or any other source.<sup>3</sup> The issue now on motion is whether or not the petitioner's

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<sup>2</sup> The service center director, however, specifically discussed the August 24, 2003 memorandum.

<sup>3</sup> As noted in the prior AAO decision, 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.

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

ability to pay arising in 2004 is an appropriate consideration in light of interpretive policy memoranda issued in connection with AC21 and the beneficiary's decision to change employment offers from the petitioner to another employer as of June 7, 2004.

memorandum states the following, in pertinent part:

**Question 11. When is an I-140 no longer valid for porting purposes?**

**Answer:** An I-140 is no longer valid for porting purposes when:

. . . .  
B. an I-140 is denied or revoked *at any time* except when it is revoked based on a withdrawal that was submitted after an I-485 has been pending for 180 days.

(Emphasis in original in bold and added in italics).

Counsel asserts that an earlier memorandum drafted by [REDACTED] "Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of [AC21]," on August 4, 2003 supports his appellate argument that only petitions revoked due to fraud are ineligible for porting under AC21. He references page 3 of that memorandum with respect to I-140 petitions undergoing revocation with respect to I-485 applications to adjust status to lawful permanent resident status that have been pending for more than 180 days. The memorandum states the following, in pertinent part:

**If an alien is the beneficiary of an approved Form I-140 and is also the beneficiary of a Form I-485 that has been pending 180 days or longer, then the approved Form I-140 remains valid with respect to a new offer of employment under the flexibility provisions of §106(c) of AC21.**

Accordingly, if the employer withdraws the approved Form I-140 on or after the date that the Form I-485 has been pending 180 days, the approved Form I-140 shall remain valid under the provisions of §106(c) of AC21. It is expected that the alien will have submitted evidence to

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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. 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 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. 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 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 office having jurisdiction over the pending Form I-485 that the new offer of employment is in the same or similar occupational classification as the offer of employment for which the petition was filed. Accordingly, if the underlying approved Form I-140 is withdrawn, and the alien has not submitted evidence of a new qualifying offer of employment, the adjudicating officer must issue a Notice of Intent to Deny the pending Form I-485. *See* 8 CFR 103.2(b)(16)(i). If the evidence of a new qualifying offer of employment submitted in response to the Notice of Intent to Deny is timely filed and it appears that the alien has a new offer of employment in the same or similar occupation, [CIS] may consider the approved Form I-140 to remain valid with respect to the new offer of employment and may continue regular processing of the Form I-485. If the applicant responds to the Notice of Intent to Deny, but has not established that the new offer of employment is in the same or similar occupation, the adjudicating officer may immediately deny the Form I-485. If the alien does not respond or fails to timely respond to the Notice of Intent to Deny, the adjudicating officer may immediately deny the Form I-485.

If approval of the Form I-140 is revoked or the Form I-140 is withdrawn before the alien's Form I-485 has been pending 180 days, the approved Form I-140 is no longer valid with respect to a new offer of employment and the Form I-485 may be denied. If at any time the [CIS] revokes approval of the Form I-140 based on fraud, the alien will not be eligible for the job flexibility provisions of §106(c) of AC21 and the adjudicating officer may, in his or her discretion, deny the attached Form I-485 immediately. In all cases an offer of employment must have been bona fide, and the employer must have had the intent, at the time the Form I-140 was approved, to employ the beneficiary upon adjustment. It should be noted that there is no requirement in statute or regulations that a beneficiary of a Form I-140 actually be in the underlying employment until permanent residence is authorized. Therefore, it is possible for an alien to qualify for the provisions of §106(c) of AC21 even if he or she has never been employed by the prior petitioning employer or the subsequent employer under section 204(j) of the Act.

(Emphasis added).

The visa petition was approved on May 5, 2001. The I-485 was filed on July 9, 2001 and would have been pending for 180 days on January 5, 2002. The director revoked the petition on May 7, 2004 based on the petitioner's failure to demonstrate its continuing ability to pay the proffered wage, not fraud. [REDACTED] 12, 2005 memorandum clearly states that all prior memoranda regarding AC21 remain in effect. The punitive aspect of AC21 dictates that even if revoked, the petition will "remain valid" for purposes of AC21 section 106(c) unless there is a finding of fraud, since the I-485 was pending more than 180 days. The August 4, 2003 memorandum holds that the beneficiary is eligible to port to a new employer regardless of having ever worked for the petitioner. The AAO will, out of judicial fairness, follow the clearest guidance for the factual and/or legal issue in dispute, and in this case, that is the August 4, 2003 memorandum. Moreover, given the facts of this case<sup>4</sup>, the AAO finds that, for the purpose of adjudicating an application for adjustment of status wherein the beneficiary wants to use the benefits of section 106(c) of AC21, it would be most appropriate for the director to view the petition as if it was "unapproved" with specific reference to question number one in the May 12, 2005 memorandum.

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<sup>4</sup> The director determined that the *bona fides* of the proffered position were not in doubt.

To determine whether or not the beneficiary qualifies to adjust status using section 106(c) of AC21, adjudicators are instructed to review the *bona fides* of the petition and determine whether it was “approvable” at the time of filing as if it had been adjudicated within 180 days of filing. The instant petition ultimately was revoked due to the petitioner’s failure to establish its ability to pay in 1999, 2000, and 2002. However, the AAO finds that the petitioner has demonstrated its ability to pay in 1998, the year of filing. Such a scenario would seem to fit the description of “approvable” found in the May 12, 2005 memorandum.

Nevertheless, the AAO does not find that a determination of “approvable” means that the initial petition itself must be approved. The approval of a third preference immigrant petition for an alien worker signifies that the petitioner named on the petition has demonstrated, among other things its ability to pay the proffered wage as set forth on the ETA 750 during the entire pertinent timeframe. Conversely, a determination that the petitioner was *approvable* means only that CIS determined that the petition was *bona fide* at the time it was filed and as such is necessarily only relevant for purposes of the adjudication of the *beneficiary’s* I-485. By definition, an application for adjustment under AC21 signifies the fact that the initial petitioner is no longer the sponsoring employer. In a case such as this where the petition was properly revoked on its merits because the initial petition has not reflected the petitioner’s ability to pay, the initial petitioner should not be awarded the benefit it would be awarded if CIS were to approve the petition.

Nevertheless, in this case, the director has jurisdiction over the beneficiary’s I-485. Thus the record, while remaining revoked because the initial petitioner failed to demonstrate its continuing ability to pay the proffered wage from the priority date until the beneficiary obtains permanent resident status, will be returned to the director so that she may consider the entire record relative to the beneficiary’s attempt to adjust status under the terms and conditions of section 106(c) of AC21.

Thus, according to [REDACTED] May 12, 2005 memorandum, the record will be returned to the director for consideration of whether or not the alien’s porting in this case was done properly and meets the requirements set forth in AC21 and various interpretive policy memoranda. The director shall review her adjudication of the beneficiary’s I-485 application accordingly, including re-opening its proceedings if necessary.

In view of the foregoing, the prior decision of the AAO is withdrawn, however, the director’s revocation of the approved petition is affirmed. The record is returned to the director consideration of the issue stated above.

**ORDER:** The motion to reconsider is granted. The director’s decision to revoke the approval of the petition is affirmed. The record is returned to the director for further consideration in accordance with the foregoing.