



U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: MAR 08 2006

LIN-03-266-50474

IN RE:

Petitioner:

Beneficiary:



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, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and information technology firm. It seeks 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. The director determined that the petitioner had not established that it had the intention to offer employment to the beneficiary and denied the petition accordingly.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

*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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

Employment-based immigrant visa petitions depend on priority dates. The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is January 13, 2003. The proffered wage as stated on the Form ETA 750 is \$71,732.00 per year. On the Form ETA 750B, signed by the beneficiary on January 6, 2003, the beneficiary claimed to have worked for the petitioner beginning in September 2002 and continuing through the date of the ETA 750B. The ETA 750 was certified by the Department of Labor on June 24, 2003.

The I-140 petition was submitted on September 8, 2003. On the petition, the petitioner claimed to have been established in 1997, to currently have 20 employees and to have a gross annual income of \$2 million. The item on the petition for net annual income was left blank. With the petition, the petitioner submitted supporting evidence.

Concurrently with the I-140 petition, the beneficiary filed a Form I-485, Application to Register Permanent Resident or Adjust Status.

The director issued a notice of intent to deny the I-140 petition (ITD) dated May 3, 2004 for failure to establish the petitioner's ability to pay the proffered wage. The director afforded the petitioner thirty days in which to submit evidence in support of the petition and in opposition to the denial.

In response to the ITD, the petitioner submitted additional evidence. The petitioner's submissions in response to the ITD were received by the director on June 3, 2004.

In a decision dated August 18, 2004, the director determined that the beneficiary was no longer working for the petitioner and found that the evidence indicated that the petitioner no longer intended to employ the beneficiary. The director accordingly denied the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that the evidence establishes the petitioner's ability to pay the proffered wage during the relevant time period. Counsel also states that the petitioner has changed jobs, but that the petition should be approved pursuant to the provisions of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), since the beneficiary's I-485 application had been pending for more than 180 days at the time the beneficiary changed jobs.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The director's reason for issuing the ITD was the director's determination that the evidence failed to establish the petitioner's ability to pay the proffered wage during the relevant period. In the ITD, the director stated the following:

A Department of Labor review indicates that the petitioner has not provided wages for 27 employees. The petitioner through its attorney acknowledge a Court Order issued by [REDACTED] on December 24, 2003. A fine that was levied against the petitioner has never been paid. Since the petitioner has not paid the fine and did not meet its payroll obligations, it appears that the petitioner does not have the ability to pay the offered wages of the beneficiary.

(ITD, May 3, 2004, at 1).

In response to the ITD the petitioner submitted a copy of the Department of Labor notice referred to in the ITD. The beneficiary's name is not among the names of the employees listed on that notice who are allegedly owed wages by the petitioner. In a letter dated June 1, 2004, counsel states that the beneficiary was fully paid by the petitioner. Counsel also states that the beneficiary had changed his employer and qualified under the terms of "180-day rule" in the act referred to by counsel through its abbreviation, "AC 21." (Letter from Counsel, June 1, 2004, at 1). The petitioner's response to the ITD also included a copy of Form W-2 Wage and Tax Statements of the beneficiary showing compensation received from the petitioner in 2002 and 2003, a copy of a pay statement of the beneficiary showing compensation received from the petitioner through the first quarter of 2004; and a copy of a pay statement of the beneficiary showing pay received from his new employer, [REDACTED], for the pay period ending May 15, 2004, and also showing the beneficiary's earnings for the year to date.

In denying the petition, the director did not further address the issue of the petitioner's ability to pay the proffered wage. Rather, the director found that the statements of counsel on the beneficiary's new employer and the evidence pertaining to the beneficiary's new employer were sufficient to show that the petitioner no longer intended to offer employment to the beneficiary. The director therefore denied the petition for that reason. The director stated that "AC21" and the "180 day rule" did not apply to the instant petition because the immigrant petition was never approved. (Director's decision, August 18, 2004, at 2).

A resolution of the instant appeal requires an analysis of certain provisions of the act referred to by counsel and by the director by its abbreviation "AC21".

The American Competitiveness in the 21<sup>st</sup> Century Act (AC21), Pub.L.No. 106-313, became law on October 17, 2000. AC21 § 106(c) added a new subsection (j) to section 204 of the INA, which states:

Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence - A petition under subsection (a)(1)(D) for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

INA § 204(j) (*added by The American Competitiveness in the 21<sup>st</sup> Century Act (AC21)*, Pub.L.No. 106-313, § 106(c), 114 Stat. 1251 (2000)).

AC21 also provides that where an I-140 petition and a new job offer satisfy the requirements of INA § 204(j), the underlying labor certification also remains valid. *American Competitiveness in the 21<sup>st</sup> Century Act*, Pub.L.No. 106-313, § 106(c)(2).

A memorandum dated December 27, 2005, from Michael Aytes, Acting Director of Domestic Operations gives guidance to CIS adjudicators concerning the effect of AC21. The guidance is presented in the form of questions and answers. The memorandum uses the term "to port" to indicate that a beneficiary is transferring his rights under an immigrant visa petition submitted by one employer to a job offer from a new employer. For situations where an I-140 visa petition has not yet been approved at the time the beneficiary seeks to transfer his or her rights to a new employer, the memorandum states the following:

**Question 1. How should service centers or district offices process unapproved I-140 petitions that were concurrently filed with I-485 applications that have been pending 180 days in relation to the I-140 portability provisions under §106(c) of AC21?**

**Answer:** If it is discovered that a beneficiary has ported off of an unapproved I-140 and I-485 that has been pending for 180 days or more, the following procedures should be applied:

- A. Review the pending I-140 petition to determine if the preponderance of the evidence establishes that the case is approvable or would have been approvable had it been adjudicated within 180 days. If the petition is approvable but for an ability to pay issue or any other issue relating to a time after the filing of the petition, approve the petition on its [sic] merits. Then adjudicate the adjustment of status application to determine if the new position is the same or similar occupational classification for I-140 portability purposes.

Memo. from Michael Aytes, Acting Director for Domestic Operations, to CIS Regional Directors and Service Center Directors, *Interim guidance for processing I-140 employment-based immigrant petitions and I-485 and H-1B petitions affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) Public Law 106-313* at 2 (December 27, 2005) (bolded in the original).

Although the Aytes memorandum may not be available publicly, identical language to the portion quoted above is found in a May 12, 2005 memorandum from William Yates, Associated Director for Operations, CIS, which is available on the public Internet Web site of CIS. See Memo. from William R. Yates, Associate Director for Operations, CIS, to Regional Directors and Service Center Directors, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)(Public Law 106-313)* at 3 (May 12, 2005) (available at <http://uscis.gov/graphics/index.htm>; path Immigration Laws, Regulations and Guides; Immigration Handbooks, Manuals and Policy Guidance; Immigration Policy and Procedure Memoranda; topic category H-1).

The Aytes memorandum is intended to give guidance to CIS adjudications officers, and its interpretation of the law is not binding on the AAO. Nonetheless, the portion of the Aytes memorandum quoted above represents a thoughtful interpretation of the relevant statutory and regulatory provisions. The AAO finds that interpretation to be a reasonable one in a situation where an I-140 petition and an I-485 application have been concurrently filed, and where the I-485 has been pending for 180 days or more. In order to retain its validity under section 204(j) of AC 21, a petition must first be determined to be "valid." CIS holds this to mean either "approved" or in certain situations, "approvable." Therefore, in limited instances, if the I-140 petition has not yet been approved, the beneficiary may still transfer his or her rights to a new employer, provided that the I-485 application has been pending for 180 days or more. When the I-140 petition is adjudicated, it may be approved if the evidence establishes all necessary elements as of the date of filing the I-140 petition. Only after this adjudication on its merits, can the beneficiary's I-485 be adjudicated under the terms of AC21.

The regulation at 8 C.F.R. § 204.5(c) states in pertinent part, "Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act." The instant petition has been filed under section 203(b)(3) of the Act.

As noted above, the instant I-140 petition was filed on September 8, 2003. To satisfy the regulation at 8 C.F.R. § 204.5(c), the evidence must establish that the petitioner was an employer "desiring and intending" to employ the beneficiary as of that date.

The record contains inconsistent evidence concerning the beneficiary's dates of employment with the petitioner. The record contains copies of Form W-2 Wage and Tax Statements of the beneficiary showing compensation from the petitioner for 2002 and 2003. Those Forms W-2 show the amounts in the following table.

Petitioner's Form W-2's				
Tax year	Wages, tips, other compensation	Social Security wages	Michigan state compensation	MI state income tax withheld
2002	\$55,000.00	\$55,000.00	\$55,000.00	\$2,165.23
2003	\$60,000.00	\$60,000.00	\$60,000.00	\$2,362.07

The record also contains copies of pay statements of the beneficiary showing compensation from the petitioner for pay periods ending January 15, 2003, February 15, 2003, April 15, 2003, May 15, 2003, June 15, 2003 and July 15, 2003. Each of those statements is for a one-month period, and each shows gross earnings for the pay period of \$5,720.00. A monthly rate of pay of \$5,720.00 is equivalent to an annual rate of pay of \$68,640.00.

The record also contains a copy of a Form W-2 Wage and Tax Statement of the beneficiary showing compensation from [REDACTED], of Windsor, Connecticut, in 2002. That Form W-2 shows the amounts in the following table.

[REDACTED] s Form W-2

Tax year	Wages, tips, other compensation	Social Security wages	Connecticut state compensation	CT state income tax withheld
2002	\$64,406.86	\$71,144.26	\$64,406.86	\$2,627.26
2003	not submitted	-	-	-

The record also contains a copy of a pay statement of the beneficiary showing pay received from [REDACTED] for the pay period ending May 15, 2004. That pay statement shows gross pay for the period of \$2,916.00, for 86.67 hours of work, and gross pay for the year to date of \$23,369.00. That pay statement shows withholding amounts for Connecticut state income tax of \$81.22 for the pay period and \$770.46 for the year to date.

In his brief, counsel states that the beneficiary resigned from his position with the petitioner in April 2004. That assertion is inconsistent with the Form W-2 from [REDACTED], which shows the beneficiary as already working for that company in 2002, at a wage level nearly equal to the proffered wage of \$71,732.00. The Form W-2 Wage and Tax Statement from the petitioner for 2002, purporting to show compensation from the petitioner to the beneficiary that year of \$55,000.00, is also inconsistent with the Form W-2 issued by [REDACTED] for 2002. Moreover, the Form W-2 from the petitioner for 2002 is also inconsistent with the beneficiary's statement on the Form ETA 750B that he did not begin working for the petitioner until September 2002, since the petitioner's Form W-2 for 2002 states compensation in an amount which indicates that the beneficiary worked for the petitioner for all of that year or for nearly all of that year.

Counsel's assertion that the beneficiary resigned from the petitioner in April 2004 is also inconsistent with the pay statement from [REDACTED] which shows that as of May 15, 2004 the beneficiary's total compensation for the year to date was \$26,369.00, comprised of \$26,244.00 in regular pay plus \$125.00 for an appreciation award. The pay statement appears to indicate a pay period of one half month, since it records 87.67 hours of work ending on the 15<sup>th</sup> of the month. Dividing the regular earnings for the year to date by the regular pay for the pay period shows that the beneficiary had worked for [REDACTED] for nine pay periods in 2004 as of May 15, 2004, that is, since the beginning of 2004.

On the beneficiary's Form I-485, the beneficiary states his address to be in Simsbury, Connecticut. Since the I-485 was filed concurrently with the I-140 petition on September 8, 2003, the beneficiary's address on the I-485 application is further evidence that the beneficiary was not working for the petitioner in the state of Michigan as of the date that the I-140 petition was filed.

While the beneficiary's employment with the new employer would ordinarily not be considered in making a determination of the petition's "approvability" on its initial merits, the date on which the beneficiary resigned from his employment with the petitioner would be relevant to any claim by the beneficiary to adjust status to that of permanent resident under the provisions of AC21. Since the I-485 application was filed on September 8, 2003, the beneficiary would have had to wait for 180 days after that date, until March 6, 2004, to make any claim to adjust status under AC21 based on a change of employer. The fact that the beneficiary changed jobs sooner than 180 days after filing the I-485 application does not necessarily imply that either the I-140 petition or the I-485 application should be denied. But a change of jobs is relevant to the issue of whether the petitioner's job offer to the beneficiary was a good faith offer. *See* Memo. from Michael Aytes, *supra*, at 4.

The statute and the regulations do not require that a beneficiary be presently employed by a petitioner at the time an I-140 petition is filed. Rather the statute and the regulations require that the petitioner have the intention to hire the beneficiary upon the grant to the beneficiary of legal permanent resident status, either through the issuance of an immigrant visa or through adjustment of status to permanent resident status. *Id.* Nonetheless, in the instant case, the petitioner has submitted evidence of the beneficiary's employment with the petitioner as evidence that the petitioner had the intention to hire the beneficiary when it filed the I-140 petition. As shown above, that evidence is inconsistent with other evidence in the record, and it is also inconsistent with assertions by counsel in his brief. As noted above, on the I-485 which was submitted concurrently with the instant I-140 petition the beneficiary states his address to be in Simsbury, Connecticut. A Simsbury, Connecticut, address for the beneficiary is inconsistent with the evidence in the record purporting to show that when the I-140 petition was filed the beneficiary was working for the petitioner, which is located in Farmington Hills, Michigan.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "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." The record contains no explanation for the inconsistencies in the evidence noted above.

The evidence fails to establish that the petitioner was an employer intending and desiring to hire the beneficiary when it filed the I-140 petition. Therefore the petition must be denied on that basis. The AAO finds that the petition was not approvable as of the date it was filed.

Beyond the decision of the director, the evidence raises questions about the petitioner's ability to pay the proffered wage during the relevant period.

As noted above, in the ITD the director stated that because of a Department of Labor notice against the petitioner for unpaid wages and a resulting court order and unpaid fines, the evidence failed to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. In response to the ITD, counsel submitted a copy of a Department of Labor notice dated May 30, 2003 showing claims against the petitioner of unpaid wages for twenty-seven employees. The periods covered by the notice start on various dates in 2000 and 2001 for the employees listed. For one of the employees the ending date is January 6, 2001, and for the other twenty-six employees the ending date is June 30, 2001.

In his letter dated June 1, 2004 accompanying the submission in response to the ITD, counsel correctly states that the beneficiary's name is not among the twenty-seven employees on the list. Counsel then states that the beneficiary was fully paid by the petitioner. However, the DOL list is not evidence of that fact, since the

absence of the beneficiary's name from the DOL notice is equally consistent with the conclusion that the beneficiary was not employed by the petitioner prior to June 30, 2001.

The regulation at 8 C.F.R. § 204.5(g)(2) requires the petitioner to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Because of the evidentiary inconsistencies discussed above, the evidence fails to establish that ability. Even if the analysis is limited to the period relevant to a claim by the beneficiary to transfer his rights to a new employer under AC21, the evidence fails to establish the petitioner's ability to pay the proffered wage beginning on the January 13, 2003 priority date and continuing until the date the I-140 petition was filed, on September 8, 2003. The petitioner has submitted a Form W-2 of the beneficiary for the year 2003, but that document cannot be considered as reliable evidence of any compensation paid by the petitioner to the beneficiary in 2003 because of the inconsistent evidence discussed above which indicates that the beneficiary was already working for [REDACTED], during the year 2002. Moreover, the only federal tax return of the petitioner in the record is the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2002, which is one of the years for which the record contains inconsistent evidence. For the foregoing reasons, even if it were assumed that the petitioner was intending and desiring to hire the beneficiary when it filed the I-140 petition in September 2003, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the January 13, 2003 priority date and continuing until the September 8, 2003 filing date of the I-140 petition.

In summary, the evidence fails to establish that the petitioner was an employer desiring and intending to hire the beneficiary when it filed the I-140 petition. Beyond the decision of the director, the evidence fails to establish the petitioner's ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 appeal is dismissed.