

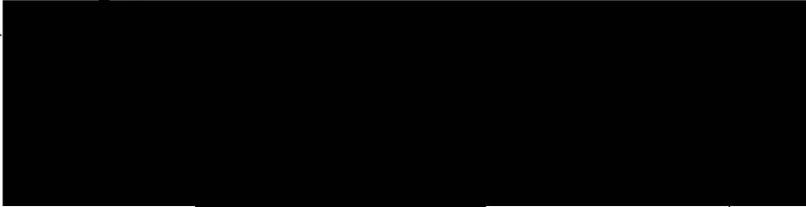


U.S. Citizenship
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Services

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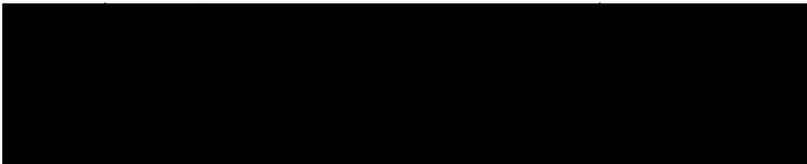


File: [Redacted] Office: TEXAS SERVICE CENTER Date: SEP 29 2006
SRC-04-027-50595

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the Service Center in accordance with below.

The petitioner is a General Contractor, and seeks to employ the beneficiary permanently in the United States as an Estimator, Civil Engineering. As required by statute, the petition was filed with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's December 3, 2004 denial of the petitioner's motion to reopen (upholding the director's September 24, 2004 denial of the underlying I-140 petition), the motion to reopen was denied on the basis that the beneficiary changed employers prior to the Service Center making a determination on the initially filed I-140 petition. The director found that the I-140 petition as originally filed, was invalidated when the beneficiary changed to a new employer under the American Competitiveness in the 21st Century Act, and denied the petition.¹ We find that the basis of the director's denial, which predated CIS guidance on this issue, was in error, and that the petition should be remanded to request further information on several aspects of the initial petition.

We will initially address the merits of the initial petition as filed, examine issues related to AC21, and then outline issues to be addressed on remand.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. However, this case has a long and confusing procedural history, which is pertinent to the decision, and as such, is set forth more fully below.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional worker. 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 who are members of the professions. For the beneficiary to qualify, the petitioner must show that it has the ability to pay the beneficiary the proffered wage, and that the beneficiary meets the qualifications set forth in the certified labor certification.

The regulation 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.

8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

¹ An individual may qualify for "portability" (employment with a new employer) based on the American Competitiveness in the 21st Century Act (AC21), Pub.L.No. 106-313, which became law on October 17, 2000.

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The petitioner's ability to pay the beneficiary must be established from the priority date onward. Additionally, the beneficiary must have obtained the required skills and education prior to the priority date. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 30, 2001. The proffered wage as stated on Form ETA 750 for the position of an Estimator is \$37.50 per hour, 40 hours per week, which is equivalent to \$78,000 per year. The job offer required that the beneficiary have a Bachelor's degree in Civil Engineering, as well as two years experience in the job offered as an Estimator.

The labor certification was approved on July 25, 2002, for the petitioner, International Builders Latin America, Inc. (International Builders), and, almost a year and one-half later, on November 6, 2003, the initial petitioner, International Builders, filed an I-140 Petition on the beneficiary's behalf.² On the I-140 petition, the petitioner listed the following information related to the position and sponsor: type of business: general contractor; job title: Estimator (Civil Engineering); nontechnical description of job: bid processing for civil engineering projects; is this a permanent position?: yes; wages per week: \$1,500.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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. The petitioner did not submit evidence that it paid the beneficiary.

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

² Counsel for the petitioner initially tried to file the I-140 concurrently with the beneficiary's I-485 application on October 10, 2003. The service center returned the case to counsel since he submitted an older I-140 form version, which was out of date. The service center requested that he resubmit the petition and file using the new proper version of the I-140 form, which he did and was accepted for filing on November 6, 2003.

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.

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 record contains copies of the initial petitioner's Form 1120 U.S. Corporation Income Tax Return for the year 2001, based on a tax year of April 1, 2001 to March 31, 2002.³ For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return.

The petitioner's tax returns state amounts for taxable income on line 28 as shown below:

<u>Tax year</u>	<u>Net income or (loss)</u>
2001	-\$477,277

The petitioner's net income would not allow for payment of the beneficiary's annual proffered wage of \$78,000 in 2001. The petitioner therefore cannot demonstrate its continuing ability to pay the wage from the priority date of April 30, 2001, until the beneficiary obtains permanent residence (or until he ported, in this case).

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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, and evidences the petitioner's ability to pay. The petitioner is expected to convert the net current assets to cash as the proffered wage becomes due.

The petitioner's net current assets during 2001 were -\$924,547. Following this second analysis, the petitioner's Federal Tax Return similarly shows that the petitioner lacks the ability to pay the required wage of \$78,000 from the priority date until the beneficiary obtains lawful permanent residence (or until valid portability).

³ The tax return is dated by the signature line that it was completed May 19, 2003, so that the petitioner's 2002 tax return may not have been available at the time of filing the I-140 petition.

⁴According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

Based on the record of proceedings, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, April 30, 2001, the initial petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage. The petitioner fails this test under an examination of wages paid to the beneficiary (no evidence), its net income (insufficient for 2001), or net current assets (insufficient for 2001). As the Service Center had not previously requested evidence from the petitioner on this issue, the initial petitioner's ability to pay presents a material issue for further examination on remand.

Next, we will address issues related to the beneficiary's portability. Counsel raised the issue of portability in a response to a Service Center request for evidence ("RFE"), which was sent to the petitioner on January 16, 2004, asking the petitioner to submit documentation that the beneficiary met the minimum job requirements, including evidence that the beneficiary had the required Bachelor's degree in Civil Engineering, and to provide evidence that the beneficiary could document the required two years of experience in the job offered, as an Estimator.

On August 20, 2004,⁵ counsel for the petitioner submitted a letter response to the RFE along with documentation to show the beneficiary's qualifications.⁶ Counsel additionally submitted a new I-140 Petition and outlined that the beneficiary sought to change employment from the initial sponsor, International Builders Latin America, Inc. to a new petitioner, Bertolami Construction Inc., based on AC21 § 106(c), since the concurrently filed I-140, and I-485⁷ had been filed and pending since November 3, 2003, for over 180 days.⁸ On August 26, 2004, the Service Center rejected the materials that counsel submitted, and returned the package to counsel. The record indicates that the Service Center returned to counsel what appeared (to the Service Center) to be a new I-140 filing, as opposed to an RFE response, since the I-140 Petition submitted on August 20, 2004 did not contain certified Forms ETA 750A and 750B.⁹

⁵ Counsel did not submit any information with the initially filed petition to document these skills. The response to the RFE was due within twelve weeks, or by May 16, 2004. According to the record of proceeding, no response was received, and the service center reissued the RFE on May 26. The petitioner was then given additional time, and instructed to submit the required documentation by August 26, 2004.

⁶ Counsel submitted an educational evaluation dated April 6, 2001, to document the U.S. equivalency of the beneficiary's educational documents from his home country of Venezuela. The letter that counsel submitted to document the beneficiary's prior work experience is dated March 2, 2001. Based on the dates that these documents were issued, and would have been available, it is unclear why counsel did not respond to the RFE by the initial due date, or submit the documentation when the I-140 was initially filed.

⁷ On July 31, 2002, the Service published an interim rule allowing for the concurrent filing of Form I-140 and Form I-485. *See*: Federal Register: July 31, 2002, (Volume 67, Number 147), page 49561.

⁸ Portability is based on AC21 § 106(c), which 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.

⁹ We note that under the June 19, 2001, Michael D. Cronin Memorandum, "*Initial Guidance for Processing H-1B Petitions as Affected by the American Competitiveness in the Twenty-First Century Act (Public Law 106-313) and Related Legislation (Public Law 106-311) and Public Law 106-396*," a new I-140 Petition, and filing fee (as

On September 24, 2004, the director denied the case pursuant to 8 CFR 103.2(b)(13), for the petitioner's failure to timely respond to the RFE by August 26, 2004 (since the August 20, 2004 submission was rejected), and for failure to document that the beneficiary met the requirements set forth in the approved labor certification.

On October 26, 2004, counsel filed a motion to reopen on the petitioner's behalf,¹⁰ and resubmitted the I-140 for the employer to which the beneficiary sought to port. On December 3, 2004, the director then upheld the denial, on the basis that the beneficiary could not "port" off the unapproved I-140 petition filed by the initial petitioner, [REDACTED]. Counsel filed an appeal, which was received on January 6, 2005.¹¹

AC21 § 106(c), which provides for portability, became law on October 17, 2000. Subsequent to AC21's passage, on July 31, 2002, an interim rule allowed for concurrent filing of Form I-140 and Form I-485. Final regulations related to AC21 have not yet been published, and the Service has periodically issued interim guidance related to AC21, and concurrent filing issues, which arose since the establishment of both procedures.¹²

were submitted in the instant case) are not necessary, and likely caused much of the confusion. Rather, based on the Cronin Memo, "the Service should continue to expect the applicant to submit a letter notifying INS of this change in intent." Further, the letter from the new employer should verify "that the job offer exists, should contain the new job title, job description and salary. This information is necessary to determine whether the new job is in the same or similar occupation and to determine whether the alien is admissible under the public charge ground of inadmissibility at INA Section 212(a)(4)."

¹⁰ The Motion to Reopen alleged that the Service Center erred in rejecting the RFE response sent on August 20, 2004.

¹¹ In his appeal, counsel notes that: "confusion seems to have ensued, at some point, in terms of the portability provisions we invoked on behalf of the new petitioner – all within the parameters of the American Competitiveness in the Twenty-First Century Act (AC21). Unfortunately, the existence of an original and a substitute petitioner may apparently have caused actions to end up in separate files . . . As a result, possibly, the Service continues to *harp* at all times on the initial petition by International, altogether ignoring the second, current stage of the petitioner, namely, the invoked portability of the petition to [REDACTED] the current petitioner."

The Service Center issued an I-140 receipt for the second petitioner, [REDACTED] on October 28, 2004. Based on the two filings, the Service Center issued two separate "A" numbers to the beneficiary. Additionally, counsel notes that the Service Center "mislabeled" the appeal receipt to read [REDACTED] the initial petitioner, and not [REDACTED]. As noted in the footnote above, to benefit from portability, a petitioner does not need to file a new I-140 Petition, rather the new employer submits a letter showing that the position is same or similar to the original job offer.

If eligibility for portability is properly shown, the initial I-140 would remain valid for the new position, and the I-485 would be approved for the beneficiary. [REDACTED] would, therefore, continue to be the proper petitioner, and the appeal receipt is properly labeled. Counsel's rationale on appeal relates to both files.

¹² See: January 29, 2001, legacy Immigration and Naturalization Service's Memorandum, "Interim Guidance for Processing H-1B Applications for Admission as Affected by the American Competitiveness in the Twenty-First Century of 2002, Public Law 106-313;" June 19, 2001, Michael D. Cronin Memorandum, "Initial Guidance for Processing H-1B Petitions as Affected by the American Competitiveness in the Twenty-First Century Act (Public Law 106-313) and Related Legislation (Public Law 106-311) and Public Law 106-396);" August 4, 2003,

In the case at hand, the director's initial decision denying the case was issued September 24, 2004. The director reaffirmed the initial decision to deny the case on December 3, 2004, in response to counsel's motion to reopen. Both determinations predate the May 12, 2005, Yates Memorandum related to AC21 processing guidance.

The Yates Memo, in pertinent part, provides for 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 a 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.
- B. If additional evidence is necessary to resolve a material post-filing issue such as ability to pay, an RFE can be sent to try to resolve the issue. When a response is received, and if the petition is approvable, follow the procedures in part A above.

(Emphasis in original).

Based on the Yates Memo (not available at the time of the director's decision), counsel for petitioner is correct in that an individual can potentially port from an unapproved petition, if the initial petition is approvable, or would have been approvable had it been adjudicated within 180 days. Since the I-140, and the I-485 Adjustment of Status application were filed on November 6, 2003, the beneficiary's I-485 application would have been filed for 180 days, providing potential portability, on or after May 1, 2004.

While portability might be allowed in a case where an individual ports from an unapproved petition, the petitioner needs to demonstrate that the petition is approvable. Although not previously raised by the Service Center, the bona fides of the initial petition, including the petitioner's ability to pay the beneficiary the proffered wage must

William R. Yates Memorandum, "*Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)*;" and May 12, 2005, William R. Yates Memorandum, "*Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by [AC21]*."

also be examined more closely to determine the initial petition's approvability at the time of filing (until the beneficiary attempted to port to a new employer after 180 days).

Question 7. Should service centers or district offices request proof of "ability to pay" from successor employers in I-140 portability cases, in other words, from the new company/employer to which someone has ported?

Answer: No. The relevant inquiry is whether the new position is in the same or similar occupational classification as the alien's I-140 employment. It may be appropriate to confirm the legitimacy of a new employer and the job offer through an RFE to the adjustment applicant for relevant information about these issues. In an adjustment setting, public charge is also a relevant inquiry.

See also Question 1 above, where the Yates Memo notes procedurally that an RFE should be sent if there is an issue regarding ability to pay in relation to the unapproved petition at the time of filing.

Additionally on remand, the Service Center should request evidence related to the petitioner's intent regarding employment of the beneficiary.

The Yates Memo also critically notes:

Question 10: Should service centers or district offices deny portability cases on the sole basis that the alien has left his or her employment with the I-140 petitioner prior to the I-485 application pending for 180 days.

Answer: No. The basis for adjustment is not actual (current) employment but prospective employment. Since there is no requirement that the alien have ever been employed by the petitioner while the I-140 and/or I-485 was pending, the fact that an alien left the I-140 petitioner before the I-485 has been pending 180 days will not necessarily render the alien ineligible to port. *However, in all cases an offer of employment must have been bona fide. This means that, as of the time the I-140 was filed and at the time of filing the I-485 if not filed concurrently, the I-140 petitioner must have had the intent to employ the beneficiary, and the alien must have intended to undertake the employment, upon adjustment.* Adjudicators should not presume the absence of such intent and may take the I-140 and supporting documents themselves as prima facie evidence of such intent, *but in appropriate cases additional evidence or investigation may be appropriate.*

(Emphasis added).

On the beneficiary's form G-325 filed with the Adjustment of Status application, he lists the following information:

Applicant's employment last five years . . . list present employment first:

Employer	Occupation	From	To
Self Employed		07/2003	present time
<i>International Building Latin America</i>	Estimator	10/2000	<i>07/2003</i>
Stateline, Inc.	Estimator	01/1997	10/2000

The beneficiary signed form G-325 on August 26, 2003. Based on form G-325 completed, the beneficiary had left his employment with [REDACTED] the original I-140 petitioner, two months prior to filing the I-140 and the I-485 concurrently in November 2003. And while we note that as outlined above, the I-140 is a future offer of employment, it appears that the beneficiary concluded or left his employment with the petitioner prior to concurrently filing the I-140 and I-485, which could raise the issue of intent of the initial petitioner. In November 2003, the petitioner must have intended to employ the beneficiary at the time that the adjustment application was approved, and the beneficiary must have intended to undertake employment (resume in this case) with the petitioner at the time that the adjustment application was approved.¹³

As the beneficiary seeks to port under AC21 section 106(c), the appropriate course would be to remand to the Service Center for the director to review the petition to determine whether the I-140 would have been approvable in accordance with the May 12, 2005, Yates Memo (specifically related to porting from an unapproved I-140). We find that the initial petitioner's ability to pay, and the initial petitioner's intent to employ the beneficiary upon adjustment, are material issues to be examined by the Service Center, and that the Service Center should request documentation related to these issues to determine whether the initial petition would have been approvable.

Should the initial petition be "approvable," the director would then have jurisdiction to determine whether portability applied based on the beneficiary's employment in the same or similar position with a new employer so that the beneficiary's I-485 could be approved. Thus, the petition will be returned to the director so that the director 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.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.

¹³ Counsel stated that the beneficiary sought to port "for reasons of prospective job security," which raises the possibility that he lacked the intent to work for the petitioner in the future at the time of filing.