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APR 05 2007

FILE: WAC 96 248 52459 Office: CALIFORNIA SERVICE CENTER Date:

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: 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, Chief
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was initially approved by the Director, California Service Center. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. The director served the petitioner with notice of intent to revoke the approval of the preference visa petition. The director subsequently revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a barbering service firm. It sought to employ the beneficiary permanently in the United States as a barber. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor.

The record indicates that the Immigrant Petition for Alien Worker (I-140) was filed on September 4, 1996. It was initially approved on February 15, 1997. Following an overseas investigation, the director concluded that the I-140 was approved in error and issued a notice of intent to revoke the petition on July 14, 2005. The director determined that the petitioner had failed to demonstrate that it had the ability to pay the proffered wage. The petitioner was afforded thirty days to offer such evidence or argument in opposition to the proposed revocation. The petition's approval was subsequently revoked on September 7, 2005, pursuant to section 205 of the Act, 8 U.S.C. § 1155.

On appeal, the petitioner submits additional evidence and asserts that he will adhere to the proffered wage as set forth on the labor certification.

Section 205 of the Act, states: "[t]he Attorney General 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."

Section 203(b)(3)(A)(i) of 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.

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 filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d). Here, Form ETA 750 was accepted for processing on April 3, 1995. The proffered wage as stated on Form ETA 750 is \$8.00 per hour, which amounts to \$16,640 per year. On Form ETA 750B, accompanying the petition, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the preference petition, the petitioner claims to have been established in 1993 and to have a gross annual income of \$85,879, a net annual income of \$49,818, and to currently employ two workers.

In support of the petitioner's ability to pay the proffered wage, the petitioner had provided a copy of his 1996 U.S. Corporation Short-Form Income Tax Return. It reflects that the petitioner reported taxable income of \$29,950 before the net operating loss (NOL). This reflects sufficient income to cover a proffered salary of \$16,640 per year.

The record contains a memorandum from the U.S. consulate in Manila, Philippines, dated February 12, 1998, indicating that pursuant to the interview with the beneficiary on September 26, 1997, the consulate called the petitioner's place of business in Guam. The investigator spoke with [REDACTED] one of the barbers employed by the petitioner. According to the memorandum, [REDACTED] claimed that "he was hired as a barber four years ago and stated that barbers have no definite salary because of the management's 'no work, no pay' policy. He also claimed that they are on commission basis (40%/60%), with 40% going to them and 60% percent going to the employer."

The consulate concluded that the nature of the job offer was speculative in nature because only a commission would be paid rather than a guaranteed salary. The memorandum does not indicate whether any commission arrangement had been discussed between the petitioner and the beneficiary.

On July 14, 2005, the director issued a notice of intent to revoke the petition, informing it of the consulate's investigation and questioning the validity of the job offer as set forth in the labor certification as requiring a proffered wage of \$8.00 per hour based on a full-time, 40 hour per week position. The petitioner was afforded thirty days to respond with additional evidence or argument in support of the petition, although the I-797 notice of action indicated that the director was sending a "request for evidence," and allowing the petitioner far more than thirty days to respond.

The director denied the petition on September 7, 2005. Noting that no response from the petitioner had been received, he determined that the consulate's investigation revealed that the petitioner had not established its ability to pay the proffered wage because "it appears 40% of fees paid by clients would be shared among the barbers with the remaining 60% to the petitioner." The director concluded that the job offer was speculative in nature in that it appeared that no guaranteed salary would be forthcoming, but only a commission that would be given to the beneficiary.

On appeal, the petitioner, through its president, [REDACTED] states that the barber who talked to the overseas investigator was on commission, because that was his option. The petitioner states that "because of shortage of barber in Guam, we follow their wishes. However, we sent proof of filing Fica Tax & Withholding Tax Returns regularly to show that we are on payroll." The petitioner adds that it will adhere to the beneficiary's wage offer of \$8.00 per hour.

The record on appeal also contains a copy of the petitioner's response to the director's July 14, 2005, notice of intent to revoke. [REDACTED] transmittal letter indicates that a few workers are on commission as per their option, but that a payroll is maintained. He submits copies of the first two quarters of Form 941, Employer's

Quarterly Federal Tax Return for 2005 showing \$5,374 in wages paid the first quarter and \$7,412 wages paid the second quarter. Two copies of the Guam quarterly tax returns are also provided, as well as a state quarterly wage report for the first two quarters of 2005. They show that the petitioner paid wages to four employees.

In this case, it is noted that proposed wage on an approved labor certification is expressed not as an unspecified formula but as specified U.S. currency based on a determination of the prevailing wage calculated pursuant to the regulatory requirements set forth at 20 C.F.R. § 656.40. Further, the regulation at 20 C.F.R. 656.20(c)(3) clearly provides that the wage offered must not be "based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis."

Through the alien labor certification process, the petitioner has been permitted to employ an alien worker in the full-time certified position defined as forty hours per week between 10 a.m. and 7 p.m., based on an hourly wage of \$8.00 per hour. In this case, pursuant to 8 C.F.R. § 204.5(g)(2), through its federal tax return, the petitioner established its ability to pay the proffered wage at the time the petition was filed. The issue is whether the petitioner intended to comply with the terms of the labor certification and provide full-time employment at the guaranteed hourly wage, rather than based on a commission as paid to other barbers that he has employed. The petitioner's president indicates that he will abide by the terms of the labor certification. The documents that he submitted as a response to the director's request for evidence indicate that the petitioner maintains a payroll and paid taxes on some of its workers in 2005, including [REDACTED] who was originally contacted by the overseas investigator. The fact that the petitioner has employed barbers on a commission basis does not demonstrate that there is no intent to abide with the terms of an approved labor certification requiring a specified wage paid to an alien worker who has been named in that labor certification. The overseas investigation does not reflect that a commission-based salary had been arranged for the beneficiary, rather than that certified by the petitioner on the labor certification. Based on the evidence provided to the record, we do not find that there is sufficient cause to revoke the petition.

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In Matter of Estime, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

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 met that burden.

ORDER: The appeal is sustained. The petition will be approved.