



U.S. Citizenship
and Immigration
Services

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FILE:

[Redacted]
WAC 02 207 53793

Office: CALIFORNIA SERVICE CENTER

Date:

JAN 22 2007

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 P. Wiemann, Chief
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 appeal will be dismissed.

The petitioner is a private residence. It seeks to employ the beneficiary permanently in the United States as a governess. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary would be employed as a permanent, full-time employee, as required on the approved Form ETA 750 labor certification.

On appeal, counsel submits a brief.

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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on August 19, 1999.¹ The proffered wage as stated on the Form ETA 750 A is \$2,000.00 per month.

The job offered is governess in a private residence. According to the labor certification the job's duties are explained as follows:

Responsible for tutoring children the Chinese [sic] language (Mandarin and Cotonese [sic]) and helping them with their homework. Especially in the area of math and science.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

¹ It has been approximately 7 years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

In the instant case, the Application for Alien Employment Certification, Form ETA-750 A, items 14 and 15, sets forth the minimum education, training, and experience that an applicant must have for the position of a governess.

In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	0
	High School	0
	College	0
	College Degree Required	0
	Major Field of Study	0
	Training	
	Years	0
	Experience	
	Years	<u>2</u>
	Related Occupation	
	Years	0

Item 15 of the Form entitled "Other special requirements" states:

Ability to speak, read and write the Chinese language (Madarin [sic] and Contonese [sic])

With the I-140 petition filed on June 13, 2002, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor; an offer of employment dated April 27, 2002; an undated prior employment verification; petitioner's U.S. federal tax returns; and, two naturalization certificates.

The director requested on December 19, 2002, *inter alia*, evidence that the beneficiary possesses the experience listed on the labor certification. The director requested prior employment verification on the employer's letterhead (the original letter with its English translation) with the beneficiary's job title, duties, dates of employment and number of hours worked.

The director requested the petitioner and the petitioner's spouse birth certificates and prior or other names by which the petitioner and spouse are known.

In response on March 13, 2003, the petitioner submitted the following documents: a declaration by [REDACTED] the beneficiary, dated March 10, 2003; a statement by [REDACTED] a prior employer; a statement dated March 3, 2003, by the petitioner concerning the beneficiary's employment; an offer of employment by the petitioner to the beneficiary dated March 10, 2003; a revised page 2 of Form I-140; and, the petitioner's personal 2001 U.S. federal tax return.

On April 7, 2003, the director requested the petitioner and the petitioner's spouse birth certificates, and explanation of the relationship between the petitioner and the beneficiary.

In response on June 30, 2003, the petitioner submitted the following documents: a letter from the petitioner dated June 12, 2003; a statement from the Embassy of the Union of Myanmar dated May 9, 2003; an Affidavit of Birth attested July 2, 1979 for the beneficiary; and, a copy of an "e-mail" response from the Consul-General of the Vietnamese Embassy dated June 16, 2003.

The director issued a notice of intent to deny the petition on February 17, 2005. The director determined that the petitioner had not established that the beneficiary will be employed as a permanent, full-time employee, as required on the approved Form ETA 750 labor certification, and cited the case of *Matter of Izdebska*, 12 I&N Dec. 54 (BIA 1966). The director stated that the beneficiary was interviewed on October 15, 2004, and stated that she worked three hours six days each week between the hours of 9:30 AM to 12:30 PM tutoring, and, also studied the English language from 9:30 AM to 3:30 PM. The beneficiary also stated, however, that the petitioner's children are in the 8th and 9th grades in school each week day from 7:30 AM to 3:30 PM.

The director then stated that by the evidence submitted, a letter dated June 30, 2003, from the petitioner, that the beneficiary is the sister of the petitioner. She is also listed as a dependent on his federal income tax return. The director stated that the petitioner did not disclose the family relationship to the U.S. Department of Labor by the evidence submitted.

In response to the notice of intent to deny the petition, counsel submitted a Declaration of [REDACTED] dated March 14, 2005. In the declaration the petitioner stated that according to his version of the CIS interview with his sister on October 15, 2004, the Citizenship and Immigration Services (CIS) interviewing officer was not told that the beneficiary was currently employed by the petitioner because of "the problem with work authorization." Further, the petitioner stated that he did not intentionally fail to disclose his family relationship with his sister, the beneficiary.

Counsel stated that the interviewing CIS officer, on October 15, 2004, misstated and distorted the beneficiary's statements. Also, according to counsel, among other assertions, the "information about the family relationship was not and is not material, and would not have effected the approval of the labor certification application." Counsel cites *Matter of Paris Bakery Corporation*, 88-INA-337 (1990) (en banc) for the proposition that there is "no automatic denial of labor certification based on the presence of a family relationship between the employer and the alien." Counsel asserts that since there were no responses to the petitioner's recruitment advertisements, the "family issue was no issue at all."

Along with the above response, counsel submitted copies of the following documents: Form I-797, receipt notice; "Results of Recruitment Efforts;" and, a communication from the State of California Employment Development Department dated June 16, 2000.

The director denied the petition on April 14, 2005. The director determined that the petitioner had not established that the beneficiary would be employed as a permanent, full-time employee, as required on the approved Form ETA 750 labor certification. The director stated that the beneficiary was interviewed on October 15, 2004, and she stated that she worked three hours six days each week between the hours of 9:30 AM to 12:30 PM tutoring, and, also studied the English language from 9:30 AM to 3:30 PM. The director also stated, however, that the beneficiary also stated the petitioner's children are in school in the 8th and 9th grades each week day from 7:30 AM to 3:30 PM. Therefore, there is an obvious contradiction between the hours that the beneficiary stated she worked, and the availability of her students since they are in school away from her during the day. The above-mentioned statements made by the beneficiary were memorialized in a written sworn statement by the beneficiary found in the record of proceeding.

The director then stated in his decision that by the evidence submitted, a letter dated June 30, 2003, from the petitioner, the beneficiary is the sister of the petitioner, and, that the beneficiary is listed as a dependent on the petitioner's federal income tax return. The director stated that the petitioner did not disclose the family relationship to the U.S. Department of Labor during the labor certification process.

Counsel appealed the director's decision. Counsel submitted a legal brief. Counsel asserts that the beneficiary's written responses to the CIS interviewing officer's questions are contrary to the director's factual findings as mentioned above.²

Further, counsel states that the interviewing officer's statement that the beneficiary had employment authorization was not correct, and "puts everything this officer reported in doubt."

According to counsel, the petitioner disclosed the fact that the beneficiary was his sister by listing the beneficiary as his sister on the petitioner's U.S. federal tax return, and, by a letter dated June 30, 2003. Also according to counsel, the director failed to identify any statute or regulation that a familial relationship may invalidate a labor certification.

Counsel restates his contention that since there were no responses to the petitioner's recruitment advertisements, the "family issue was no issue at all." Counsel again cites *Matter of Paris Bakery Corporation*, 88-INA-337 (1990) (en banc) for the proposition that there is "no automatic denial of labor certification based on the presence of a family relationship between the employer and the alien.

Counsel then contends that the director's decision found that "the beneficiary cannot meet the hours requirement for full-time employment" is incorrect. Counsel makes an assertion on appeal that the beneficiary will work a six-day week and that therefore "the total number of hours will be over 35 hours per week," and, the beneficiary does not have work authorization.

We note that despite a discussion concerning grounds necessary to invalidate a labor certification, the director has not invalidated the labor certification in this instance for fraud or misrepresentation.³

In the context of CIS's authority regarding eligibility for occupational (job) preference classification, counsel's preceding statements must be qualified. In determining the respective jurisdictions of the Department of Labor and the CIS, one may turn to the entire body of recent court proceedings interpreting the interplay of the agencies and strictly confining the final determination made by the Department of Labor. See *Stewart Infra-Red Commissary, Etc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981); *Denver Tofu Company v. District Director, Etc.*, 525 F. Supp. 254 (D. Colo. 1981); and, *Joseph v. Landon*, 679 F.2d 113 (7th Cir. 1982).

² That the beneficiary worked three hours six days each week between the hours of 9:30 AM to 12:30 PM tutoring, and, also studied the English language from 9:30 AM to 3:30 PM. The director also stated, however, that the petitioner's children are in the 8th and 9th grades each week day from 7:30 AM to 3:30 PM.

³ The federal court in *Spyropoulos v. Immigration and Naturalization Service*, 590 F.2d 1 (1978), in a similar factual situation, found that when evidence was submitted to demonstrate that an alien did not take the job for which a valid labor certification was issued that the then Immigration and Naturalization Service was not required to prove that fraud or willful misrepresentation was used to procure the certification because the validity of the certification was not at issue.

These cases recognize the labor certification process and the authority of the Department of Labor in this process stem from section 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A). In labor certification proceedings, the Secretary of Labor's determination is limited to analysis of the relevant job market conditions and the effect, which the grant of a visa would have on the employment situation. CIS, through the statutorily imposed requirement found in section 204 of the Act, 8 U.S.C. 1154, must investigate the facts in each case and, after consultation with the Department of Labor, determine if the material facts in the petition including the certification are true and correct. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

Although the advisory opinions of other Government agencies are given considerable weight, CIS has authority to make the final decision about a beneficiary's eligibility for occupational preference classification. The Department of Labor is responsible for decisions about the availability of United States workers and the effect of a prospective employee's employment on wages and working conditions. The Department of Labor's decisions concerning these factors, however, do not limit CIS's authority regarding eligibility for occupational preference classification.⁴ Therefore, the issuance of a labor certification does not necessarily mean a visa petition will be approved.

⁴ Relying in part on *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983), the Ninth Circuit Court of Appeals in *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983) stated in pertinent part:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

Id. at 1008. The court in that case relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

After a review of the record of proceeding, there is no finding by the director in the decision in regard to fraud or willful misrepresentation. **That is not an issue in this case.** As counsel raises this issue throughout his contentions in this case, we find that it is not an issue based upon the director's findings or the record of proceeding, and, it will not be further discussed.

In relation to the particular facts of the case, counsel asserted in response to the director's intent to deny, that the issues in the case concern the factual statements reduced to writing which the beneficiary disclosed to the interviewing immigration officer during her interview concerning the I-140 petition.

Present in the record of proceeding is a "Record of Sworn Statement in Affidavit Form" ("Record") sworn and subscribed by the beneficiary on October 15, 2004. On page 2 of the Record, the beneficiary answered the following question as follows:

Q. What hours do you work. [?]

R. 9:30 AM to 12:30 PM 6 days a week. H.S.F. [the beneficiary's initials]

Counsel contends that the petitioner intends to employ the beneficiary and the beneficiary intends to accept the position of governess according to the terms of the labor certification. (The labor certification states that the beneficiary will work 40 hours per week from 1:00 A.M. to 9:30 P.M. or 21.5 hours per day. This is evidently a typographical error.)

The beneficiary's employment in the petitioner's residence as a governess, based upon the beneficiary's sworn response, was she worked three hours each day six days each week (18 hours per week). Counsel asserts that the beneficiary's written responses to the CIS interviewing officer's questions are contrary to the director's factual findings as mentioned above. Counsel makes an assertion on appeal that the beneficiary will work a six-day week and that therefore "the total number of hours will be over 35 hours per week," and, the beneficiary does not have work authorization and did not work. **Counsel's statement is not correct and contradicted by the beneficiary's sworn statement.**

Counsel submitted a declaration of the petitioner, [REDACTED], dated March 14, 2005. As found in the declaration, the petitioner stated that according to his version of the CIS interview with his sister on October 15, 2004, the CIS interviewing officer was not told that the beneficiary was currently employed by the petitioner because of "the problem with work authorization." The above statement of the beneficiary is contrary to the petitioner's statement, since the beneficiary was asked in the present tense what hours she worked.

Further, counsel stated in an explanatory letter dated March 14, 2005 that the record does not show that the beneficiary has worked for the petitioner. We note that the petitioner has admitted that he provided financial assistance to the beneficiary, listed her on his personal tax returns as a dependent, and according to the statement made by the petitioner dated March 3, 2003, found in the record, "[REDACTED] is presently employed by this establishment as Governess. The monthly income of this employee is \$2000.00." We find that the beneficiary has worked for the petitioner, but only part-time, that is 18 hours per week.

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

We will accept the beneficiary's sworn statement to the CIS interviewing officer concerning the hours work prior to receipt of the permanent residency visa as an accurate representation of her present working conditions. We find that, according to the facts as presented, the beneficiary had no intent to work as a Governess for the petitioner according to the job stated and the terms of the labor certification, according to the regulation at 8 C.F.R. § 204.5(c), and, the case precedent of *Matter of Semerjian*, 11 I&N 751 (Reg. Com. 1966). There is no evidence in the record of proceeding that the beneficiary was ever employed as Governess for 40 hours each week for the petitioner or has the intent to do so.

The director stated that the petitioner did not disclose the family relationship to the U.S. Department of Labor. Counsel contends that since there were no responses to the petitioner's recruitment advertisements, the "family issue was no issue at all." According to counsel, the petitioner disclosed the fact that the beneficiary was his sister by listing the beneficiary as his sister on the petitioner's U.S. federal tax return, and, by a letter dated June 30, 2003. According to counsel, the director failed to identify any statute or regulation that a familial relationship may invalidate a labor certification.

Counsel again cites *Matter of Paris Bakery Corporation*, 88-INA-337 (1990) (en banc) for the proposition that there is "no automatic denial of labor certification based on the presence of a family relationship between the employer and the alien." This is not an issue in this case, and it will not be discussed further.

In response to a notice of intent to deny and a specific query concerning familial relationships involved in this matter, only then did the petitioner disclose his brother relationship to the beneficiary, his sister. The petitioner did not disclose that fact to CIS when it initially filed the petition. Counsel has indicated that no disclosure was made to the U.S. Department of Labor (DOL) during the alien labor certification application process.

According to DOL precedent and regulations, under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Although the petitioner's president made a statement in response to the director's first notice of intent to deny that the offer was valid and legitimate, its failure to make critical disclosures to DOL and CIS initially undermine that notion. The AAO cannot conclude that the petitioner is extending a *bona fide* job offer to the beneficiary.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.