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U.S. Citizenship
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Office: VERMONT SERVICE CENTER

Date: **MAY 22 2007**

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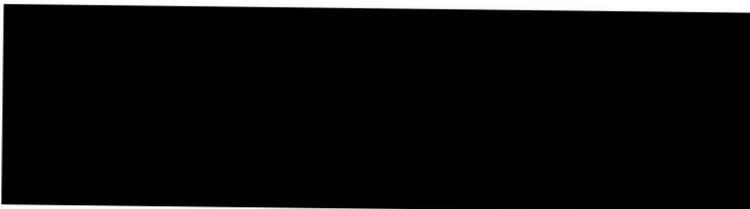
Petitioner:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a jewelry store. It seeks to employ the beneficiary permanently in the United States as a jeweler. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition with a request for substituting the beneficiary on the labor certification. After issuing a notice of intent to deny (NOID) on August 31, 2005, the director determined that the grounds for denial had not been overcome because the record did not include a response to the NOID, and denied the petition accordingly.

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. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 28, 2005 denial, the petitioner failed to overcome the grounds of denial on the director's NOID because the petitioner did not respond to the NOID. On appeal counsel admits that the petitioner inadvertently failed to respond to the NOID and is including their response as part of this appeal.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). On appeal the petitioner submits the evidence expressly requested by the director in the NOID but not submitted in response to the NOID. As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

The AAO also notes that even if the AAO considered the evidence submitted by the petitioner first time on appeal, the appeal would have been dismissed because the petitioner failed to submit all the documents requested in the director's NOID, and thus, failed to establish that it actually did apply for the labor certification and actually did file the Form I-140 based on a *bona fide* job offer.

Counsel contends that the director's NOID is based on the unrelated conduct of the petitioner's prior counsel and not on any direct evidence of falsification, and that cases such as this, where there is an absence of negative evidence, must be adjudicated on an individual basis, based on the merits of each case, and not be subject to a blanket intention to deny.

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.

In the instant case, a Form ETA 750, Application for Alien Employment Certification was filed on April 2, 2001 by the petitioner on behalf of an alien worker. On January 31, 2002, the Form ETA 750 was approved by the DOL. The instant Form I-140 visa petition was subsequently filed on April 8, 2003 requesting to substitute the beneficiary on the labor certification. [REDACTED] was the attorney of record in the labor certification application and the instant I-140 visa petition on behalf of the instant beneficiary. On April 14, 2005, [REDACTED] was convicted of various counts of immigration fraud relating to the falsifying of labor certification applications and conspiracy to submit false labor certifications.

In his NOID dated August 31, 2005, the director requests for additional evidence pursuant to the regulations at 8 C.F.R. § 204.5(l)(1), 8 C.F.R. §§ 103.2(a)(2) and (7)(i) and 20 C.F.R. §656.17(a)(1). The director specifically states:

[Citizenship and Immigration Services (CIS)] will deny the petition unless the petitioner submits to CIS a statement, accompanied by documentary evidence, to establish that the petitioner did, in fact, retain [REDACTED], or his firm, in order to obtain a *bona fide* labor certification relating to a *bona fide* job offer, and to file a *bona fide* immigrant petition so that the beneficiary could immigrant based on the *bona fide* job offer.

The statement should come from a Chief Executive Officer, President, owner, or other responsible officer or employee of the petitioner (should be someone other than that shown on the petition and identified below) that has been signed under oath or “under penalty of perjury under United States law;” identifies the signer’s position; and indicates whether:

1. The petitioner retained [REDACTED], or his firm, to file immigration-related papers on the beneficiary’s behalf;
2. the person whose signature appears on the Form I-140 or Form ETA-750 is an officer or employee of the petitioner; and
3. the signature is genuine.

Additional documentary evidence that would establish that the petitioner retained [REDACTED] or his firm, in order to procure a *bona fide* labor certification relating to a *bona fide* job offer could include: a copy of a contract between the petitioner and [REDACTED] and /or copies of correspondence between [REDACTED] and the petitioner.

In addition to the evidence request above please provide a complete list of all the people the petitioner has petitioned for in the past. The list should include names, dates of birth and priority dates.

To establish the petitioner's ability to pay, submit IRS certified copies of the petitioner's 2001, 2002, 2003, and 2004 tax returns. As an alternative, audited financial statement for the same years may be submitted.

The Immigrant Petition for Alien Worker, Form I-140, and Application for Alien Employment Certification, Form ETA-750, bear the signature of [REDACTED] who is identified as the petitioner's president. If the person who purportedly signed either the Form I-140 or the Form ETA 750 actually is an officer or employee of the petitioner, the petitioner shall submit five (5) specimens of that person's signature, so that USCIS may compare the signature with the signatures on the Form I-140 or Form ETA 750.

On appeal, the petitioner submits an affidavit of [REDACTED] five samples of his signature and the petitioner's tax returns for 2001 and 2003. The signature samples of [REDACTED] prove that the signatures on the Form ETA 750 for the previous alien and the instant beneficiary and Form I-140 were not signed by [REDACTED]. In his affidavit, [REDACTED] states in pertinent parts that:

1. That I am the President of Dua International, Inc.
2. That my business address is [REDACTED]
3. That on April 02, 2001 my company filed a labor certification, Form ETA-750 on behalf of [REDACTED]. The job title was Jeweler. I personally authorize my Manager to sign the Form ETA-750 as President of my company and was based on a *bona fide* job offer.
4. That on[sic] April 2003, my company filed an immigration petition, Form I-140 on behalf of [the beneficiary]. This was a substitution filing with [the beneficiary] as the substituted beneficiary and was filed at my request by another previous counsel, [REDACTED]
5. The Form I-140 was based on a *bona fide* job offer and President of the company I personally authorized my Manager to sign on my behalf.

[REDACTED] stated that the instant I-140 immigrant petition was filed at his request by [REDACTED] implicitly confirming that the petitioner retained [REDACTED] to file the instant petition, however, he did not indicate that the petitioner retained [REDACTED] to file the labor certification application. In addition, [REDACTED] did not submit any documentary evidence such as a copy of a contract between the petitioner and [REDACTED] and /or copies of correspondence between [REDACTED] and the petitioner in order to procure a *bona fide* labor certification relating to a *bona fide* job offer as requested in the director's NOID. The affidavit indicated that [REDACTED] authorized his manager to sign the Form ETA 750 and Form I-140 on his behalf as the president of the company. However, he did not explain why he authorized the manager to sign his name on the forms instead of the manager's name. [REDACTED] did not provide the manager's name, nor did he verify that the manager was an officer or employee of the company. The record does not contain any documentary evidence showing that the petitioner hired any person as a manager. Instead, the petitioner's 2001 tax return indicates that the petitioner did not pay any wages and salaries in the year when the petitioner filed the labor certification, instead it paid \$201,447 to independent contractors. The petitioner's 2001 tax return also bears a signature of [REDACTED] which appears to be the same signature as on the Form ETA 750 and Form I-140, but different from the sample signatures provided by [REDACTED] on appeal. [REDACTED] did not state whether he also authorized said manager to sign the petitioner's 2001 tax return. Although [REDACTED] claimed

that he has been the president of the petitioning entity, the record does not contain any documentary evidence to prove his position or ownership in the company. The petitioner's 2001 tax return does not show the petitioner's ownership;¹ the petitioner's 2003 tax return shows that a person named [REDACTED] owns 100% of shares of the company. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Therefore, [REDACTED]'s affidavit failed to establish that the petitioner filed a bona fide labor certification application relating to a bona fide job offer and a bona fide immigrant petition on behalf of the beneficiary.

Further, the NOID addressed the petitioner's ability to pay the proffered wage. 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.

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).

Here, the Form ETA 750 was accepted on April 2, 2001. The proffered wage as stated on the Form ETA 750 is \$19.80 per hour (\$41,184 per year). On the Form ETA 750B signed by the beneficiary on March 30, 2001, the beneficiary did not claim to have worked for the petitioner.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of

¹ The tax return indicates that the petitioner has four shareholders at the end of the tax year.

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).

The record contains copies of the petitioner's tax returns for 2001 and 2003. The two tax returns provide inconsistent information about the petitioner's structure. The petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for 2003 indicates that the petitioner was incorporated on February 4, 1996 and elected to be an S corporation on the same day. However, its 2001 tax return submitted in the record of proceeding shows that the petitioner was incorporated on February 4, 1996 as a C corporation and filed its tax return on Form 1120. The petitioner did not submit IRS certified copies of its tax returns for 2001 and 2003 as required by the director in his NOID. The 2001 tax return was signed with Mr. Wadhwanian's name by someone other than himself. The 2003 tax return was not signed. The record does not contain any other regulatory-prescribed evidence, such as annual reports or audited financial statements for 2001 and 2003. Without independent objective evidence, the petitioner's affidavit does not suffice to resolve the inconsistencies with the tax returns. See *Matter of Ho*. The petitioner's 2001 and 2003 tax returns cannot be considered as primary regulatory-prescribed evidence to establish the petitioner's ability to pay the proffered wage for 2001 and 2003.

The petitioner did not submit its tax returns or audited financial statements for the years 2002 and 2004. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns for 2002 and 2004. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). In addition, without the tax returns, audited financial statements or other regulatory-prescribed evidence, the AAO cannot determine whether the petitioner had sufficient net income or net current assets to pay the beneficiary in 2002 and 2004.

Therefore, the evidence submitted does not establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

In addition, this office notes that the petitioner's corporate status was forfeited for failure to file a property return for 2001 in the State of Maryland on October 7, 2002. See http://sdatcert3.resiusa.org/ucc-charter/CharterSearch_f.asp (accessed on April 5, 2007).

Counsel's assertions and the documents submitted by the petitioner on appeal fail to establish the petitioner's *bona fide* job offer, the *bona fide* filing of the labor certification application, and the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner has not met that burden.

ORDER: The appeal is dismissed.