U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 21 2005
WAC-96-253-52882

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

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 employment-based preference visa petition was initially approved by the Director, California Service Center. After a series of procedural events which are not now at issue, the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will remain approved.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], 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." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a dry cleaning, laundry, alterations and tailoring company. It seeks to employ the beneficiary permanently in the United States as a custom tailor. 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 continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition 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.

Employment based immigration petitions depend on priority dates. The priority date for a petition 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, 1995. The proffered wage as stated on the Form ETA 750 is $12.60 per hour, which amounts to $25,292.80 annually. On the Form ETA 750B, signed by the beneficiary on January 4, 1995, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on September 25, 1996. On the petition, the petitioner claimed to have been established on March 1, 1990, to have been incorporated in April 1995, to currently have eleven employees, to have a gross annual income of $531,790.00, and to have a net annual income of $342,482.00. With the petition, the petitioner submitted supporting evidence.

The director initially approved the petition on November 30, 1996.

On December 30, 1996 the beneficiary submitted a Form I-485 Application to Register Permanent Resident or Adjust Status (Form I-485). The director denied that application on January 19, 1998 on the grounds that the beneficiary had made a willful misrepresentation of a material fact in obtaining a nonimmigrant visa in February 1993, and that she was therefore inadmissible under section 212(a)(6)(C)(i) of the Act.

Following the denial of the beneficiary's adjustment of status application, the director determined that the petitioner's offer of employment to the beneficiary had been withdrawn. The director therefore on April 18, 1998 issued a notice of automatic revocation of the I-140 petition, pursuant to the regulation at 8 C.F.R. § 205.1. In finding that the offer of employment had been withdrawn, the director relied on several sentences in a letter dated

August 29, 1997 from the petitioner's owner stating that an offer of full-time permanent employment to the beneficiary was being made only upon the beneficiary obtaining legal permanent residence status. The director reasoned that since the beneficiary's I-485 application had been denied, the petitioner's offer of employment must be considered to have been withdrawn.

The petitioner filed an I-290B notice of appeal on May 18, 1998.

The record contains no indication that the petition was ever forwarded to the AAO pursuant to the notice of appeal filed on May 18, 1998.

On September 26, 2002, the director issued a decision captioned "Service Motion to Reopen/Reconsider, Intent to Revoke." In that decision the director vacated the decision of April 18, 1998 which had automatically revoked the I-140 petition. The director also notified the petitioner of his intention to revoke the I-140 petition on the basis that the evidence failed to establish the petitioner's ability to pay the proffered wage during the relevant period. The director afforded the petitioner 30 days to submit evidence or a written statement in rebuttal to the notice.

In response to the Service Motion to Reopen/Reconsider, Intent to Revoke, the petitioner submitted additional evidence. The petitioner's submissions were received by the director on October 22, 2002.

The director issued a Notice of Intent to Revoke (ITR) dated October 2, 2003. The director again notified the petitioner of his intention to revoke the petition. The director stated that the beneficiary's employment was not full-time at the time of her interview for adjustment of status, that the evidence failed to establish the petitioner's ability to pay the proffered wage during the relevant period, that the record did not make clear whether the petitioner attempted to recruit U.S. workers prior to filing the application for labor certification, and that the business name of the employer on the ETA 750 differed from the corporate name of the petitioner on the I-140 petition and that no successor in interest had been established.

In response to the ITR the petitioner submitted additional evidence. The petitioner's submissions in response to the ITR were received by the director on October 31, 2003.

In a decision dated August 5, 2004 the director revoked the I-140 petition. The director found that the issues of an offer of full-time employment and of the petitioner's ability to pay the proffered wage had been resolved in the petitioner's favor by the evidence submitted in response to the ITR. But the director found that the evidence failed to establish that the petitioner had attempted to recruit U.S. workers prior to filing the application for certification, and that the evidence failed to establish that the petitioner was a successor in interest to the employer which filed the ETA 750 labor certification application.

The petitioner filed a second I-290B notice of appeal which was received by the director on August 20, 2004. That notice of appeal is the matter now before the AAO.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that the director was without authority to question the labor certification by the Department of Labor absent evidence of fraud or willful misrepresentation. Counsel states that under the regulation at 20 C.F.R. § 636.30(d), CIS may invalidate a labor certification only where there is a showing of fraud or misrepresentation. Concerning the director's finding on the petitioner's need to establish that it is a successor in interest to the employer which filed the ETA 750, counsel states that the ETA 750 was filed when the petitioner was a sole proprietorship, under the trade name of the business, but that soon after the filing date of the ETA 750 the business was incorporated and the Department

of Labor was duly notified of that fact. Counsel states that the petitioner was a corporation at the time of the certification by the Department of Labor, and that the petitioner is the same legal entity which obtained the labor certification.

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 authority to certify Form ETA 750 labor certification applications is assigned to the Department of Labor. *See* Act §§ 203(b)(5)(B)(i), 212(a)(5)(A).

The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor regulations concerning labor certifications went into effect in March 2005, but the instant petition is governed by the prior regulations. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The citations below are to the Department of Labor regulations as in effect prior to the 2005 amendments.

Pursuant to 20 C.F.R. § 656.21(b)(5), a petitioning employer is required to document that its requirements for the proffered position are the minimum necessary for performance of the job and that it has not hired or that it is not feasible for the petitioner to hire workers with less training and/or experience. Furthermore, the regulation at 20 C.F.R. § 656.21(b)(5) addresses the situation of a petitioning employer requiring more stringent qualifications of a U.S. worker than it requires of the alien; the petitioner is not allowed to treat the beneficiary alien more favorably than it would a U.S. worker. *See ERF Inc., d/b/a Bayside Motor Inn*, 1989 INA 105 (U.S. Dept. Labor, BALCA, Feb. 14, 1990).

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).

Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

The regulation at 20 C.F.R. § 656.30, Validity of and invalidation of labor certifications, states in pertinent part as follows:

> (d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a RA [Regional Administrator] or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

The regulation at 20 C.F.R § 656.31, Labor certification applications involving fraud or willful misrepresentation, states in pertinent part as follows:

> (d) If a Court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefor shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

In his revocation decision, the director found that the evidence failed to establish that the petitioner had attempted to recruit U.S. workers for the offered position, but the director did not invalidate the labor certification. The director stated the following:

> During the district interview [on the beneficiary's application to adjust status to that of legal permanent resident], it was revealed that the beneficiary resided with the petitioner. It was noted that the petitioner and the beneficiary met at church, and subsequently became roommates. It appears that the petitioner hired the beneficiary based on their acquaintance. [CIS] questions whether the petitioner made a reasonable good faith effort to recruit U.S. Workers? (sic)

(Director's decision, August 5, 2004, at 6)

After quoting the regulation at 20 C.F.R. § 656.21(iii)(B)(1) concerning the employer's obligation to make reasonable good faith efforts to recruit U.S. workers for the offered position and after discussing the evidence submitted in response to the ITR, the director continued as follows:

> [CIS] questions the petitioner's credibility in recruiting U.S. workers prior to offering the employment to his/her friend and prior to the employment certification. It is the regulations (sic) intent for the petitioner to primary (sic) conduct recruitment for U.S. workers prior to an employment selection. It is not clear if the petitioner attempted to recruit U.S. workers prior to filing the application for certification. The evidence is not convincing to substantiate the petitioner's claims. The rebuttal did not include documentation establishing that the petitioner attempted to recruit U.S. workers prior to filing the application for certification.

(Director's decision, August 5, 2004, at 6)

The director's language quoted above assumes that an employer filing a labor certification application has an obligation to recruit U.S. workers prior to filing the application for certification. The record in the instant I-140 petition does not contain copies of the documentation submitted to the Department of Labor in support of the ETA 750. However, under procedures in effect at the time the ETA 750 was filed, all recruitment of U.S. workers to fill the offered position would have been done after the filing date of the ETA 750. *See* Ira J. Kurzban, *Immigration Law Sourcebook* ch. 7, 717 (9th ed., American Immigration Law Foundation 2004).

The record in the instant I-140 petition contains no evidence of fraud or willful misrepresentation involving the labor certification application, nor does the director make any such allegation or finding. Absent such a finding, CIS is without authority to invalidate a labor certification by the Department of Labor. *See* 20 C.F.R. §§ 656.30(d), 656.31(d). *See also* Act § 212(a)(6)(C)(i); *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983). *Cf*

Falaja v. Gonzalez, 418 F.3d 889 (8th Cir. 2005) (false testimony in support of an asylum application may constitute willful misrepresentation within the meaning of section 212(a)(6)(C)(i) of the Act).

For the foregoing reasons, the director erred in requiring the petitioner to establish as part of its burden of proof in the I-140 petition that it had made reasonable good faith efforts to recruit U.S. workers. That fact is already deemed to have been established as a result of the Department of Labor certification of the ETA 750 submitted in support of the instant petition.

The second ground cited by the director for revocation the instant petition was the failure of the petitioner to establish that it is the same entity which obtained the labor certification or to establish that it is a successor in interest to that entity.

Counsel states that the ETA 750 was filed when the petitioner was a sole proprietorship, under the trade name of the business, but that soon after filing date of the ETA 750 the business was incorporated and the Department of Labor was duly notified of that fact. Counsel states that the petitioner was a corporation at the time of the certification by the Department of Labor, and that the petitioner is the same legal entity which obtained the labor certification.

The ETA 750 was filed under the name "Orinda Martinezing Cleaners." Other documents in the record show the spelling of the business name as "Orinda 'Martinizing' Cleaners." A letter dated April 12, 1995 from the petitioner's owner to the California Employment Development Department, Alien Labor Certification Office states in pertinent part as follows:

> Our California Tax ID is [a number ending in [redacted] We've incorporated in April of 1995, and we will have a new Tax ID number.
>
> The new name, business address and phone number of the person to contact is:
>
> [redacted]
>
> We will let you know our new California Tax number as soon as we get it from our CPA.

(Letter from [redacted] pril 12, 1995, at 1).

The April 12, 1995 letter bears a stamp on each of its two pages stating "Attachment approved by U.S. D.O.L. Region IX." The stamp on page one also bears apparent initials which are not clearly legible and it bears the handwritten date "4-18-96." (Letter from [redacted] April 12, 1995, at 1).

The Form ETA 750 bears a certification stamp from the Department of Labor carrying the signature of a certifying officer. The certification stamp is date stamped August 21, 1996.

The foregoing evidence shows that the petitioner amended the ETA 750 by letter dated April 12, 1995 to show its change of legal status to a corporation; that the Department of Labor approved that amendment on April 21, 1996; and that the Department of Labor then certified the application on August 21, 1996. At the time of certification,

therefore, the employer was a corporation with the name Clean Cleaners of Orinda, Inc. That corporation is the same one which filed the instant I-140 petition. Therefore no issue exists in the instant petition concerning a successor in interest.

The record also contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for the years 1995, 1996, 1997, 1998, 1999, 2000 and 2001. Each of those returns states in block D on page 1 that the petitioner's date of incorporation is February 16, 1995. Those documents provide further corroboration of the fact that the petitioner was incorporated prior to the date of the certification of the Form ETA 750 by the Department of Labor.

On appeal, the petitioner also submits a copy of its articles of incorporation showing its incorporation in the State of California on February 16, 1995. The petitioner also submits a copy of a letter dated May 23, 1996 to the U.S. Department of Labor, Employment and Training Administration, in San Francisco, California, signed by the petitioner's owner. In that letter the petitioner formally amends the ETA 750A, item 4, to reflect that "Orinda Martinezing Cleaners" had changed its name to "Clean Cleaners of Orinda, Inc." (Letter from petitioner's owner, May 23, 1996, at 1). The foregoing documents are further corroboration of the fact that the incorporation of the petitioner occurred prior to the August 21, 1996 certification of the ETA 750 by the Department of Labor, and that the Department of Labor had been duly informed of the change in legal status.

For the foregoing reasons, the evidence in the record is sufficient to establish that the petitioner is the same employer which obtained the labor certification. No evidence of a successor in interest is therefore relevant to the instant petition. *Cf Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

In his decision of August 5, 2004 revoking the instant petition, the director stated only two justifications for the revocation, first, the failure of the petitioner to conduct good faith recruitment of United States workers for the offered position, and second, the failure of petitioner to show that it is the same legal entity which obtained the ETA 750 labor certification or that it is a successor in interest to that entity. For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal are sufficient to overcome the decision of the director on each of those issues.

In summary, the record contains no evidence of fraud or of willful misrepresentation in connection with the ETA 750 labor certification. Therefore the director had no grounds to invalidate the labor certification. Absent an invalidation of the labor certification, matters concerning the adequacy of the petitioner's efforts to recruit United States workers are under the authority of the Department of Labor and are not under the authority of the director. Furthermore, the evidence establishes that the employer which obtained the labor certification and the petitioner in the instant petition are the same corporation. Therefore the issue of a successor in interest is not relevant to the instant petition.

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 sustained. The petition remains approved.