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U.S. Citizenship
and Immigration
Services

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[redacted]

APR 05 2007

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:

EAC 01 149 51937

IN RE: Petitioner:
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:

[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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, revoked approval of the visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a computer consulting and engineering firm. It seeks to employ the beneficiary permanently in the United States as a systems analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition.

The director revoked approval of the instant visa petition finding that the petitioner had failed to respond to a notice of intent to revoke that approval. The notice of intent to revoke determined that the evidence in this case indicates that the petitioner and the beneficiary provided fraudulent information to CIS. Specifically, the acting director found that the beneficiary did not work for the petitioner at the wage stated in the Form I-140 petition, thus indicating that the petitioner had not intended, when it filed the petition in this matter, to employ the beneficiary pursuant to the terms of the approved labor certification in this case after the beneficiary adjusted status to legal permanent resident.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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 granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

The Form ETA 750 states that the salary for the proffered position is $54,000 per year. The beneficiary signed the Form ETA 750B on October 8, 1999. On that date the beneficiary stated that he had been working for the petitioner since July 1999.

The record contains (1) 2000, 2001, and 2002 Form W-2 Wage and Tax Statements, (2) earnings statements the petitioner issued to the beneficiary during 2000, (3) an earnings statement the petitioner issued to the beneficiary for December 2002, (4) a photocopy of a cancelled 2002 paycheck and check stub, and (5) earnings statements another employer issued to the beneficiary during 2005 and 2006.

The W-2 forms submitted show that the petitioner paid the beneficiary $42,688, $25,509, and $41,673 during 2000, 2001, and 2002, respectively.[1]

[1] The record reflects that the petitioner employed the beneficiary in an H-1B capacity prior to filing the Form I-140 petition on his behalf. As an H-1B employer the petitioner was required to pay the beneficiary the prevailing wage pursuant to the terms of the H-1B visa. Whether the beneficiary was in the United States

The 2000 earnings statements submitted are for the months of June, July, and August 2000. During those months the petitioner paid the beneficiary gross pay of $5,667 per month. The most recent of those pay statements shows year-to-date wages of $42,668 through the end of August 2000.

The December 2002 earnings statement shows that the petitioner paid the beneficiary wages of $4,583 during that month. That statement shows a year-to-date total, through December 31, 2002, of $41,673.

The cancelled check and check stub provided is for wages paid for the month of April 2002. The petitioner paid the beneficiary $4,583 for work performed during that month. The pay stub shows that the beneficiary's gross year-to-date pay was also $4,583 when that check was issued, thus indicating that the beneficiary did not work for the petitioner during the first quarter of 2002.

The 2005 and 2006 earnings statements, issued to the beneficiary by an employer other than the petitioner, are not relevant to whether the petitioner intended to employ the beneficiary pursuant to the terms of the approved labor certification.[2]

The record shows that the Form I-140 petition in this matter was approved on August 15, 2001.

The record contains an investigative report that states,

> On Thursday, October 17, 2002, [the beneficiary and his spouse] appeared for an Adjustment of Status interview. During the interview [the beneficiary] was questioned as to his current position and current salary with [the petitioner]. [redacted] stated, under oath, that he was a System Analyst with a current salary of $54,000 a year. When [the beneficiary] was asked for copies of his filed 2001 income taxes, which he produced, it revealed that [the beneficiary] had earned $25,509. Inside the file was a letter dated April 18, 2002, which stated that [redacted]s current annual salary is $55,000 a year. [redacted] also provided a letter, from [the petitioner], stating that he has a full-time permanent job offer, as a System Analyst, with an annual salary of $54,000, upon approval of his residency status. [The beneficiary] claims that he has been working for [the petitioner] since he entered the United States on May 25, 1999 as a System Analyst in a full-time capacity (See sworn statement in file). With all the documents provided and the given answers on the sworn statement it is this

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unlawfully or failed to meet the terms and conditions of his H-1B visa and was thus out of legas states when he filed the Form I-485 application to adjust status to permanent resident is beyond the scope of this decision. The beneficiary's eligibility to adjust status to permanent resident, includingt his eligibility under section 245(i) of the Act, 8 U.S.C. § 1255(i), is determined at the time of the I-485 adjudication.

[2] This office will assume that those other earnings statements were submitted to show that the beneficiary worked for another employer, and to demonstrate that the petition should be approved pursuant to the provisions of The American Competitiveness in the Twenty-First Century Act of 2000 (AC21). This office notes that AC21, under some circumstances, precludes denial of a petition merely because the beneficiary has gone to work for another employer. In this case, the petition was not denied because the beneficiary had changed jobs, and AC21 has no applicability to the outcome of this appeal.

> officer's belief that there is a possibility of fraud involved in this case, therefore it is recommended that [approval of the visa petition] be revoked.

The beneficiary's sworn statement is dated October 17, 2002. In that statement the beneficiary asserted that his salary when he came to the United States was $54,000 per year, that it increased to $60,000 on some unspecified date, and that it was lowered to $54,000 again based on the poor economy. Asked why he declared income of only $25,509 during 2001 the beneficiary stated that he was then between projects.

The director revoked approval of the petition on April 29, 2005. On appeal, counsel noted that the petitioner is not required to employ the beneficiary at any time prior to his adjustment to permanent resident status.[3] Counsel asserted that the fact that the petitioner was not employing the beneficiary at the proffered wage on the date of his adjustment interview is not grounds for denial in itself, nor evidence of a material misstatement.

Counsel also argued that section 205 of the Act, 8 U.S.C. § 1155, protects an approved visa from revocation once the beneficiary has come to the United States. Counsel relied on the third sentence of that section as support for that assertion, citing *Firstland International, Inc. v. USINS*, 377 F. 3d 127 (August 2, 2004).

This office need not reach the issue of whether the section upon which counsel relied would prevent revocation under the circumstances of the instant case. The section upon which counsel relied was amended on December 17, 2004, deleting the sentence upon which counsel relied. This amendment was effective prior to the April 25, 2005 revocation of approval of the instant visa petition. *Firstland International, Inc. v. USINS,* 377 F. 3d 127, the case relied upon by the petitioner, was subsequently denied again based on this change in the law.[4]

The remaining issue is whether the evidence in the record justified revocation of approval of the visa petition.

Nothing the beneficiary said at his interview strongly suggests that the petitioner did not intend, as it has consistently asserted, to employ the beneficiary pursuant to the terms of the approved labor certification beginning on the date of his adjustment.

When asked at his interview when the petitioner began paying him $54,000 per year the beneficiary answered that he began earning that amount when he first entered the United States. The record does not contradict that assertion.

The Form ETA 750 B states that the beneficiary began working for the petitioner sometime during July of 1999. At his interview the beneficiary stated that he began working for the petitioner on May 25, 1999. Although those two statements are discrepant, the discrepancy is minor and not relevant to any material issue. The record does not reveal how much the petitioner paid the beneficiary during 1999.

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[3] Actually, the letter containing these arguments is dated December 2, 2004 and was submitted in response to the Notice of Intent to Revoke, though it was not then received and placed in the record.

[4] *Firstland International, Inc. v. USINS,* 2006 WL 436011 (E.D.N.Y.) (Unpublished).

During 2000 the beneficiary earned $42,668. The August 30, 2000 pay stub submitted shows that the beneficiary had earned that amount prior to that date. The beneficiary apparently did not work for the petitioner during the last four months of 2000. Earning $42,668 prior to August 30, 2000 is consistent with a $60,000 annual salary minus slightly more than three months. In explaining why he earned less than the proffered wage during 2001 the beneficiary stated that he did not work during some portion of 2001 because he was between projects. That hiatus apparently began sometime during August of 2000.

During 2001 the petitioner paid the beneficiary $25,509. That amount is consistent with the beneficiary working only part of that year, as he claimed.

During 2002 the petitioner earned $41,673. That is the amount stated on both the W-2 form and the December 31 2002 pay statement. Further, the April pay stub shows that the petitioner did not employ the beneficiary during 2002 prior to April. The beneficiary may also have been laid off sometime after the October 17, 2002 interview. The amount the petitioner paid the beneficiary is consistent with an annual salary of $54,000 to $60,000, reduced by lay offs.

Because, when asked his salary and when he began earning it, the beneficiary did not spontaneously add that his earnings were interrupted since the petition was submitted, the beneficiary's answer might arguably be seen as imperfectly detailed. Nothing in the record, however, demonstrates that the beneficiary's answers were false or that his imperfectly detailed answer was given in an attempt to mislead the interviewer.

Further, even if the evidence were inconsistent with the beneficiary's assertion of his salary, this office notes counsel's argument pertinent to materiality. The petitioner is not obliged to employ the beneficiary prior to adjustment of status and is not bound to pay him any specific salary if it does employ him.[5]

The record indicates that the petitioner did respond to the Notice of Intent to Revoke. Nothing in the record indicates that approval of the visa petition was occasioned by fraud. The record does not establish that the petitioner does not intend to employ the beneficiary pursuant to the terms of the approved labor certification. The petitioner has overcome the basis for denial and the bases for the Notice of Intent to Terminate.

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 is approved.

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[5] The employer's obligation to pay the beneficiary the prevailing wage as an H-1B employer is beyond the scope of the instant decision.