



U.S. Citizenship
and Immigration
Services

(b)(6)



Date: JUN 20 2013

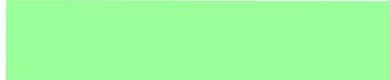
Office: TEXAS SERVICE CENTER

FILE:



IN RE:

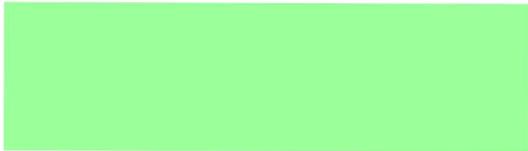
Petitioner:



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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On December 3, 2012 the Administrative Appeals Office (AAO) issued a decision withdrawing the director's decision to revoke the approval of the employment-based immigrant visa petition and remanding the matter to the Director, Texas Service Center (the director), for further action and review in accordance with the AAO's decision. On April 10, 2013, the director, after sending the petitioner a Notice of Intent to Revoke (NOIR) and receiving no response, revoked the approval of the petition, invalidated the labor certification, and certified the decision to the AAO for review pursuant to 8 C.F.R. § 103.4(a). Upon review, the AAO will affirm the director's decision to revoke the approval of the petition.

The petitioner is a retail store. It seeks to permanently employ the beneficiary in the United States as a merchandise displayer pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). The petition was initially approved on March 31, 2004, but the approval of the petition was eventually revoked and the labor certification invalidated in April 2013. The director found fraud or willful misrepresentation involving the labor certification process. Specifically, the director determined that the petitioner failed to demonstrate that it conducted good faith recruitment in accordance with the U.S. Department of Labor (DOL) recruitment procedures. Additionally, the director found that the petitioner failed to demonstrate the continuing ability to pay the proffered wage from the priority date.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

We will discuss each of the director's findings as follows.

a) **Whether there was fraud or willful misrepresentation involving the labor certification process.**

As noted above, the director found fraud or willful misrepresentation involving the labor certification application and invalidated the labor certification because of the following reasons:

1. The director stated that the attorney who filed the Form ETA 750 and the Form I-140 petition, [REDACTED], had been suspended from practicing law before the Board of Immigration Appeals (BIA), the Immigration Courts, and the Department of Homeland Security (DHS) for three years from March 1, 2012 under 8 C.F.R. § 292.3(b); and
2. The director found that the advertisements from the [REDACTED] intended to demonstrate that the petitioner complied with DOL's recruitment regulations did not

¹ 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 nature, for which qualified workers are not available in the United States.

conform to several of DOL'S requirements under 20 C.F.R. § 656.21(g) (2001), i.e. the advertisements did not describe the job opportunity, did not state the rate of pay, nor did they state the minimum job requirements.

In accordance with 20 C.F.R. § 656.30(d), U.S. Citizenship and Immigration Service (USCIS) may invalidate the labor certification based on fraud or willful misrepresentation. The term "willfully" in the statute has been interpreted to mean "knowingly and intentionally," as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) ("knowledge of the falsity of the representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary"). Materiality is determined based on the substantive law under which the purported misrepresentation is made. *See Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979).

Upon *de novo* review, the AAO finds that the evidence of record does not support the director's conclusion that there was fraud or willful misrepresentation involving the labor certification. There has been an insufficient development of the facts upon which the director can make a determination of fraud or willful misrepresentation in connection with the documentation submitted to support the beneficiary's qualifications based on the criteria of *Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961).

In response to the director's February 12, 2009 Notice of Intent to Revoke (2009 NOIR) and to demonstrate that the petitioner fully complied with the DOL recruitment requirements, counsel for the petitioner at the time [REDACTED] submitted the following evidence:

- Copies of the newspaper tear sheets evidencing that the petitioner placed advertisements for the position of merchandise displayer in the [REDACTED] from September 1 through September 8, 2002; and
- A copy of the letter dated February 14, 2001 addressed to [REDACTED] from the [REDACTED] [REDACTED] stating that the advertisements he ordered would be run on [REDACTED]

At the time the Form ETA 750 labor certification was filed on November 1, 2002, DOL accepted two types of recruitment procedures – the supervised recruitment process and the reduction in recruitment process. *See* 20 C.F.R. § 656.21 (2004). Under the supervised recruitment process an employer must first file a Form ETA 750 with the local office (State Workforce Agency), who then would: date stamp the Form ETA 750 and make sure that the Form ETA 750 was complete; calculate the prevailing wage for the job opportunity and put its finding into writing; and prepare and process and Employment Service job order and place the job order into the regular Employment Service recruitment system for a period of thirty (30) days. *See* 20 C.F.R. §§ 656.21(d)-(f) (2003). The employer filing the Form ETA 750, in conjunction with the recruitment efforts conducted by the local office, should then: place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication and supply the local office with required documentation or requested information in a timely manner. *See* 20 C.F.R. §§ 656.21(g)-(h) (2003).

Under the reduction in recruitment process, the employer could, before filing the Form ETA 750 with the local office, conduct all of the recruitment requirements including placing an advertisement in a newspaper of general circulation and posting a job notice in the employer's place of business. *See* 20 C.F.R. §§ 656.21(i)-(k). Here, based on the evidence submitted and the stated facts above, the AAO notes that the petitioner appears to have conducted reduction in recruitment, which was allowed at that time.

The director in the Notice of Certification (NOC) also stated that the job advertisements did not contain and include, among other things, the description of the job, the rate of pay, and the minimum job requirements, as required by the regulation at 20 C.F.R. § 656.21(g) (2001).

We acknowledge the extensive requirements prescribed by the regulation above to advertise the position; however, the record shows that DOL certified the Form ETA 750 on April 29, 2003, after the petitioner apparently conducted recruitment in September 2002. The record does not contain any inconsistencies or anomalies in the recruitment process.

Further, we note that at the time the petitioner filed the Form ETA 750 labor certification application with DOL for processing in November 2002, employers were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the DOL. *See* 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991.² For these reasons, the AAO does not find fraud or willful misrepresentation involving the labor certification.

Regarding [redacted] representation of the petitioner, the AAO acknowledges [redacted] suspension from practicing law before the BIA, immigration courts, and DHS for three years from March 1, 2012. However, the record contains no evidence implicating [redacted] involvement in the recruitment process or participation in interviewing or considering the job applicants in this case. Thus, the director's finding of fraud or willful misrepresentation is not substantiated by evidence of record and will be withdrawn. Further, the director's decision to invalidate the certified Form ETA 750 will also be withdrawn, and the certification of the Form ETA 750 will be reinstated.

Nevertheless, the approval of the petition cannot be reinstated because the petitioner has not established by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date onwards.

b) The Petitioner's Ability to Pay the Proffered Wage.

² Not until 2005, when the DOL switched from paper-based to electronic-based filing and processing of labor certifications, were employers required to maintain records and other supporting documentation, and even then employers were only required to keep their labor certification records for five years. *See* 69 Fed. Reg. 77386, Dec. 27, 2004 as amended at 71 Fed. Reg. 35523, June 21, 2006; *also see* 20 C.F.R. § 656.10(f) (2010).

With respect to the petitioner's ability to pay, 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 either 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, 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 DOL. *See* 8 C.F.R. § 204.5(d).

Here, as indicated above the Form ETA 750 was accepted by DOL for processing on November 1, 2002. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$9.00 per hour or \$16,380 per year (based on the indicated 35-hour work per week).³

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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) 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'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

³ The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DoL Field Memo No. 48-94 (May 16, 1994).

The petitioner submitted a 2004 Internal Revenue Service (IRS) Form W-2 stating that it paid the beneficiary \$18,200 in that year. This document is sufficient to establish the petitioner's ability to pay the proffered wage in that year alone. The petitioner also submitted a paystub dated November 15, 2005 in the amount of \$560. This amount is less than the proffered wage, so the petitioner must demonstrate its ability to pay the difference between the actual wage paid and the proffered wage which is \$15,820.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts, 558 F.3d at 118. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang*, 719 F. Supp. at 537 (emphasis added).

The petitioner submitted its 2002 IRS Form 1120S, which stated net income⁴ of \$32,356. This amount exceeds the proffered wage, so it is sufficient to demonstrate the petitioner’s ability to pay the proffered wage in that year alone. Therefore, the petitioner has established the ability to pay the proffered wage in 2002 and 2004, but not in 2003 or from 2005 onwards until the beneficiary receives his lawful permanent residence. The record does not contain any other evidence of the petitioner’s ability to pay (i.e. federal tax returns, annual reports, and/or audited financial statements) for 2003 or 2005 onwards. In view of the foregoing, the AAO agrees with the director that the petitioner has not established by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date.

In summary, the director’s finding that there was fraud or willful misrepresentation involving the labor certification will be withdrawn. Similarly, the director’s decision to invalidate the labor certification will be withdrawn. Nevertheless, the AAO finds that the director had good and sufficient cause to revoke the approval of the petition per section 205 of the Act, 8 U.S.C. § 1155, which states, “The Secretary of Homeland Security may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204. Such revocation shall be effective as of the date of approval of any such petition.” 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).

Here, the petitioner has failed to establish by a preponderance of the evidence that the petitioner has the continuing ability to pay the proffered wage from the priority date. Where the petitioner of an approved visa petition is not eligible for the classification sought, the director may seek to revoke the approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for good and sufficient cause. Notwithstanding the USCIS burden to show good and sufficient cause in

⁴ Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed June 11, 2013) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had no additional adjustments shown on its Schedule K, the petitioner’s net income is found on line 21.

proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought.

The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984). The revocation of the previously approved petition is affirmed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 director's decision to revoke the previously approved petition is affirmed.

FURTHER ORDER: The director's finding of fraud and/or willful misrepresentation involving the labor certification process is withdrawn.

FURTHER ORDER: The director's decision to invalidate the alien employment certification, Form ETA 750, ETA case number [REDACTED] is withdrawn.