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

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: MAR 03 2005
SRC 01 151 53637

IN RE: Petitioner: [REDACTED]
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:



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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director found that the petition in this matter was filed by the beneficiary, rather than by a United States employer. The director determined, therefore, that the petition could not be approved.

On appeal, counsel submits a statement.

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 the granting of 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 not available.

Section 203(b)(3)(C) of the Act states:

LABOR CERTIFICATION REQUIRED. – An immigrant visa may not be issued to an immigrant under subparagraph (A) until the consular officer is in receipt of a determination made by the Secretary of Labor Pursuant to the provisions of section 212(a)(5)(A).

The regulation at 8 C.F.R. § 204.5(l)(1) *Skilled workers, professionals, and other workers* states:

Any United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(3) as a skilled worker, professional, or other (unskilled) worker.

The regulation at 8 C.F.R. § 204.5(l)(3) *Initial evidence* states, in pertinent part:

(i) *Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

On appeal, counsel asserts that the beneficiary, [REDACTED], is also an agent of the petitioner, and signed the petition as such, rather than in his capacity as the beneficiary. Counsel states that the beneficiary did not, therefore, petition for himself and the petition should be approved.

With the petition, the petitioner provided a letter, dated April 4, 2001, from one of its directors. That letter states that the beneficiary is a member of the church and has been the petitioner's secretary since January 1997. On the petition, the petitioner declined to state the beneficiary's current nonimmigrant status, although the letter would appear to imply that he is living in the United States.

The petitioner also declined to state the date it was established. The petitioner responded "N/A" in blocks where it was obliged to report its current number of employees, its gross annual income, and its net annual income. The petitioner declined to specify the title of the position in which it intends to employ the beneficiary or to provide a job description. The petitioner stated that the beneficiary would work 30 hours per week but declined to specify the wages he would be paid. The petition was not accompanied by a Form ETA 750 Application for Alien Employment Certification.

The beneficiary signed the petition. The signature matches various other examples of the beneficiary's signature in the file. The beneficiary did not indicate, when signing, that he was signing in the capacity of an agent for the petitioner or in any capacity other than as an individual. The record demonstrates that the petition in this matter was not filed by a United States employer, as required by 8 C.F.R. 204.5(l)(1). The petition may not, therefore, be approved.

Further, pursuant to 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 and 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 the relationship may be financial, by marriage, or through friendship." *See Matter of Summart*, 374, 00-INA-93 (BALCA May 15, 2000)

Where the beneficiary owns the petitioner, the job offer is not *bona fide*. *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 the position applied).

In this case, the record appears to indicate that the beneficiary is hiring himself for the position. Thus, even if the beneficiary signed the petition not as an individual but in his capacity as an employee of the church, the record indicates that no *bona fide* job offer exists that was available to U.S. workers.

Additional issues exist in this matter beyond that cited in the decision of the director.

The regulation at 8 C.F.R. § 204.5(l)(3) states that a petition pursuant to the instant visa classification, if it is not for a Schedule A position or a shortage occupation listed in the Department of Labor's Labor Market Information Pilot Program, must be accompanied by a Form ETA 750 labor certification approved by the Department of Labor. The petition is not apparently for a Schedule A occupation, nor is it for a Labor Market Information Pilot Program shortage occupation. No Form ETA 750 labor certification was submitted with the instant petition.¹ The petition should have been denied for this additional reason.²

¹ Without that Form ETA 750 labor certification, the record contains no indication of the education, training, or employment experience required to fill the proffered position. Further, the record contains no evidence of the amount of the proffered wage, no evidence that the proffered wage is comparable to the predominant wage of similarly situated employees in the area of intended employment, and no evidence that the petitioner is unable to hire a U.S. worker to fill

The regulation at 8 C.F.R. § 204.5(g)(2) requires that evidence of the petitioner's ability to pay the wage proffered to the beneficiary accompany the Form I-140 petition. No such evidence was submitted. The petitioner has not demonstrated the continuing ability to pay the proffered wage beginning on the priority date. The petition should also have been denied for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *affd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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 dismissed.

the proffered position. In addition to failing to comply with the regulatory language, the failure to submit this evidence strikes at the very essence of the instant visa category.

² The regulation at 8 C.F.R. § 103.1(f)(3)(iii), which accords this office its authority to adjudicate appeals, does not authorize appeals from denials for the failure of the petitioner to submit a valid labor certification. Thus, no appeal from denial on that ground exists.