



U.S. Citizenship  
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FILE:

[REDACTED]  
LIN 04 222 52524

Office: NEBRASKA SERVICE CENTER

Date: OCT 05 2006

IN RE:

Petitioner:  
Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a software development consultancy. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor (DOL). The director made a finding of misrepresentation on the labor certification, invalidated the labor certification and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, while the petitioner's filing history is curious, the director's conclusions, drawn solely from the petitioner's filing history and without further investigation, are too speculative to form the basis of a finding of misrepresentation. Thus, we will remand the matter for an adjudication on the merits of the petition.

The regulation at 20 C.F.R. § 656.30(c)(2), as in effect when the petitioner filed the labor certification application, provides:

A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form.

The regulation at 20 C.F.R. § 656.30(d), as in effect when the petitioner filed the labor certification application, provides:

After issuance labor certifications are subject to invalidation by the INS [now Citizenship and Immigration Services (CIS)] 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 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 petitioner filed a Form ETA 750, Application for Alien Employment Certification, with DOL on October 15, 2003. On the application, the petitioner listed a business address in Des Moines, Iowa and stated that the petitioner would work at that address. The petitioner honestly reported that the beneficiary was currently residing in Dallas Texas. On the Form ETA 750B, Statement of Qualifications of Alien, the beneficiary indicated that he had been working for the petitioner since September 2003, listing a Des Moines, Iowa address for the petitioner.

DOL certified the Form ETA 750 on March 24, 2004. On July 29, 2004, the petitioner filed the instant Form I-140, Immigrant Petition for Alien Worker. The petitioner listed its address as Des Moines, Iowa and indicated that the beneficiary would work at an address in Irving, Texas. In support of the petition, the petitioner submitted Forms W-2 issued to the beneficiary from the petitioner's Austin, Texas address and the approval notice for the beneficiary's nonimmigrant visa petition issued by the Director, Texas Service Center.

On April 26, 2005, the director issued a Request for Evidence, advising that unless the beneficiary was already working in Des Moines, Iowa, the labor certification was not valid. In response, counsel advised that the petitioner has offices in Austin, Texas and Des Moines, Iowa and confirmed that the beneficiary was currently working in Texas. The petitioner submitted a letter from [REDACTED] its Chief Executive Officer (CEO), advising that while the beneficiary currently worked in Texas, the petitioner was offering the beneficiary a job in Iowa. The petitioner also submitted a non-precedent decision issued by this office regarding section 106(c) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21). In that decision, this office cited an August 4, 2003 memorandum from William Yates, Acting Associate Director for Operations, CIS. The memorandum notes that "there is no requirement in statute or regulation that a beneficiary of a Form I-140 actually be in the underlying employment until permanent residence is authorized."

In the final denial, the director noted for the first time that the petitioner had listed the place of employment as Irving, Texas on the petition. The director concluded that any change to this information would be a material change and could not be accepted. The director further stated that the petitioner had never filed a nonimmigrant visa petition to employ the beneficiary in Iowa and, in fact, had filed only nonimmigrant visa petitions for positions in Texas and only immigrant visa petitions for positions in Iowa. The director concluded that this filing history indicated "a willful misrepresentation in the labor certification process."

On appeal, counsel correctly notes that the indication on the petition that the beneficiary would work in Irving, Texas was not mentioned as a concern in the request for evidence. Counsel asserts that the listing of the Irving, Texas address was a typographic error, reflecting the physical address of the petitioner's client where the beneficiary was working at the time of filing. Counsel correctly notes that the petitioner does not have an address in Irving, Texas. Thus, we are persuaded that the listing of Irving, Texas as the place of employment on the initial Form I-140 does not render the labor certification invalid. Nor are we persuaded that the listing of the petitioner's Iowa address on the Form ETA 750B, line 15, is evidence of misrepresentation. The form requests the address of the employer, not the location of the employment. The petitioner does have an address in Iowa. Moreover, the beneficiary honestly reported his Texas address on the Form ETA 750B.

Counsel references a May 9, 2000 memorandum from Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, stating that there is no requirement that the beneficiary of an approved visa petition work for the sponsoring employer before receiving permanent resident status. Finally, counsel asserts that the petitioner filed five immigrant visa petitions in Texas in

2005. The petitioner submits two Forms ETA 750 filed in 2003 for positions in Austin, Texas and two approval notices for immigrant petitions filed in Texas in late 2005.

We concur with counsel that the beneficiary need not be working in the proffered position or even for the sponsoring employer prior to adjusting status. Rather, the petitioner need only establish its intent to hire the beneficiary in the position offered. The director dismisses the petitioner's expression of its intent as "self-serving," but the director's basis for rejecting the written affirmation of the employer's intent, normally accepted in these proceedings, is mere speculation. We cannot conclude that an employer's offer of a position in a different location than the location where the alien is currently employed is *prima facie* evidence of misrepresentation. Such a conclusion would ignore the reality that employers legitimately transfer employees from office to office. While the petitioner may have a history of filing mostly nonimmigrant visa petitions for Texas positions and immigrant visa petitions for Iowa positions, such a history, in and of itself, is not *prima facie* evidence of misrepresentation. The record is absent evidence of a completed investigation revealing more concrete evidence confirming the director's suspicions. For example, the record is absent evidence that the petitioner has a pattern of not following up on its Iowa job offers after the aliens offered those jobs adjust status.

In light of the above, the director's finding of misrepresentation resulting in the invalidation of the labor certification is withdrawn. Should the director acquire any additional derogatory information on this issue, the petitioner would need to be advised of this information prior to any new decision based on such information. 8 C.F.R. § 103.2(b)(16)(i).

Therefore, this matter will be remanded for an adjudication of the visa petition on its merits, including the petitioner's ability to pay the proffered wage pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), which 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 demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day 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). Here, the Form ETA 750 was accepted for processing on October 15, 2003. The proffered wage as stated on the Form ETA 750 is \$72,000 annually. In evaluating this issue, the director may consider that the petitioner has filed multiple immigrant visa petitions and must demonstrate its ability to pay all of the beneficiaries of those petitions.

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.