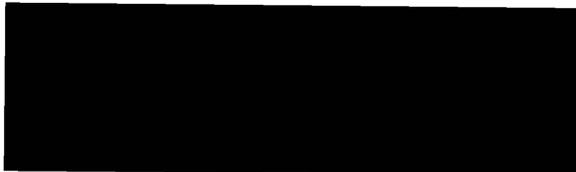




U.S. Citizenship
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Services

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BC

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **JUN 25 2007**
SRC 03 056 51645

IN RE: Petitioner: [REDACTED]
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: SELF-REPRESENTED

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, Texas Service Center, denied the preference petition and certified her decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed.

The petitioner claims to be a boat and marine equipment exporting firm. It seeks to employ the beneficiary permanently in the United States as a boat and marine equipment exporter. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director invalidated the labor certification based upon a finding that it had been procured by fraud or willful misrepresentation. The director denied the petition because it was no longer supported by a valid labor certification and also determined that the petitioner failed to establish its continuing ability to pay the proffered wage. The director certified her decision to the AAO.

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

On Part 5 of the preference petition, the petitioner describes itself as an "Exporter, Boats & Marine Eqmt.," which was established on January 1, 1995. It claims to have a gross annual income of \$101,576.00, a net annual income of \$9,765 and currently employ one worker.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The petitioner must also demonstrate that it has the continuing ability to pay the proffered salary as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 29, 2002.

The first issue in this case is whether or not the director properly invalidated the labor certification based upon a finding that it had been procured by fraud or willful misrepresentation. The director determined that fraud occurred within the context of representations made about the existence of a valid job offer. In reviewing the nature of the position offered, Citizenship and Immigration Services (CIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). In the instant case, the certified position of a boat and marine equipment exporter is described in item 13 of the ETA 750A. It states:

Export boat equipment, such as steering, pneumatic and hydraulic systems, CD boxes, and GPS systems. Discuss price, sales, and purchases. Obtain freight regulations and payment conditions.

It is noted that item 14 of the ETA 750A sets forth the requirements of education, training and experience that the beneficiary, "██████████" must have obtained as of the priority date. With regard to work experience, the beneficiary must have accrued two years in the job offered of "Exporter, Boats & Marine Eqpt." The beneficiary set forth his credentials on Form ETA-750B, which he signed on March 4, 2002. On Part 15, eliciting information about his work experience, the beneficiary states that he worked for "All Marine Ltd." in Trinidad, West Indies from October 1985 to December 1995 as an "Importer/Exporter/Boat and Marine Eqpmt."

His described duties are virtually identical to the language appearing on the ETA 750A, referring to the certified position.

As verification of this job, the petitioner provided a letter, dated May 27, 2002, and signed by [REDACTED] as managing director of All Marine Ltd. [REDACTED] who bears the same last name as the beneficiary, states that the beneficiary worked as a "marine technician" during the same period claimed by the beneficiary on the ETA 750B. [REDACTED] praises the beneficiary's performance but fails to describe the duties performed.

The director issued a notice of intent to deny the petition on June 30, 2003. The director noted that the petitioner's counsel, [REDACTED], was found guilty of all charges against him, including:

conspiracy to commit immigration fraud by making false representation in multiple visa petitions filed with [Citizenship and Immigration Services (CIS)], by knowingly accepting visas procured by fraud, and by harboring illegal aliens for profit. Mr. Lopera was additionally charged with 11 substantive counts of making materially false, fictitious statements to [CIS] and 7 substantive counts of harboring an illegal alien for profit. The aliens worked in Mr. Lopera's law firm.

* * *

Since Mr. Lopera's law firm was found guilty of committing immigration fraud, it may be concluded that this petition may contain fraudulent documents. As such, this petition cannot be considered approvable with the documents submitted.

The director detailed a list of documents and evidence required to overcome her notice of intent to deny the petition, including evidence of the current physical address of the petitioner and the address of the beneficiary's intended worksite, existence of family relationship between "an officer of the petitioning entity and beneficiary," details of the proposed position to be filled, sworn statements from previous employers attesting to the beneficiary's experience, exact dates of employment, duties, and evidence of wages paid by this employer. The petitioner further requested evidence of the petitioner's ability to pay the proffered wage of \$14.50 per hour, which amounts to \$30,160 per year.

In response, the petitioner submitted a copy of its petition in which it a letter, dated July 28, 2003, signed by its vice-president, Susan Tardieu, who affirmed the petitioner's physical address and location of the beneficiary's employment as "Earle's Marine, Inc., Winston & Susan Tardieu, 4331 SW 52nd Court, Apt. W, Ft. Lauderdale, Florida, 33314." A copy of a lease of this location is also provided as well as documents from the petitioner denying any familial relationship between [REDACTED] and the beneficiary and affirming that the job was still available. A letter from Susan Tardieu contains a description of the certified position as involving locating prospective buyers in Trinidad and Tobago, sourcing costs and parts to prospective buyers, obtaining payment, arranging for shipping and preparing of export documents. The petitioner further provided copies of its articles of incorporation and amendments thereto, as well as evidence of continuing business shown through copies of 2003 invoices on the petitioner's letterhead. The letterhead advertises the petitioner as a provider of "complete yacht restoration dockside service."

On September 16, 2003, the director issued a second notice of intent to deny describing the duties of the certified position listed on the ETA 750A and noting that the evidence provided to the record thus far indicated that the petitioner was in the business of repairing boats, not exporting boating equipment. The director requested evidence that the beneficiary will be performing the job duties described on the ETA 750A.

In response, the petitioner provided a letter from the beneficiary, dated October 15, 2003, noting that "we were unaware" that [REDACTED] had been charged with fraud. The beneficiary's letter also notes that the documents

attached reflect that he will be performing the job offered by the petitioner. The documents consist of a purchase order and invoices reflecting that the petitioner had, in May 2002, bought parts and shipped them to JGH Aviation, Inc. in Pembroke Pines, Florida, as well as six letters, dated during September/October 2003, from Trinidad/Tobago businesses affirming their awareness of the petitioner's intent in establishing an export department and expressing interest in doing business.

The director reviewed the evidence provided, noting that the invoices indicated that the petitioner was paid for boat repairs, that it had sold parts to US companies, and that it had received letters of interest (September/October 2003) relating to its intention to establish an export department, but that the evidence revealed that the petitioner was in the business of repairing boats, not exporting boating equipment. The director concluded that the proffered position did not exist at the time of filing the ETA 750 and does not now exist. Citing, the regulation at 20 C.F.R. § 656.30, which provides that CIS may, upon a determination finding that fraud or willful misrepresentation of a material fact involving a labor certification application, invalidate the labor certification, the director concluded that the alien labor certification should be invalidated. The director further determined that the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date.

The petitioner did not provide any submissions upon certification. In this instance, the AAO concurs with the director's conclusion as to willful misrepresentation, not because the petitioner could not legitimately seek to expand its business by establishing a new position as it stated on Part 6 of the preference petition,¹ but because it misrepresented the nature of its current business as an exporter of boat and marine equipment. No evidence submitted indicated that it was primarily engaged in the business of exporting boat and marine equipment as stated on Item 8 of the ETA 750A and as subsequently reaffirmed on Part 5 of the preference petition that the director instructed the petitioner to complete in her first request for evidence. Rather, as the documentation shows, the petitioner sold some parts to an aviation company in Florida during May 2002, but was otherwise engaged in the servicing and repair of boats. Therefore, the labor certification was properly invalidated pursuant to 20 C.F.R. § 656.30.

The director also determined that the petitioner was incapable of paying the proffered wage beginning on the priority date and continuing. 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.

Although not necessary for this decision, as the labor certification is deemed to be invalidated, the AAO notes that it finds that the petitioner demonstrated its ability to pay in 2002, the year of its priority date. In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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. In the instant case, there was no evidence

¹ See *ie, Matter of Advanced Digital Corp.*, 90-INA-137 (BALCA 1991); *Accord Matter of Cable Car Photo & Electronics*, 90-INA-141 (BALCA 1991) (in relation to job requirements, employer may reasonably show intent to expand business, but must document business plan).

that established that the petitioner employed the beneficiary, although as suggested by the beneficiary's letter using "we" and referring to documents concerning petitioner's operation, there is some basis for suspicion that some kind of employment relationship has existed.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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).

In this case, the priority date is April 29, 2002. The record indicates that the petitioner provided Form 1120S, U.S. Income Tax Return for an S Corporation for 2001 and 2002. As the 2002 return covers the priority date, it is most relevant to the petitioner's ability to pay. Ordinary income, which CIS treats as net income for ability to pay purposes, reflects that the petitioner reported \$31,334 in net income in 2002. This is sufficient to establish the petitioner's ability to pay during this year.

Further corroboration, however, would be required as the record failed to clarify the family relationship suggested by the commonality of names between the beneficiary, [REDACTED] and [REDACTED] who wrote the May 27, 2002, employment verification letter, vouching for the beneficiary's prior experience at All Marine Ltd. Where such an interest is indicated, additional evidence corroborating the duration and duties performed should be offered. It is additionally noted that although the petitioner denied any familial relationship with [REDACTED] there was no mention of [REDACTED] and as stated above, the beneficiary appears to be connected in interest to the petitioner through employment or some other financial interest.²

Beyond the decision of the director, we note that the petitioner failed to provide an employment verification letter that demonstrated that the beneficiary had obtained at least two years in the position offered. Although the petitioner was asked to provide a sworn statement from a previous employer detailing the position and duties that the beneficiary performed, as well as evidence of wages paid, the petitioner did not comply. It is noted that doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The letter from [REDACTED] initially submitted is not adequate to establish the beneficiary's duties as a "marine technician" for All Marine Ltd., as it failed to conform to the requirements of 8 C.F.R. § 204.5(l)(3)³ and

² 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 Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000). *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987).

³ The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) **General.** Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

failed to show that the beneficiary had accrued two years as an exporter of boat and marine equipment, rather than as a marine technician. It failed to specifically describe the beneficiary's duties as a marine technician or why this position provided the requisite two years of qualifying work experience in the job offered that was necessary to be considered for a position as an exporter of boat and marine equipment as set forth on Form ETA 750A.

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), *aff'd*. 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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director's decision that the petition should be denied is affirmed.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.