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FILE: [REDACTED]
SRC 06 217 53181

Office: TEXAS SERVICE CENTER Date:

NOV 19 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, invalidated the Form ETA 750, Application for Alien Employment Certification, and denied the preference visa petition in this matter and certified the case to the Administrative Appeals Office (AAO) for review. The case will be remanded to the director for further consideration and entry of a new decision.

The petitioner is a buyer and seller of recyclable materials. It seeks to employ the beneficiary permanently in the United States as a wholesale and retail buyer. As required by statute, a Form ETA 750 approved by the Department of Labor (DOL) accompanied the petition. The director determined that the petitioner had not established that it revealed to the DOL, during the processing of the Form ETA 750, that the petitioner's owner and the beneficiary were members of the same family. The director suggested further that the petitioner had not addressed whether the beneficiary had an interest in the petitioning business, and that the existence of such an interest is material to the issue of whether the proffered position was truly made available to qualified U.S. workers. The director indicated that, based on the totality of the circumstances in the case, no valid employment relationship exists between the petitioner and the beneficiary; that no *bona fide* job opportunity was made available to qualified applicants in the United States; and that the labor certification application would not have been approved if all the facts of the case, including the familial relationship and any interest that the beneficiary may have in the petitioner, had been presented to the DOL. Therefore, the director invalidated the labor certification application and denied the petition, as it was no longer accompanied by a valid labor certification.

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.

According to the director's notice of certification, the central issues in this case are whether the petitioner demonstrated to the DOL: that a valid employment relationship exists between the petitioner and the beneficiary, despite the familial relationship between the petitioner's owner and the beneficiary and despite any financial interest that the beneficiary may hold in the petitioner; and that a *bona fide* job opportunity was made available and is currently available to U.S. workers.

The regulations at 20 C.F.R. § 656.1 provide the following:

Purpose and scope of Part 656.

(a) Under section 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:

(1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and

(2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.¹

The regulation at 20 C.F.R. § 656.3 states the following, in relevant part, regarding the definitions of terms used in this part:

Employment means permanent full-time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee.

20 C.F.R. § 656.20(c)(8) provides that job offers filed on behalf of foreign workers on the Application for Alien Employment Certification form must clearly show that the job opportunity has been and is clearly open to any qualified U.S. worker.

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 granting 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.

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 DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$550.00 per week for a forty-hour workweek, or \$28,600 per year.

The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form I-140, Immigrant Petition for Alien Worker, in this matter was submitted on July 11, 2006. On the petition, the petitioner stated that it was established during 1998 and that it employs one worker. The petitioner stated that its gross annual income is \$1,580,464 and that its net annual income is \$167,500. On the Form ETA 750, Part B, signed by the beneficiary on March 22, 2001, the beneficiary did not claim to have worked for the petitioner.

¹ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM, for Program Electronic Review Management. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. However, the instant labor certification application was filed prior to March 28, 2005 and is governed by the prior regulations. This citation and those that follow are to the DOL regulations as in effect prior to the PERM amendments.

The AAO maintains plenary power to review this matter on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The federal courts have long recognized the AAO's *de novo* review authority. *See*, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted in response to the certification.

The record contains the following evidence:

- a Form ETA 750 submitted on April 16, 2001;
- a DOL Notice of Findings dated January 26, 2006, which relates to the Form ETA 750 submitted on April 16, 2001, in which the petitioner is asked to address several apparent defects of the application including the DOL findings: that it appears that the offered position is not clearly open to qualified U.S. workers because the beneficiary has a familial relationship to the petitioner's owner; and that the proffered job may not meet the definition of employment set out at 20 C.F.R. § 656.3 in that the proffered position may amount to the beneficiary working for himself because the beneficiary may have an ownership interest in the petitioner;
- counsel's March 2, 2006 response to the Notice of Findings which addresses the familial relationship between the petitioner's owner and the beneficiary, the allegations that the beneficiary has an ownership interest in the petitioner, as well as the other issues raised in the DOL Notice of Findings, together with supporting documentation;
- the petitioner's owner's two letters dated February 22, 2006 and March 1, 2006 which address various issues raised in the DOL Notice of Findings;
- a DOL Final Determination which indicates that on June 13, 2006 the DOL approved the petitioner's Form ETA 750 submitted on April 16, 2001, after taking into consideration the familial relationship between the petitioner's owner and the beneficiary;
- a Form I-140 submitted on July 11, 2006;
- a Request for Evidence (RFE) dated February 12, 2007, which relates to the Form I-140 filed on July 11, 2006;
- counsel's two responses to the February 12, 2007 RFE which are dated February 26, 2007 and March 2, 2007, respectively;
- an April 20, 2007 Notice of Intent to Deny (NOID) the Form I-140 submitted on July 11, 2006;
- the petitioner's response to the NOID which is dated May 16, 2007;
- the beneficiary's sworn statement submitted in response to the NOID which is dated May 14, 2007;
- the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, for 2001, 2002, 2003, 2004 and 2005;
- a Certificate of Incorporation for the petitioner dated February 25, 1998;
- a Certificate of Filing which indicates that the petitioner filed as a corporation with the State of New York on February 26, 1998;
- a certificate of filing which indicates that Hudson Fiber International Corporation filed as a corporation with the State of New York on January 25, 2001;

- a copy of a letter from the accounting firm employed by [REDACTED] International Corporation dated February 23, 2006;
- an ETA Form 9089, Application for Permanent Employment Certification, submitted on September 16, 2005 on behalf of the same beneficiary named on the Form ETA 750 which accompanied the instant petition, which the DOL certified on May 7, 2007;
- a DOL Audit Notification dated December 2, 2005 regarding the ETA Form 9089, Application for Permanent Employment Certification, in the record, which raises questions relating to, e.g., whether the proffered position was truly made available to qualified U.S. workers, identifying those having an ownership interest in the petitioner, etc.;
- counsel's December 22, 2005 response to the December 2, 2005 DOL Audit Notification;
- petitioner's owner's letter dated December 23, 2005 submitted in response to the December 2, 2005 DOL Audit Notification;
- a second Form I-140 filed by the petitioner on behalf of the same beneficiary on May 18, 2007, and approved on June 14, 2007;
- a request for evidence dated May 31, 2007 regarding the second Form I-140 which the petitioner filed on May 18, 2007;
- the petitioner's owner's sworn statement dated June 6, 2007 submitted in response to the May 31, 2007 request for evidence;
- the beneficiary's sworn statement dated June 5, 2007 submitted in response to the May 31, 2007 request for evidence;
- counsel's cover letter dated June 6, 2007 submitted in response to the May 31, 2007 request for evidence;
- counsel's brief filed in response to the director's August 27, 2007 notice of certification, together with supporting documentation.

The record does not contain any other evidence relevant to whether the petitioner demonstrated to the DOL during the processing of the Form ETA 750: that the petitioner's owner and the beneficiary were family members; whether or not the beneficiary had an ownership interest in the petitioner; that a valid employment relationship exists between the petitioner and the beneficiary; and that a *bona fide* job opportunity was made available to qualified applicants in the United States.

Thus, the evidence in the record, such as the DOL Notice of Findings (NOF) dated January 26, 2006 and the petitioner's owner's responses to the NOF dated February 22, 2006 and March 1, 2006, respectively, verifies that the petitioner did reveal to the DOL during the processing of the Form ETA 750 filed on April 16, 2001 that the petitioner's owner and the beneficiary were members of the same family. As such, the DOL did take this familial relationship into account when it considered, during the processing of the Form ETA 750, whether the proffered position was made available and clearly remains open to qualified U.S. workers. The petitioner also apparently rebutted, to the satisfaction of the DOL, the DOL's finding that the beneficiary might have an ownership interest in the petitioner, such that the DOL decided to certify the Form ETA 750. In sum, the DOL apparently determined before it certified the Form ETA 750 on June 13, 2006 that the beneficiary did not have an ownership interest in the petitioner and that despite the familial relationship, a valid employment relationship exists between the petitioner and the beneficiary; and that a *bona fide* job opportunity was made available to qualified applicants in the United States.

This office does not find evidence in the record to support the finding that the beneficiary had an ownership interest or any other form of vested interest in the petitioner. This office also does not find evidence in the record to indicate that the familial relationship between the beneficiary and the petitioner's owner impacted the petitioner's recruitment efforts such that the position was not made available and is not currently available to qualified U.S. workers.

In view of the foregoing, the previous decision of the director will be withdrawn. The matter will be remanded so that the director may, if he chooses, request any evidence that he deems relevant to any issue material to the approvability of the instant visa petition. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision which is to be certified to the AAO for review.