

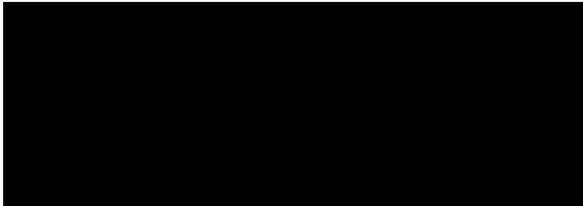
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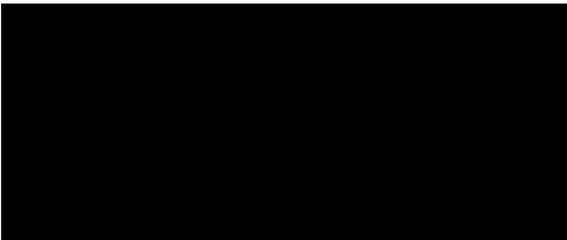
Office: VERMONT SERVICE CENTER

Date: MAR 10 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 103(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 Director, Vermont Service Center, revoked approval of the visa petition. That revocation 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 The decision of the director will be withdrawn and the petition will be remanded for further consideration and action.

The petitioner is a donut company. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification. The ETA 750 was filed on February 26, 2001, and approved by the Department of Labor (DOL), on August 28, 2002. The director revoked approval of the petition after concluding that the beneficiary lacked the qualifications required to perform the job, had no relevant experience from abroad, and had submitted false information. The director determined that despite providing the petitioner an opportunity to submit evidence in rebuttal, no evidence was submitted, only representations from counsel. Consequently, the petition was revoked. On appeal, counsel submits a brief and several documents including declarations from the beneficiary and the petitioner.

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. Section 205 of the Act, 8 U.S.C. § 1155, provides that an approved visa petition may be revoked at any time for good and sufficient cause. Once Citizenship and Immigration Services (CIS), has provided some evidence to show cause for revoking the petition, the alien retains the ultimate burden of proving eligibility. *Matter of Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 9th Cir. 1984).

The petitioner filed the ETA 750 seeking to hire a full-time manager at a salary of \$129,875.20 per year. The ETA 750 extensively described the position as one involving the coordination of all activities relating to the production, sale and distribution of donut products. In terms of the education, training and experience required of applicants, the ETA 750 specified only four years of experience as an assistant manager in the job offered or a related occupation.

With the petition, counsel submitted only the ETA 750, an experience letter from [REDACTED] identified as the owner of the [REDACTED] in Tucson, Arizona, and the petitioner's Form 1120S tax return for 2000. Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on December 28, 2001, requested additional evidence pertinent to that ability. In particular, the Service Center requested that the petitioner provide copies of the beneficiary's W-2 Wage and Tax Statements showing any payments made to the beneficiary. In response, on or about March 11, 2002, counsel submitted the petitioner's U.S. Income Tax Return for 2001, the petitioner's bank account records from Commerce Bank for 2001, and a letter from [REDACTED] President of [REDACTED] explaining that no W-2s existed for the beneficiary as the company did not employ him during 2000 and 2001. Following receipt of additional information, the director approved the petition on May 26, 2002.

On January 2, 2003, the director issued a Notice of Intent to Revoke (NOIR) the previously approved petition. The notice stated that a comparison of the job description provided by the petitioner in Part A, line 13 of the

ETA 750 and the statement of the beneficiary's work experience as listed in Part B, line 15 led the director to conclude that the beneficiary was not qualified to perform the job as described. In addition, the director concluded that the petitioner "willfully failed to disclose material facts in its labor certification process" based upon inconsistencies between information supplied on the ETA 750, Part B, and the G-325 Biographic Information forms. While the director asserted that such misrepresentation was grounds for invalidating the labor certification pursuant to 20 C.F.R. § 656.30 (2001), he did not express an intent to do so. The director also referred to the findings of an investigation involving the beneficiary's employment history in Arizona. Counsel responded to the NOIR on January 29, 2003, disputing the director's findings on both issues, and requesting that the director reconsider the revocation and reaffirm the previously granted petition. On July 10, 2003, the director issued a decision revoking the petition. In that decision, the director noted that counsel's representations relating to the grounds supporting the revocation, including the circumstances surrounding the alleged false statements, were not accompanied by any evidence and did not satisfy the petitioner's burden of establishing eligibility for the benefits sought.

On appeal, counsel submits a brief and several documents. The first document included is an affidavit dated August 26, 2003, from the beneficiary asserting that the G-325, Biographical Information form submitted with the I-589 asylum application contained incorrect information of which the beneficiary was unaware and that such erroneous information was the result of a clerical error. The affidavit adds that the employment information submitted with the adjustment of status application is correct. The affidavit further states that the beneficiary was employed as a manager for [REDACTED] from 1991 to March of 1993. As an explanation for why this information had not previously been indicated on the ETA 750, the beneficiary states that he understood he was not required to include all prior employment. The second document offered is an affidavit dated August 25, 2003, from the petitioner, [REDACTED] president of [REDACTED]. The affidavit asserts that the beneficiary will be employed as manager of [REDACTED] as soon as he is granted lawful permanent resident status. It also asserts that the experience required for the job is four years in the job offered or four years in the related occupation of assistant manager and that experience in management of a bakery was not a prerequisite, nor did the petitioner rely upon the beneficiary's claimed experience abroad. The third document offered by counsel is a letter dated January 22, 2003, from an individual identified only as [REDACTED] President of [REDACTED] Corporation), indicating that the beneficiary worked for him as a manager of [REDACTED] from 1991 to March of 1993. The letter details the beneficiary's job duties and recommends the beneficiary for any management opportunity. Finally, counsel has offered wage and tax records relating to the beneficiary which include wage records and an Individual Income Tax Return for 1991 showing that the beneficiary was employed by and received wages as an employee of [REDACTED] Corporation.

Counsel offers these documents in support of two contentions of error by the director in revoking the approved petition. First, counsel argues that the director erred in too narrowly construing the experience requirements for the position offered, and rejecting as inadequate the beneficiary's varied managerial experience. Counsel supports her contention by asserting that CIS lacks the authority to revoke the petition or invalidate the labor certification because DOL has certified his qualifications and experience as a manager. Second, counsel argues that any alleged false information submitted by the beneficiary was simply the result of a clerical error or a mistake on the part of the preparer, and further, was not material information bearing any relation to the petition. *See Motion for Reconsideration*, dated August 26, 2003.

As to the first point, the AAO disagrees that CIS has no role in evaluating the qualifications of the beneficiary for the position. Counsel, relying on *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983), suggests that the DOL's certification of the petition is somehow dispositive and binding on CIS regarding its ability to examine the beneficiary's qualifications for the position. Counsel's reliance on *Madany* is misplaced. Although counsel argues that DOL's certification precludes CIS from determining that the beneficiary is not qualified for the position, this principle is not supported by the decision. On the contrary, *Madany* specifically upheld the role of INS in evaluating whether an alien meets the requirements of the labor certification. While noting that DOL had authority to make two specific determinations, (i.e., that there were not sufficient workers able, willing, or qualified to perform the work, and that the employment of foreign workers would not adversely affect the wages and working conditions of U.S. workers), the court specifically rejected the argument that the scope of the INS' inquiry was limited to the facts of the certification alone. *Id.*, at 1011. As the courts have previously recognized, the mere fact of an approval of a labor certification by the Department of Labor is not dispositive, as the statute contemplates an investigative role for the Secretary (formerly the Attorney General), relating to the petition. *Matter of Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982).

Nevertheless, the AAO agrees with petitioner's counsel that the director imposed an unduly strict experience requirement and demanded experience beyond that required by the labor certification, thus exceeding his designated role. See *Madany*, at 1015. The director concluded that the nature of the job duties involved in managing a motel or convenience store differed significantly from the job duties involved in managing a food production and retail establishment such as a donut shop. Consequently, he compared the duties performed by persons holding management positions within the bakery, lodging, and market fields, as reflected in the descriptions of each in the United States Department of Labor's Dictionary of Occupational Titles (DOT). The director then concluded that the position of bakery manager involved different skills and that the beneficiary's experience was not sufficiently related to the job duties to be performed to satisfy the experience requirements.¹ Although the director's reasoning is understandable, the AAO is obligated to consider the experience requirements reflected in the ETA 750 which specified that four years of experience in the job offered or a related occupation—identified in Part 14 as "Assistant Manager"—was what the petitioner required. The AAO will not construe the experience requirement so narrowly in the absence of an intent by the petitioner or the Department of Labor to impose a more limited experience requirement. The AAO is persuaded that the experience was business management, and it appears on its face from the evidence in the record that the beneficiary has such experience.²

The director also concluded that the beneficiary had submitted false information and that the explanations offered by counsel that the beneficiary signed a blank form that was later filled out by an unspecified person were vague and did not constitute evidence. Specifically, the director noted that the beneficiary had submitted a G-325 Biographic Information Form to the former INS in support of an asylum application filed in March of 1993. The G-325 requires the applicant to specify *any previous employment during the*

¹ The references are as follows: 189.117-046 Manager, Bakery (bakery products); 320.137-014 Manager Lodging Facilities (hotel and rest.); and 186.167-042 Manager, Market (retail trade; wholesale trade).

² The AAO notes an additional error made by the director. The director's decision referenced an investigation revealing that the petitioner had not intended to manage an existing office in Nogales, Arizona. As counsel notes, the petitioner has maintained that he intends to employ the beneficiary in New Jersey. Thus, the director's decision erroneously references information that does not relate to this petition.

preceding five-year period, and also requests information regarding the applicant's *last occupation abroad* if not previously specified. (Emphasis supplied) The beneficiary's G-325 accompanying the 1993 asylum application indicated that he was "unemployed" during the preceding five year period, i.e., 1988-1993, and that his occupation abroad from May of 1980 to the date of the filing of the asylum application was that of "business—cloth merchant." The director's decision points out the inconsistency between this information and that contained in the G-325A submitted in support of the beneficiary's adjustment of status application on May 9, 2002. The latter specifies that during the preceding five-year period, i.e., 1997-2002, the beneficiary was employed at the [REDACTED] in Tucson as a manager. Furthermore, and critical to the director's conclusion, the G-325A indicates that from April 1982 to November 1990 the beneficiary's last occupation abroad was managerial assistant at [REDACTED] in India. The director concluded that based on these documents the beneficiary possessed no qualifying experience from abroad and had submitted false information to the INS, now CIS. The director rejected counsel's attempt to explain the inconsistencies.

The director's decision noted the above inconsistencies relating to the beneficiary's stated experience from abroad, although experience from abroad was not a requirement for the position. Consequently, if the director based his decision to revoke upon those inconsistencies, he cannot have done so due to a finding that it reflected a lack of necessary experience from abroad because we find that it would go to a matter that is irrelevant to the visa petition. *See Matter of Arias*, 19 I&N Dec. 568 (BIA 1988). We are not suggesting that inconsistencies may not themselves form a basis to deny a visa petition. *See Matter of Ho*, 19 I&N Dec. at 590. The director did not, however, explain how the inconsistencies are relevant or cast doubt on evidence relevant to the beneficiary's eligibility.³ Because the director's NOIR did not adequately explain the facts and evidence supporting the proposed decision, the matter is remanded pursuant to *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987).⁴

The director's NOIR and decision did not adequately address whether he considered the evidence sufficient to invalidate the labor certification. Had the director invalidated the labor certification, the AAO would lack jurisdiction over the subsequent revocation of the petition unless certified to us. Compare 8 C.F.R. § 205.2 (2003) (providing for appeals from revocations on notice), with 8 C.F.R. § 205.1 (2003) (describing automatic revocations including those based upon invalidation of labor certifications pursuant to 20 C.F.R. Part 656); *Matter of Zaidan*, 19 I&N Dec. 297 (BIA 1985).

In considering the petition on remand the director should consider the following information and provide the petitioner with an opportunity to submit an explanation. The AAO has reviewed the record relating to the petition, other files relating to the applicant's immigration history and that of his immediate family members, and has also consulted other publicly available information. As a result of its review, the AAO believes that there are several factors relevant to a determination in this case that require additional clarification by the

³ The AAO does not suggest that information from these proceedings might not have some relevance, such as in assessing the reliability of information provided by the beneficiary. A review of the record relating to those proceedings indicates that the immigration judge's decision denying asylum was affirmed by the Board of Immigration Appeals (BIA) on January 29, 2003. The Ninth Circuit Court of Appeals has remanded the matter in order for the BIA to clarify or elaborate its findings relative to the asylum application, including its finding that the beneficiary had filed a frivolous asylum application.

⁴ It is worth noting that the beneficiary's signature of a blank Form I-589 could lead to a finding that the beneficiary is inadmissible pursuant to 212(a)(6)(C) of the INA. However, a determination as to the beneficiary's admissibility is not material to the instant petition.

petitioner and beneficiary before a decision can be issued. The principal issues which the AAO has identified and which will be discussed, are: 1) the beneficiary's ownership of the [REDACTED] 2) discrepancies in the record regarding the beneficiary's experience; and 3) the beneficiary's possible business connections to the petitioner.

In support of the petition, the record contains the ETA 750, which states in Part B that the beneficiary was employed as a manager by the [REDACTED] in Tucson, Arizona from June 1995 through the date of filing of the petition in February 2001. The documents supporting the petition include a letter dated December 20, 1998, from [REDACTED] the motel's owner verifying this information. The letter reads as follows:

CERTIFICATE

I KNOW Mr. [REDACTED] for more than Ten years.

He is working as Assistant Manager in my motel from May 1st 1993 to December 16, 1998. He is doing all managerial works related to business and is capable of handling even larger business also. Presently, He [sic] is operating the motel, which includes making schedule for works like desk clerks, cleaning, purchase, pay rolls, maintenance, books [sic] keeping and customer services.

[REDACTED] is a matured [sic] and honest person and can handle all administrative problems as well as deal with customers, to utmost satisfaction.

December 20, 1998

[REDACTED]
Owner

The record contains conflicting information as to the beneficiary's status in relation to the [REDACTED]. An examination of the files relating to the beneficiary's family members reflects that the beneficiary submitted an Affidavit of Support (Form I-134) in support of their applications for adjustment of status. The I-134 indicates that the beneficiary owns real estate valued at \$450,000 and [REDACTED] Tucson, Arizona. This is the same address listed in the Form ETA 750 for the [REDACTED] beneficiary's alleged employer. In addition, the beneficiary's Form 1040 provides additional information of interest regarding the beneficiary's relationship to the [REDACTED]. The Schedule C (Profit or Loss from Business—Sole Proprietorship) accompanying the Form 1040 lists the beneficiary as the proprietor of the business known as the [REDACTED] in Tucson, Arizona. The Schedule C contains an Employer Identification Number (EID), for the [REDACTED].⁵ Thus, while the beneficiary was claiming to be merely an employee working under the direction of the owner [REDACTED] it appears that he was the owner/operator of the motel and withheld this information from the ETA 750 and other documentation submitted in support of his applications for immigration benefits.⁶

⁵ In addition to the documents contained in the CIS files, various public database searches conducted by the AAO also indicate that the beneficiary was the owner/operator of the [REDACTED].

⁶ Although it is possible that the beneficiary would claim that he was a co-owner of the motel, or that he only acquired the motel between the filing of the requests for immigration benefits and the submission of the Affidavit of Support, this is not supported by the tax records which indicate that the beneficiary was operating the motel as a sole proprietor, and which contains no indication in line H that the beneficiary acquired the business during 2001.

The beneficiary's ownership of the business which allegedly employed him in a junior position to that which he actually occupied is, the AAO believes, a matter that the director should consider in assessing whether there has been a material misrepresentation regarding the petitioner's experience, and the bona fides of the petition as a whole.

Second, the director should consider additional discrepancies in the record relating to the beneficiary's claimed experience, and determine whether the discrepancies are considered material to the petition. There are a number of discrepancies which are apparent from an examination of the information contained in the record. First, the director should reexamine his findings relating to the beneficiary's experience from abroad. As noted previously, the AAO does not believe that the director's decision adequately addressed how those discrepancies were relevant to a determination of the petitioner's eligibility or the bona fides of the petition. The AAO believes that the discrepancies are not material to the requirements of the visa classification desired. Should the director believe otherwise, the decision must clearly articulate the particular discrepancies identified and how it is material to a determination in the case. Second, aside from the petitioner's experience from abroad, the record also contains additional discrepancies relating to the beneficiary's experience which warrant additional examination. The ETA 750 indicates that the beneficiary also gained required experience by virtue of his employment from June 1995 to the time of filing the ETA 750 on February 1, 2001, as an Assistant Manager of the [REDACTED] Market in Tucson, Arizona. Notably, the description of the beneficiary's duties indicates that he managed the convenience store under the direction of the manager. However, as with the [REDACTED] Motel, additional information discovered by the AAO through available public databases indicates that the beneficiary may also have an ownership interest in the [REDACTED] Market via a partnership known as [REDACTED] which will be discussed below.

In addition, the beneficiary's claim that the beneficiary was employed as a manager of a [REDACTED] establishment should be closely examined. The information relating to the beneficiary's employment at [REDACTED] was raised only on appeal. The instructions on the ETA 750 require that the beneficiary's employment during the preceding three years be listed, as well as "any other jobs related to the occupation for which the alien is seeking certification." In response, the beneficiary listed two jobs. The first is the beneficiary's part-time employment by the [REDACTED] Market in Tucson, Arizona from June 1998 through the date of filing, February 10, 2001, as an assistant manager. The second job listed was the beneficiary's full time employment as the manager of the [REDACTED] Motel in Tucson, Arizona from June 1995 to the time of filing the petition in 2001. No other employment is listed. Nevertheless, counsel now submits evidence in support of the assertion that the beneficiary obtained experience as a manager at a [REDACTED] store in West Haverstraw, New York, from early 1991 to March of 1993. The tardy submission of this information suggests the possibility that it was only disclosed because it appeared that the petition was in danger of being denied due to the director's conclusion that the beneficiary's other experience was not sufficiently related to managing a donut shop. Given the instructions on the ETA 750, and the relevance of such experience to the petition, the beneficiary's explanation that this experience was not listed because it was not required is simply inconsistent with the instructions and raises questions as to the credibility of the explanation, and possibly the evidence itself. The evidence offered consists of a letter from an individual identified only by the first name

[REDACTED] is listed in a Pima County, Arizona assessment database as the owner of the property at [REDACTED] the address of [REDACTED]

of [REDACTED] who signed a letter as the President of [REDACTED] Corporation in which he described the beneficiary's duties. In addition, copies of tax records from 1991 and 1992 were also submitted on appeal.

A third issue that raises additional questions about the petition and warrants additional inquiry by the director relates to the nature and extent of the business interests held by the petitioner and his wife and whether those business interest are such that the petition raises issues of self-employment by the beneficiary or otherwise suggests that the petition relates to something other than a bona fide employment situation. A number of items from the record and databases raise these questions.

In addition to the beneficiary's ownership of the [REDACTED] the tax records reflect additional business holdings of the petitioner and/or his wife. The Form 1040 for 2001 includes Schedule E, which specifies additional income from real estate, royalties, partnerships, [REDACTED] trusts, etc., and lists additional income of \$23,722 from three business partnerships or [REDACTED]. Those entities are two partnerships identified as [REDACTED] and [REDACTED] and one [REDACTED] identified as [REDACTED] Corporation. The beneficiary's interest in a donut business naturally raises questions about the relationship of that business to the petitioning entity, itself a donut company. An examination of the tax records reflects employee identification numbers (EIDs) as follows: [REDACTED] Group, EID [REDACTED] [REDACTED] Corporation, [REDACTED]. On remand, the petitioner should examine the extent, if any, to which these business entities have financial connections to [REDACTED] corporation.

The absence of certain documentation from the record also raises additional questions regarding a possible connection between the petitioner and the beneficiary. The AAO notes that the petition file contains Form 1120S tax returns for 2000 and 2001 submitted by the petitioner's president, [REDACTED]. Only the 2000 return contains a copy of Schedule K-1 that itemizes a shareholder's share of income, credits, deductions, etc. The return from 2001, which is arguably the more relevant document to evaluate the petition, contains only the more abbreviated Schedule K and not the detailed K-1. While it may be that [REDACTED] was not required to submit a Schedule K-1 for the 2001 tax year, it bears mention that it is the Schedule K-1, which discloses whether an individual was a 100% shareholder, as was the case in 2000, or whether the individual had less than full ownership in the corporation. The Schedule K-1s disclose the identity of and respective distributions of each shareholder. The director, on remand, may wish to obtain a copy of that return and related schedules to see if they disclose any ownership interest of the beneficiary, his wife, or other family members.

A search of database records available to CIS indicates that there may be a financial connection between [REDACTED] Corporation and [REDACTED] Corporation. The records submitted by [REDACTED] Corporation indicate that it has an EID of [REDACTED]. A database search under the EID and under the business name in New Jersey resulted in no records being found.⁸ However, a search conducted under Pennsylvania Corporation and Limited Partnership Records using [REDACTED] Corporation as the search criteria resulted in a company ID number of [REDACTED] for a company incorporated in Pennsylvania on September 22, 1998, located in Philadelphia. That company listed [REDACTED] as CEO, Treasurer, and Secretary.

⁸ The failure to locate corporate records in New Jersey may be a result of search limitations rather than the corporation's non-existence, as it appears from other searches that additional information exists for [REDACTED] in New Jersey.

In terms of the New Jersey entity, a UCC search identified records for ██████████ Corporation located at ██████████ in Gloucester, New Jersey.⁹ It is unknown whether this is the same business location as the previously identified location for Glendora, New Jersey. The UCC search also identified records for ██████████ Corporation at ██████████ New Jersey. Those additional records appeared to show some type of debtor/creditor relationship between ██████████ Corporation and ██████████ Corporation--the ██████████ identified in the beneficiary's tax return. Thus, there appears to be a relationship between the beneficiary's prospective employer ██████████ Corporation, and the beneficiary's own business, ██████████ Corporation, although the precise nature of that relationship is unclear. While it would be premature to draw any conclusions from this information, additional information regarding this relationship should be sought from the petitioner and beneficiary as well as through the appropriate Service investigation.

Based on the foregoing, this matter will be remanded for additional consideration by the director. As always, the burden of proof in these proceedings 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 for further action in accordance with the foregoing and entry of a new decision, which, regardless of outcome, is to be certified to the AAO for review.

⁹ We note that the various records reflect slightly differing address information, such as 320 or 220 as the street number, or references to Glendora, or Gloucester, New Jersey. Whether these reflect discrepancies in reporting, data entry, or different business entities is unknown; however, they all appear to relate to the petitioner.