



U.S. Citizenship
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Services

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FILE:

EAC 01 081 51856

Office: VERMONT SERVICE CENTER

Date:

APR 04 2006

IN RE:

Petitioner:

Beneficiary:



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: On August 7, 2001, the director initially approved the employment-based preference visa petition. On May 26, 2004 the director issued a notice of intent to revoke the petition (NOIR). The NOIR was based on the fact that the attorney of record in the visa petition proceeding was [REDACTED] and/or [REDACTED] of [REDACTED]. On October 22, 2003, Mr. [REDACTED] pled guilty to criminal counts of money laundering and conspiracy to commit immigration fraud, and Mr. [REDACTED] pled guilty to conspiracy to commit immigration fraud. [REDACTED] and [REDACTED] both consented to the revocation of their licenses to practice law in Virginia on October 24, 2003. The director subsequently invalidated the underlying labor certification and revoked the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Asian market and restaurant. It seeks to employ the beneficiary permanently in the United States as a cook of Korean food specialties. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that based on numerous discrepancies and the petitioner's failure to provide evidence of wages paid by any of the beneficiary's previous employers, the petitioner had not established that the beneficiary had two years of relevant work experience as stipulated by the labor certification. The director revoked the petition.

On appeal, counsel states that in his response to the director's NOIR, he sent incorrect work experience documentation for the beneficiary that was actually work documentation for another beneficiary. Counsel submits further documentation.

Section 205 of the Act, 8 U.S.C. 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

In the director's notice of intent to revoke the petition, he stated that the conspiracy committed by the petitioner's former counsel involved the submission of fraudulent Forms ETA-750 and fraudulent Forms I-140. THE director further stated that it appeared in many cases, the beneficiaries named on the Forms ETA-750 and I-140 were fictitious, or that the petitioner may not have intended to hire the beneficiary named on the form(s). The director stated that due to the nature of the frauds perpetrated by the individual attorneys and/or law firm, CIS had determined that it must scrutinize all immigrant worker visa petitions filed with the CIS in which [REDACTED] and [REDACTED] appear as attorneys of record. The director also stated that the nature of the fraud committed by the attorneys called into question whether the person who signed the Form ETA-750 and/or I-140 was an authorized

representative of the prospective employer, and whether the person identified as the prospective employer ever intended to employ the beneficiary named on either form. The director stated that based on these reasons, CIS intended to revoke the instant petition.

The director then requested a notarized statement from the petitioner, with accompanying evidentiary documentation, that it did hire [REDACTED] and [REDACTED], the law firm, or any of their associates, to obtain a bona fide labor certification for a bona fide job offer, and to file a bona fide I-140 petition. The director also noted that the beneficiary in the instant petition had been substituted for the original ETA 750 Beneficiary [REDACTED]. The director requested that the petitioner provide evidence to establish that Ms [REDACTED] actually existed and that the petitioner had a bona fide intent to hire this person at the time the ETA-750 was filed. The director requested that the petitioner provide a detailed explanation of why it substituted the current beneficiary [REDACTED] for the original beneficiary.

The director also requested numerous other documents with regard to the petitioner's current business operations, including federal tax returns for tax years 2001 to 2003, names of employees, employment records of employees, notarized statements from the beneficiary's previous employers as to prior work experience and wages, a notarized statement from the beneficiary that the information listed on the ETA-750 is correct, and an indication as to how many Form ETA750 the petitioner has filed, as well as the current employment status of such individuals.¹

In response, new counsel submitted numerous documents with regard to the petitioner's current business operations and location. Thus, the petitioner has established that it exists and is doing business. It is noted that the employment of the beneficiary is documented in the W-2 Forms submitted for 2002 and 2003.² Therefore the actual employment of the beneficiary by the petitioner is also not in question. Pursuant to the director's request, the petitioner submitted a notarized statement from [REDACTED] [REDACTED] Corporation, one of the petitioner's officers. [REDACTED] states the following:

That [REDACTED], our employee/the beneficiary of the I-140 petition hired [REDACTED] PLLC to represent her in the process. We authorized [REDACTED] by way of a G-28 and statement on a Labor certification and I-140 Petition that gave him authority to represent our interest in the matter. We had the intention to hire [REDACTED] prior to the substitution of the beneficiary on the ETA 750. We had the intent of hiring the beneficiary Ms. [REDACTED] and have indeed done so once she received authorization to work and continue to do so.

The director in his NOIR asked for a notarized statement form previous employers attesting to any experience requirements of the labor certification. The director requests that the letters include exact dates of employment, titles and duties, as well as evidence of wages paid by the beneficiary's former employers.³ In response the

¹ The director provided the petitioner with a detailed list of requested evidence. This list is contained in the record, and as such, will not be entirely repeated here.

² It is noted, however, that the beneficiary's name on her W-2 Form is identified as [REDACTED] rather than [REDACTED]. The petitioner would need to clarify this discrepancy in any further proceedings in this matter.

³ The director did not specify as to whether he referred to the original beneficiary identified on the Form ETA 750

petitioner submitted a notarized statement with regard to the previous employment of an individual named [REDACTED] [REDACTED] as a cook of Korean food by [REDACTED] Seoul, Korean, from October 20,2000 to December 19, 2003. The petitioner also submitted an updated Part B, Form ETA 750 for the current beneficiary that stated she was unemployed from April 1997 to May 2002.

On August 11, 2004, the director revoked the I-140 petition. The director noted that the petitioner in his response only briefly mentioned the initial beneficiary of the labor certification in the notarized statement by [REDACTED] [REDACTED]. The director stated that the petitioner did not address the reason for the substitution, nor did the petitioner provide any evidence of the actual existence of the initial beneficiary. The director stated that since [REDACTED] and [REDACTED] often filed labor certifications using fictitious names, the failure of the petitioner to establish the existence of [REDACTED] as a bona fide person and beneficiary casts doubt on the validity of the labor certification. The director stated that for this reason, the petition must be revoked.

In addition, the director noted that the substituted beneficiary had indicated that she was employed with Buffet from February 1995 to April 1997, and then was unemployed since April 1997. The director noted that in response to the director's NOIR, the petitioner had submitted a notarized certificate of experience from [REDACTED] [REDACTED] that referred to the employment experience for [REDACTED]. The director stated that this name might be a different English translation of the beneficiary's name, as it was substantially similar to the beneficiary's name, [REDACTED]. The director stated that the employment of the beneficiary by the Korean company listed in the certificate of experience presents a large discrepancy in the beneficiary's documentation and there is no explanation for why the beneficiary did not list this employment in the initial submission. The director determined that such discrepancies cast doubt on the validity of the certificate of experience, since the beneficiary claimed to have been working with the petitioner since May 2002. The director finally noted that petitioner had not provided evidence of wages paid by either [REDACTED] or [REDACTED], the Korean employer previously identified in the From ETA 750.

The director also noted that a discrepancy existed between statement made by the beneficiary on her currently pending Form I-485, Application to Register Permanent Resident or Adjust Status and the statements made on Part B, Form ETA 750 with regard to employment. The director stated that on her I-485, she claimed she was self-employed in Korea from November 1998 to April 2000, while on her Form ETA 750, she claimed to be unemployed during this period of time. The director then stated that this discrepancy casts further doubt on the validity of the beneficiary's claimed employment history. Finally the director noted that the beneficiary's signatures on both the notarized statement⁴ and the new ETA 750 Part B⁵ do not clearly match her purported signature on the Part B submitted with the initial petition. The director then revoked the petition based on the beneficiary lack of the required two years of experience in the position as required by Form ETA 750 and invalidated the Form ETA 750 pursuant to 20 C.F.R. 656.30(D), because the ETA 750 had been obtained by the use of fraud or willful misrepresentation.

or the current beneficiary.

⁴ Exhibit 27 of the petitioner's response to the director's NOIR.

⁵ Exhibit 26 of the petitioner's response to the NOIR.

On appeal, new counsel states that the petitioner submitted 28 exhibits in response to the director's notice of intent to revoke the petition. Counsel states that CIS, in the notice of intent to revoke, requested that the petitioner provide a notarized statement from a previous employee attesting to any experience requirement, but that, in the director's revocation decision, it states that a new notarized statement was requested. Counsel asserts that the CIS is requesting one thing in its notice of intent to revoke and then using another standard in the actual revocation notice. Counsel also asserts that he accidentally submitted the "work experience of another of our clients [REDACTED] with the petitioner's response to the director's NOIR.⁶ Counsel submits an affidavit, signed by [REDACTED] President, [REDACTED] Corporation. In her affidavit [REDACTED] stated that the attorney [REDACTED] told her husband, then president of the corporation, that he had an individual who was willing to work for [REDACTED] Corporation, and that the petitioner agreed to sponsor the individual, ([REDACTED] because the petitioner was in need of workers and were unable to fill restaurant positions. Mrs. [REDACTED] then stated they signed the ETA 750 A authorizing Mr. [REDACTED] to represent them in the labor certification, and that later Mr. [REDACTED] informed the petitioner that he had another individual that he could substitute for [REDACTED] and they agreed. Mrs. [REDACTED] also states that this is why they sponsored the beneficiary and that the petitioner had the intention of hiring [REDACTED] prior to the substitution. Mrs. [REDACTED] finally adds that the petitioner had the intent of hiring the beneficiary and has done so once she received work authorization.

Counsel also submits a copy of the original Form ETA 750 dated October 4, 2000, for [REDACTED] with Mr. [REDACTED] signature in Declaration of Employer section. Counsel submits an affidavit from Ms. [REDACTED] dated August 26, 2004 that stated that she filed an ETA 750 Part B and that the information on Part B is correct. She also states that her name is not [REDACTED], and the experience letter submitted with her name was submitted in error by the attorney. Ms. Im also stated that she attached the experience letter originally submitted with the I-140 petition and a new letter from a co-worker who is now the owner of the restaurant in Korea. Ms. [REDACTED] also states that during the period of time from November 1988 to April 2000 She was unemployed, but that her husband owned a jewelry stores where she helped out on occasion. Ms. [REDACTED] states that is why she stated she was self-employed and unemployed at the same time. Ms. [REDACTED] finally states that she adopted a new signature which is why her signature on the Form ETA 750 Part B does not match the affidavit she submitted.

Counsel then submits a notarized Certificate of Working Experience dated August 19, 2004 signed by [REDACTED] president, Doosan Buffet. In this affidavit, the affiant states that she worked with the beneficiary from February 1, 1995 to April 3, 1997, and that after taking over the shop in May 1, 2001, she operated it under the same shop name. Counsel also submits a notarized Certificate of Employment Experience dated December 6, 2000 signed by [REDACTED] president, Doosan Buffet. This certificate listed the beneficiary's name, sex, address, ID Number, job title, period of employment and provided a description of the main duties of the job.

Counsel's submission of another beneficiary's Certificate of Work Experience in the context of a possible revocation of a petition based on substituted beneficiaries and possible fraudulent ETA 750s is questionable, however, the AAO accepts counsel's explanation of the submission offered on appeal. Therefore the director's comments on the discrepancies in employment periods noted on the erroneous Certificate of Work Experience and the actual beneficiary's Certificate of Work Experience are withdrawn.

⁶ Counsel further confuses the record by identifying the actual beneficiary as another of his clients whose employment records were submitted to the record in the petitioner's response to the director's NOIR.

Counsel's comments on appeal with regard to evidence requested by the director in his NOIR and the description of such materials in the revocation decision are immaterial. The director requested documentation from the petitioner, whose initial Form ETA 750 and I-140 petition was filed by an attorney disbarred in part on the basis of fraudulent ETA 750s. Thus, the request for evidence is an opportunity for the petitioner to provide probative evidence that the initial Form ETA 750 and I-140 petition were indeed bona fide applications. With regard to the Form ETA 750, the director requested evidence that the beneficiary had the required two years of work experience as cook as outlined by the ETA 750. Since the petitioner had previously submitted a letter from Doosan Buffet, the petitioner could have presented an additional notarized statement or resubmitted the original statement.

However, the director specifically requested evidence of wages paid to the beneficiary in any previous jobs. The petitioner would have been well advised to provide probative evidence as to the beneficiary's wages from her Korean employer. The fact that the petitioner had not provided any evidentiary documentation as to the beneficiary's wages in the claimed Korean employment, or an explanation of why such documentation is not available, diminishes the weight to be given to either the initial work certificate or the newly submitted notarized work certification statement. Thus, the AAO concurs with the director that the petitioner has not established that the beneficiary has the requisite two years of work experience is qualified to perform the position as of the 1999 filing date.

With regard to the issues of document fraud raised by the director, the director questioned in his NOIR whether the beneficiary named on the initial Form ETA 750, [REDACTED], actually exists and whether the petitioner had a bona fide intent to hire this person at the time the ETA 750 was filed.⁷ The director asked for a detailed explanation of why the petitioner substituted the current beneficiary for the original beneficiary. The petitioner in its response to the NOIR does not address this issue, other than to say in the notarized letter that it intended to hire [REDACTED]. It is noted that in the petitioner's cover letter for the initial filing dated January 10, 2001, the petitioner stated that it has now "learned that we cannot hire Ms. [REDACTED] because she is no longer interested in the position." Former counsel stated in an accompanying letter dated January 11, 2001, that the petitioner "cannot employ [REDACTED] in the position at this time due to a change in circumstances." On appeal, in a new affidavit, the petitioner states that former counsel approached the petitioner with regard to the initial beneficiary, [REDACTED], and that it was the petitioner's intention to hire [REDACTED] prior to the substitution of the beneficiary and to hire [REDACTED] after the substitution.

While the letter submitted by the petitioner with the initial I-140 petition as to the substitution provides some rationale for the substitution and could suggest some contact by the petitioner with the original beneficiary, the affidavit submitted on appeal suggests that the attorney of record initiated the idea of an ETA 750 and subsequent I-140, and that the petitioner had no contact with the original beneficiary prior to submitting the original Form ETA 750. This fact, in combination with a lack of evidence with regard to Ms. [REDACTED] actual existence, is sufficient to question the validity of the original ETA 750.

⁷ It is noted that the original Form ETA 750 certified on October 12, 2000, is found in the record.

As previously stated, in *Matter of Estime*, a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial. In the instant petition, the petitioner's documentation submitted in response to the director's notice of intend to deny and on appeal, does not sufficiently address the questions raised by the director with regard to the original beneficiary's existence and the employment of the actual beneficiary in Korea prior to the priority date of 1999. Therefore the AAO concurs with the director's decision to revoke the petition.

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). Beyond the decision of the director, it is noted that in response to the director's notice to revoke the instant petition, the petitioner submitted a list of ten prospective beneficiaries identified as "cases completed by not working for the petitioner" as well as ten beneficiaries whose applications are still pending and not authorized to work". If all of these beneficiaries are for employment-based petitions, the petitioner has to establish its ability to pay the proffered wages of all beneficiaries submitted in the same year, not just one beneficiary at a time. Although the federal tax return documents submitted to the file by the petitioner indicate substantial net current assets, it is questionable whether the petitioner has sufficient financial resources for the numbers of potential beneficiaries identified by the petitioner.

It is also noted that the petitioner did not submit its federal tax return for tax year 2000, the year in which the priority date for the labor certification was established. The record reflects that the petitioner submitted its IRS Form 1120 for tax year 1999 which is not dispositive of the petitioner's ability to pay the proffered wage in tax year 2000. *See* 8 C.F.R. § 204.5(g)(2).

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 appeal is dismissed.