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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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FILE: [REDACTED]
LIN 01 220 54449

Office: NEBRASKA SERVICE CENTER

Date: FEB 03 2008

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:

[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, Director
Administrative Appeals Office

CC: [REDACTED]

DISCUSSION: The Director, Nebraska Service Center, initially approved the employment-based preference visa petition. Subsequent to an adjustment interview before an immigration judge, the director served the petitioner with a notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Subsequent to the appeal, the petitioner appears to have obtained new counsel. However, the record does not contain a Form G-28, Notice of Entry of Appearance of Attorney or Representative, signed by the petitioner authorizing new counsel to represent it before Citizenship and Immigration Services (CIS) in this proceeding. Therefore, a copy of the decision will be forwarded to both prior counsel and new counsel.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], 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." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). A Notice of Intent to Revoke 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. *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Notwithstanding the CIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as cook, specialty foreign food. As required by statute, an Application for Alien Employment Certification (Form ETA 750) approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary met the experience requirements as a cook, specialty foreign food, as stated on the Form ETA 750. The director revoked the approval of the petition accordingly.

The regulation at 8 C.F.R. § 205.2(d) requires that revocations of approvals must be appealed within 15 days after the service of the notice of revocation. The appeal was filed on April 29, 2002, 24 days after the decision was rendered (April 5, 2002). Thus, the appeal was not timely filed.

It is noted that the director erroneously allowed the petitioner 30 days to file the appeal (33 days if by mail). The director's error does not, and cannot, supersede the regulation regarding the time allotted to appeal a revocation.

8 C.F.R. § 103.3(a)(2)(v)(B)(1) exacts that an appeal which is not filed within the time allowed must be rejected as improperly filed. In such a case, any filing fee CIS has accepted will not be refunded. However, in the interest of due process and fairness, the merits of the case will be discussed below.

The record indicates that the Form I-140 was filed with the Service Center on July 2, 2001. It was initially approved on August 14, 2001. Following the receipt of information from the Office of District Counsel and the Immigration Court relevant to the beneficiary's experience, the director concluded that the I-140 was approved in error and issued a NOIR on March 1, 2002.

In response to the NOIR, counsel submitted a letter from the petitioner's owner, a letter addressed to U.S. CIS District Counsel in connection with the beneficiary's Application for Adjustment of Status (Form I-485), a letter to the beneficiary in connection with his Form I-485, and an I-140 packet filed by the petitioner. Counsel contended that the Immigration and Nationality Service, now CIS, District Counsel's statements were "biased, hearsay words of an adverse party to an adversarial proceeding which in this case is the Deportation Proceeding of [REDACTED] [sic] [REDACTED]". Counsel further argued that since this is an adversarial proceeding, whatever evidence District Counsel filed to request that the petition be revoked should have been provided to him by District Counsel as a matter of procedure and/or courtesy.

The director concluded that the documentation failed to establish that the beneficiary met the experience requirements of the labor certification as of the visa priority date. The director revoked the petition's approval on April 5, 2002, pursuant to section 205 of the Act, 8 U.S.C. § 1155.

On appeal, counsel submits a statement and indicates that a brief would be submitted within thirty days. To date, no additional documentation has been received; therefore, a decision will be determined based on the record, as it is currently constituted. Counsel states:

The adverse decision of the Service Center Director is not well reasoned and is clearly erroneous. We asked for fair consideration of the evidence contained in the record of proceedings, which was not given. We presented substantial evidence to support our position that [CIS] cannot consistent with due process of law, both substantive and procedural, blindly and expeditiously revoke a duly approved Immigrant Visa Petition based on incredible information provided by [CIS] District Counsel. To have revoked this petition based on the unsubstantiated words of U.S. [CIS] District Counsel is both illegal and oppressive.

* * *

The Petitioner has presented credible evidence that the Beneficiary meets the experience requirement of the Labor Certification Application. The Beneficiary's experience is supported by undebunked documentary evidence. As indicated, the hearsay utterances of a [CIS] District Counsel who is an adverse party to an adversarial proceeding is not evidence and cannot consistent with due process of law, be taken as such.

I submit to you with all due respect that there has not been a willful misrepresentation of a material fact involving the Labor Certification Application. We have provided documentary evidence in this regard but I have not seen the documentary evidence provided by [CIS] District Counsel in support of revocation. [The beneficiary] has the work experience of a Tandoori Chef. His excellence has been the subject of two newspaper articles in New York and Minneapolis which are contained in the record of proceedings. Failing to find any discretionary means of blocking [the beneficiary's] Adjustment of Status, [CIS] District Counsel resorted to the strategy of unfairly attacking the Labor Certification by initiating a "secret" visa revocation process that did not comport with due

process of law. There is insufficient evidence in this record of proceedings to warrant revocation of his approved petition as was done by the Service Center Director.

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 filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is January 2, 2001. As noted on the labor certification, the beneficiary must have four years experience in the job offered with a supervisory background as set forth on Block 14 and Block 15 of the ETA 750.

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(1)(3) additionally 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.

(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.

The regulation at 8 C.F.R. § 103.2 also provides guidance in evidentiary matters. It states in pertinent part:

(b) *Evidence and processing—*

(1) *General.* An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form. Any evidence submitted is considered part of the relating application or petition.

(2) *Submitting secondary evidence and affidavits—*

(i) *General.* The non-existence or other unavailability of required

evidence creates a presumption of ineligibility. If a required document such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

If primary evidence such as an employer letter is not available, then the petitioner should demonstrate its unavailability and submit relevant secondary evidence. If secondary evidence, such as pay stubs or tax documents verifying the alien's employment, is unavailable, the petitioner must demonstrate the unavailability of such evidence and then may submit affidavits pursuant to the requirements of 8 C.F.R. § 103.2(b)(2). It is noted that two or more affidavits from individuals who are not parties to the petition and who have direct personal knowledge of an event are only acceptable after the petitioner demonstrates the unavailability of the required primary and relevant secondary evidence.

On appeal, counsel asserts that the evidence shows that the beneficiary has the required four years of experience. In this case, counsel previously submitted a letter from the beneficiary's prior employer, Sonargaon Pan Pacific Hotel, Dhaka, Bangladesh, verifying the beneficiary's employment from May 6, 1984 to May 20, 1991, a letter from the beneficiary's prior employer, New Mandarin Chinese Restaurant, Dhaka, Bangladesh, verifying the beneficiary's employment from February 1, 1980 to March 4, 1984, a letter from the beneficiary's prior employer, Taj Palace Restaurant, Banani-Dhaka, Bangladesh, verifying the beneficiary's employment from May 6, 1984 to June 1, 1988, and an undated letter from the beneficiary's prior employer, Tandoor Authentic India Restaurant, Albany, New York, verifying the beneficiary's employment from April 21, 1995 to the present. On the signed Form ETA 750, the beneficiary, under penalty of perjury, stated that from October 1992 to May 1995, he worked at the Gandhi (Indian) Restaurant, New York City, New York; from April 1995 to May 1996, he worked at the Tandoor Authentic Indian Restaurant, Albany, New York; from June 1996 to April 1999, he worked at The Moghals Fine Indian Cuisine Restaurant, Minneapolis, Minnesota; and from April 1999 to the present he worked at the petitioner, Passage to India Restaurant, Minneapolis, Minnesota. The ETA 750 was signed on December 8, 2000.

During the merits hearing on December 18, 2001, the Immigration Court heard arguments concerning the beneficiary's Form I-485, and it was noted that inconsistencies between the restaurant's Form ETA-750, and the beneficiary's testimony at the hearing indicated that the beneficiary did not have the necessary qualifying experience. The following information illustrates those discrepancies.

ETA-750	RESUME	LETTERS	TESTIMONY
0/92-5/95 - Gandhi	10/92 -5/95 - Gandhi	5/84 - 5/91 - Sonargaon	92 - 94 - Pas. To India, New York City, Panma Two, New York City, Window, New York City, All Part-Time (when needed) Hrg. Transcr.

			56:17, 57:5-24 (Dec.18, 2001)
4/95-5/96 - Tandoor	4/95 - 5/96 - Tandoor	2/80 - 3/84 - New Mand.	1996 - Shalimar, Albany, 2-2 1/2 months, 3 to 4hrs/day, Tandoor, Albany, 1 yr. & 7/8 mos., Fulltime. Hrg. Transcr. 60:10-20 (Dec. 18, 2001)
6/96 - 4/99 - Moghals	6/96 - 4/99 - Moghals	5/84 - 6/88 - Taj Palace	10/96 - 8/96 - Moghals, Minneapolis. Hrg. Transcr. 62:1-21 (Dec. 18, 2001)
4/99 - Pres. - Pas. to Ind., Minneapolis	4/99 - Pres. - Pas. to Ind., Minneapolis	4/95 - Pres. - Tandoor	98 - 1/99 - Gandhi, Albany, 3 to 4 mos. Hrg. Transcr. 63:14-25 (Dec. 18, 2001)
			99 - Pas. to Ind., NYC, 1 mo. Hrg. Transcr. 64:12-17 (Dec. 18, 2001)
			Unemployed - 2 mos. Hrg. Transcr. 64:24-25 (Dec. 18, 2001)
			Became 15% partner of Pas. To Ind., Minneapolis, - 4/2001 Hrg. Transcr. 65:19-25, 66:1-12 (Dec. 18, 2001)

Again, *Matter of Esteime*, 19 I&N Dec. at 450, states 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. In the instant case, the director determined that the petition should be revoked based on the inconsistencies between the beneficiary's testimony and the documentation provided. The AAO finds that the director's doubts based on the discrepancies in the record does constitute "good and sufficient cause" to revoke the petition.

Matter of Ho, 19 I&N Dec. at 591-592 states:

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.

* * *

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Finally, the director determined that the petitioner had not made the beneficiary a bona fide job offer since the beneficiary is a partner in the business. The AAO agrees with the director and does find, in this case, that the beneficiary being part owner constitutes "good and sufficient cause" to revoke the petition. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). 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 Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the person applying for a position owns the petitioner, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that [CIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

In his response to the NOIR, counsel stated:

A review of the business registration documents does not indicate anywhere that [the beneficiary] is a 15% owner of the business. The only indication that [the beneficiary] is an owner of the business is the "fictitious" tax returns, which we voluntarily filed with the Court. The accountant that prepared the tax returns did not have in his possession any documentation that evidences Ahamed [sic] Miha as being an actual 15% owner of the business. He prepared the tax returns based on information that was provided to him by Mr. [REDACTED] who hired him to do [the beneficiary's] returns. Also, neither the Secretary of State issued certificates nor the organizational documents of Passage to India Restaurant, LLC prepared by attorney [REDACTED], Esq., in Minneapolis, Minnesota indicate any ownership interest by [the beneficiary].

Counsel is correct that the organizational documents of Passage to India Restaurant, LLC do not indicate any ownership interest by the beneficiary. In fact, the only name listed on the organizational documents is Mohammed A. Awal. Therefore, the AAO does not consider the organizational documents as verification that the beneficiary is not part owner of the petitioner, since none of the other owners, referenced by the beneficiary in sworn court proceedings, are listed either.¹ Furthermore, the petitioner's 1999 tax return shows the beneficiary as 50% owner. This tax return was before the priority date of the petition, January 2, 2001, and further increases the discrepancies in this case. While counsel describes the tax returns filed with the Court as "fictitious", they obviously were presented to another agency of the United States government, under penalty of perjury, as true, correct, and complete. They were also presented to CIS as evidence of the petitioner's ability to pay the proffered wage; and,

¹ The beneficiary testified under oath that the petitioner had three partners in addition to himself.

therefore, CIS should be able to consider them to be true, correct, and complete. *See* section 204(b) of the Immigration and Nationality Act. If the tax returns are, indeed, "fictitious", then the petition might also be revoked for the lack of proof of the ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2).²

Given that the beneficiary is part owner of the petitioner's business, the facts of the instant case suggest that the job offer was not bona fide. The observations noted above suggest that further investigation, including consultation with the Department of Labor may be warranted, in order to determine whether any business relationship between the petitioner and the beneficiary represents an impediment to the approval of any employment-based visa petition filed by this petitioner on behalf of this beneficiary.

Counsel claims that he was never provided with a copy of District Counsel's request that the instant petition be revoked, that he was unaware that the hearing had been transcribed, and that District Counsel's information would have been biased, hearsay words of an adverse party to an adversarial proceeding. Counsel further contends that the revocation of the instant petition, based on the unsubstantiated words of U.S. CIS District Counsel is not consistent with due process of law.

The AAO does not concur with counsel's reasoning. While District Counsel may not have provided counsel with his request to the Center director that the petition be revoked, the Center director did provide counsel with a NOIR that counsel responded to. The reasons for the revocation were clearly stated in the NOIR and the petition was subsequently revoked based on those reasons and an insufficient rebuttal thereto. There is nothing in the record to indicate that District Counsel's information was biased, hearsay, or unsubstantiated. With regard to the transcription of the hearing, that issue lies within the jurisdiction of the Immigration Court, which falls under the Executive Office for Immigration Review (EOIR) of the Department of Justice, and is not an issue before the AAO which falls under CIS and the Department of Homeland Security. The AAO cannot and will not offer an opinion about issues before EOIR.

Counsel suggests that the director's adjudication of the petition was unfair. The petitioner has not demonstrated any error by the director in conducting its review of the petition. Nor has the petitioner demonstrated any resultant prejudice such as would constitute a due process violation. *See Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975).

Although counsel also argues that the beneficiary's rights to substantive and procedural due process were violated, he has not shown that any violation of the regulations resulted in "substantial prejudice" to the beneficiary. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The petitioner has fallen far short of meeting this standard. A review of the record and the adverse decision indicates that the director properly applied the statute and

² 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.

regulations to the petitioner's case. The petitioner's primary complaint is that the director revoked the petition. As previously discussed, the petitioner has not met its burden of proof and the revocation was the proper result under the regulation. Accordingly, the petitioner's claim is without merit.

Finally, counsel claims that District Counsel unfairly attacked the Labor Certification by initiating a "secret" visa revocation process. Again, the AAO does not concur with counsel. The labor certification should not have been approved as the beneficiary is part owner of the petitioner. There is no evidence in the record that indicates that the Department of Labor was aware of this fact when the labor certification was approved. In addition, the AAO does not understand counsel's accusations concerning District Counsel's "secret" visa revocation process. The record of proceeding does not corroborate counsel's accusations. The record clearly shows the discrepancies in the case and further lists those discrepancies in a NOIR that counsel responded to. The director revoked the petition based on those discrepancies, which are part of this record, a public proceeding.

Beyond the decision of the director, 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). In the instant case, the issue that should be considered is whether the petitioner has established its continuing ability to pay the proffered wage from the priority date.

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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification 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 request for labor certification was accepted on January 2, 2001. The proffered salary as stated on the labor certification is \$26,700 per year.

With the petition, counsel submitted a copy of the petitioner's 1999 Form 1065, U.S. Partnership Return of Income. The tax return reflected an ordinary income of \$16,769 and net current assets of \$37,046.

The petition was approved on August 14, 2001. However, the priority date was January 2, 2001, and the tax return provided was before the priority date. As the petition was filed on July 2, 2001, the petitioner should have had its 2000 tax return available to provide as evidence of its ability to pay the proffered wage. There is no evidence in the record that indicates that the 2000 tax return was unavailable and there is no evidence in the record that shows that the director requested the 2000 tax return. As the 1999 tax return was two years before the priority date, it should not have been considered when determining the petitioner's ability to pay the proffered wage in 2001. Furthermore, as noted above, counsel claims that the tax returns provided to the Court were "fictitious" and, therefore, any tax

return not verified by the Internal Revenue Service as authentic should not be considered as evidence of the petitioner's ability to pay the proffered wage in any year. *See Matter of Ho*, 19 I&N Dec. at 591-592.

The petition should be denied for the above stated reasons, with each reason 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.