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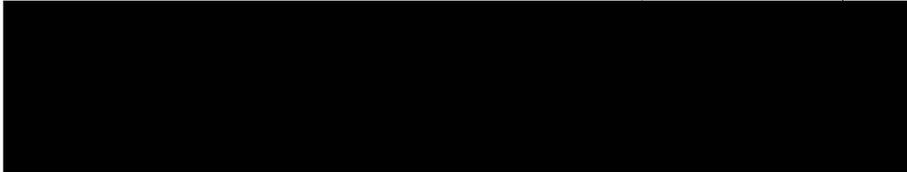
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: DEC 05 2007
EAC 04 166 52514

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

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, initially approved the preference visa petition. Subsequent to obtaining information regarding the petition, 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 remanded for further consideration and entry of a new decision.

Section 205 of the Immigration and Nationality Act (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).

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. 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 the petitioner had not established that it has a need for a foreign food specialty cook or that it qualifies as a restaurant requiring such a position and revoked the visa petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director’s August 2, 2006 NOR, the issues in this case are whether or not the petitioner has established that it requires a foreign food specialty cook or that the petitioner is a restaurant requiring such a position.

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 record indicates that the Immigrant Petition for Alien Worker (I-140) was filed with the Vermont Service Center on May 13, 2004. It was initially approved on September 17, 2004. Following the receipt of information from an investigation, conducted by Immigration and Customs Enforcement (ICE) on May 18, 2005, the director concluded that the I-140 was approved in error and issued a NOIR on May 2, 2006.

In response to the NOIR, counsel submitted an affidavit, dated June 1, 2006, from the owner of the petitioner, a menu from the petitioner, photographs of the interior of the petitioner’s business, and a copy of the first two pages of the petitioner’s 2004 Form 1120S, U.S. Income Tax Return for an S Corporation.

The affidavit from the petitioner’s owner states:

I am the owner of New Garrett Kabab and Grocery;
We are a Pakistani and Indian Halal restaurant and grocery store;

* * *

I have attached a copy of our menu. These items are prepared for our customers for both eat in and take out service. They are prepared using Halal meats in a Tandoori oven; We also sell hoagies and fried foods such as French fries and chicken which are requested by our American customers. We are located in an inner city neighborhood. We get foot traffic from the neighborhood and we sell American food to these people. In addition our grocery carries many products for Americans although we are a Pakistani grocery.

* * *

Our restaurant area has seating for twelve patrons; I spoke to the Immigration Agents who claim that "anyone can prepare and place Kababs in the oven." Those agents knew nothing about Halal meats, were not familiar with spices, the operation of the oven or even the ingredients used in our other dishes and breads; The fact that we have American patrons and carry American products [d]oes not mean that we do not have a need for a cook for our Pakistani and Indian foods; Because [the beneficiary] does not currently have employment authorization, I am forced to do the cooking seven days a week. If the Agent was unable [t]o prepare the foods, why does he conclude that anyone could do so?

The director concluded that the petitioner had failed to establish that it has a need for a foreign food specialty cook or that it qualifies as a restaurant requiring such a position. The director revoked the petition's approval on August 2, 2006 pursuant to section 205 of the Act, 8 U.S.C. § 1155.

The AAO maintains plenary power to review each appeal 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 AAO's de novo authority has been long recognized by the federal courts. *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 upon appeal¹. Relevant evidence submitted on appeal includes counsel's brief and a copy of the report on the investigation conducted by the ICE agents. Other relevant evidence includes a copy of the petitioner's 2003 Form 1120S. The record does not contain any other evidence relevant to the petitioner's need for a foreign food specialty cook or its qualification as a restaurant.

The report conducted by the ICE agents states:

[The ICE agents] asked [the beneficiary] why he is managing a Crown Fried Chicken instead of working at [the petitioner]. At first, [the beneficiary] was reluctant to answer the question, but then stated [the petitioner's owner] would not hire anyone that does not have authorization to work in the United States. [The beneficiary] does not have work authorization. [The beneficiary] claims to earn \$6.00 an hour at Crown Fried Chicken and that if he gets work authorization, he would make \$12.00 or \$13.00 an hour at [the petitioner] as a chef.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[The ICE agents] then went to [the petitioner] and spoke to [the owner]. [The owner] stated he had filed applications of Labor Certification for [the beneficiary] and [redacted] because he needed authentic Indo-Pakistani cooks. [The agents] looked at the menu. Most of the food items on the menu would be considered fast food, chicken wings, chicken fingers, French fries, and an assortment of sandwiches and hoagies. There was about eight different kababs listed that [the petitioner's owner] claimed would be made in a Tandoori oven. A tandoori oven is a stone oven used to cook certain Indian and Pakistani food. There is a concrete tandoori oven in the kitchen. It would appear that the kababs could be prepared and placed in the oven by anyone. This restaurant is a fast food place with no place to sit and eat. I would question the need for a specialty chef in this restaurant. Most of this location is set up as a regular grocery store. It sells candy and house-hold goods. [The petitioner's owner] claims the grocery store and restaurant has been opened for over two years and has no specialty chef working there now.

On appeal, counsel notes:

Upon review of the Notice of Intent to Deny, it should first be pointed out that no where in the record is there a request from the Department of Labor that an investigation of the Petitioner's premises be made as is indicated in the Notice of Intent to Deny.

Second the Petitioner's current employment with Crowne Fried Chicken is relevant only to the extent of whether the Beneficiary intends to work for the Petitioner. Inasmuch as the beneficiary testified he did not have employment authorization, his reason for not working for the Petitioning employer at the time of the investigation is reasonable. By law he is not required to work for the Petitioning employer until he receives his permanent resident status.

Third. The determination that the restaurant was a fast food take out facility as indicated in the Notice of Intent to Deny is not supported by the evidence. The restaurant has seating for twelve and a kitchen equipped to prepare ethnic food and serves ethnic food among other menu items.

* * *

Revocation of an application cannot be based on unsupported statements by the investigators, conclusions, speculations or presumptions. See *Matter of Estime*, 19 I&N Dec. 450 (1987). There must be some good and sufficient cause.

* * *

Immigration authorities are powerless to review the validity of the Secretary of Labor's decision to certify a particular alien for a particular job. The Service cannot independently review the facts surrounding the issuance of the labor certification and revoke the visa Petition as if the labor certification has no effect. See *Castaneda-Gonzalez v. INS*, 183 U.S. App. DC 396, 564 F2d 417 (1977); *Spyropoulos v. INS*, 590 F2d 1 (1st Cir. 1978).

² It is noted that Citizenship and Immigration Services (CIS) records show that the I-140 approved on March 28, 2005 was for Ahmed Amjad, not Shabana Ali.

* * *

Once an alien shows that the Secretary of Labor has made a determination, the Service is not permitted to ignore the determination because of a belief that it is factually defective and then decide that under the correct facts a labor certificate should not have been granted. See *Castaneda-Gonzalez*, supra.

If the USCIS believes that an application was obtained through fraud or willful misrepresentation, it can invalidate the labor certification. See 20 C.F.R. § 656.30(d); OI 204c(8).

In the instant case, the Investigation Report alleges neither fraud nor misrepresentation. It may be an obtuse way to allege that the employer does not intend to employ the alien in the job described. However, the Report does not even make reference to the job described.

There must be good and sufficient cause for revocation. It cannot be based on unsupported statements, conclusions or speculations. See *Matter of Estime*, 19 I&N Dec. 450 (1987). In the instant case the service completely ignored the portions of the report indicating there was a kitchen and in that kitchen was a tandoori oven. They [sic] Service ignored the Pakistani menu items and instead focused on the Investigators statements that American fast foods were prepared and a grocery is also operated.

Clearly there is not sufficient evidence to revoke an I-140 employment based visa Petition on the "Unapproved" Investigator's Report.

Matter of Estime, 19 I&N Dec. 450 (1987) 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 did not have good and sufficient cause to revoke the approval of the petition. The beneficiary is not required to work in the job offered or even in a related job at the time of the investigation. S/he is only required to have the required experience before the priority date. Moreover, the results of the investigation conducted by ICE are in no way conclusive. Furthermore, the report does not explain what criteria were used in determining that the petitioner did not need a foreign food specialty cook to prepare its menu. Instead, the agents merely stated:

I would question the need for a specialty chef in this restaurant. Most of this location is set up as a regular grocery store. It sells candy and house-hold goods. [The petitioner's owner] claims the grocery store and restaurant has been opened for over two years and has no specialty chef working there now.

In the instant case and without specific evidence, the investigative agents determined that the petition should be revoked based merely on supposition. The agents have not supported their claims with any evidence that shows that a foreign food specialty cook is not needed to prepare the Pakistani and Indian food or that the petitioner is a

grocery store and not a restaurant.^{3 4} The AAO finds that the agent's doubts based on the petitioner's lack of a current specialty cook, the petitioner's establishment, and the petitioner's customers do not constitute "good and sufficient cause" to revoke the petition. The AAO also does not agree with the director and does not find, in this case, that the newly created position constitutes "good and sufficient cause" to revoke the petition.

Beyond the decision of the director,⁵ another issue concerning the instant case is whether the petitioner had 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by CIS.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is December 19, 2002. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour or \$24,960 annually.

The petitioner's 2003 and 2004 Forms 1120S reflect an ordinary income or net income of \$28,472 and \$30,126, respectively. The 2003 Form 1120S also reflects net current assets of \$5,442. Schedule L was not provided for the 2004 tax return. Therefore, the AAO is unable to determine the petitioner's net current assets for 2004.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the

³ It is noted that counsel claims to have submitted a copy of the petitioner's business license in response to the NOIR. However, this license is not in the record of proceeding. Had a copy of the business license been present in the record of proceeding, it may have verified the petitioner's authorization to operate as a restaurant.

⁴ The petitioner acknowledges that it is also a grocery store and not just a restaurant. The actual name of the petitioner, [REDACTED] proves this point. Therefore, the issue of the petitioner also being part grocery store is not relevant in the instant case.

⁵ 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).

ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed on December 18, 2002, the beneficiary does not claim the petitioner as a past or present employer. In addition, counsel has not submitted any Internal Revenue Service (IRS) Forms W-2 or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary, for the pertinent years (2003 and 2004). Therefore, the petitioner has not established that it employed the beneficiary from the priority date of December 19, 2002 and continuing to the present.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* at 537.

In 2003 and 2004, the petitioner filed its tax returns as an "S" corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S.

In the instant case, the petitioner's 2003 and 2004 net incomes were \$28,472 and \$30,126, respectively. While it appears that the petitioner had sufficient funds to pay the proffered wage of \$24,960 to the beneficiary in 2003 and 2004, it is noted that the petitioner filed another Form I-140 for an additional employee with the same priority date.⁶ That petition was approved on March 28, 2005. Therefore, the petitioner is obligated to establish not only the ability to pay the proffered wage to the beneficiary, but also to the additional employee of the approved petition with the same priority date. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977)(petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). In the instant case, the petitioner could not have paid the proffered wage of \$24,960 and the wage of the additional employee from its net income in 2003 and 2004 (2003: \$28,472 net income - \$24,960 proffered wage = \$3,512 to pay the additional wage; 2004: \$30,126 net income - \$24,960 proffered wage = \$5,166 to pay the additional wage).

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets in 2003 were \$5,442. The petitioner could not have paid either the proffered wage of \$24,960 or the additional wage from its net current assets in 2003. Schedule L was not submitted for 2004, and, therefore, the AAO is unable to determine if the petitioner had sufficient funds to pay the proffered wage of \$24,960 and the additional wage from its net current assets in 2004.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage to the instant beneficiary and the proffered wage to the beneficiary of the other petition filed by the petitioner beginning on the priority date.

The director must afford the petitioner reasonable time to provide evidence that it has the continuing ability to pay the proffered wage of \$24,960 to the instant beneficiary and the additional wage to the beneficiary of the other petition filed by the petitioner and approved on March 28, 2005 from the priority date of December 19, 2002. In addition, if the beneficiary of the other petition filed by the petitioner, having the same priority date and approved

⁶ EAC 04 256 50807. If this petition is also for a foreign food specialty cook, the director should review the petitioner's need for two cooks on remand.

⁷ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

on March 28, 2005, is for another foreign food specialty cook, the director should review the petitioner's need for two such cooks. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's August 2, 2006 decision is withdrawn. The petition is remanded to the director to be adjudicated on its merits and for entry of a new decision which is to be certified to the AAO for review.