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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

File: [redacted] WAC-01-280-55817 Office: CALIFORNIA SERVICE CENTER Date: JAN 16 2007

In re: Petitioner: [redacted]
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:

[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, Chief
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, California Service Center ("director"). Following approval, the director served the petitioner with a Notice of Intent to Revoke the Approval of the Petition (NOIR). In a decision dated January 26, 2005, the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The petitioner appealed to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a Korean restaurant and seeks to employ the beneficiary permanently in the United States as a cook, specialty foreign foods ("Chef, Korean Specialty"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's January 26, 2005 decision, the case was revoked based on a determination, after the beneficiary was interviewed at a local Citizenship & Immigration Services ("CIS") office in connection with her I-485 adjustment application, that the petitioner failed to establish its intent to engage the beneficiary, and, therefore, failed to establish a valid job offer. Further, the petitioner failed to establish that the beneficiary met the requirements of the certified Form ETA 750.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

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 the decision. The procedural history in this case is long, and will be outlined in greater detail.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for 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.

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

The regulation 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

[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).

> 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.

The history of the case is quite lengthy and complicated, but pertinent to the case, and in order to fully understand its progression, is summarized in a chronology as follows:

- On January 16, 2001, the petitioner filed Form ETA 750 on behalf on the beneficiary for the position of a cook, specialty foreign, for 40 hours per week, at a pay rate of $2,002 per month, equivalent to an annual salary of $24,024;
- On July 23, 2001, the Form ETA 750 was approved;
- On August 16, 2001, the petitioner filed the I-140 Petition on behalf of the beneficiary;
- On December 31, 2001, the director issued an RFE requesting that the petitioner provide documentation that the beneficiary met the experience requirements of the ETA 750; and documentation regarding the petitioner's ability to pay;
- On February 27, 2002, the director approved the I-140 petition;
- On February 26, 2003, the beneficiary attended an I-485 Adjustment of Status interview at a local CIS office in Los Angeles, California, seeking to adjust status to lawful permanent residence on the basis of the approved I-140 Petition;
- On July 7, 2004, the director issued a Notice of Intent to Revoke ("NOIR") the petition's approval on the basis of ability to pay; that the record does not establish the beneficiary has been paid the proffered wage, and therefore, the NOIR questioned the petitioner's intent to engage the beneficiary in accordance with the terms of the job offer. Further, based on an overseas investigation conducted related to the beneficiary's documented prior work experience, a Special Agent sent from the U.S. Embassy contacted a neighbor of the beneficiary who indicated that the beneficiary did not work, but stayed home to raise her children. As the letter in question was the only experience letter provided, the beneficiary did not meet the experience requirements of the certified ETA 750;
- On January 26, 2005, the I-140 petition's approval was revoked.[2] The reasons for the stated denial were: the petitioner had not established its continuing ability to pay the beneficiary; the petitioner had filed five other petitions and the petitioner's quarterly wage statements did not indicate that the individuals were employed, and, therefore, the petitioner failed to establish its intent to employ the beneficiaries in accordance with the job offer. Further, the petitioner failed to provide requested information related to the petitioner's monthly expenses in order to assess the petitioner's ability to pay the proffered wage. Additionally, the petition was denied for the petitioner's failure to document the beneficiary's prior experience, as the one letter provided was discredited by the overseas investigation conducted.

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[2] 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). Accordingly, the director has the authority to revoke the petition at any time for good and sufficient cause. Whether the beneficiary is in the United States or not, has no bearing on this issue.

The petitioner appealed and the matter is before the AAO. On appeal, counsel provides that: "The notice of revocation at page 3, paragraphs 3-8, refers to five other petitions purportedly filed by the petitioner between 1999 and 2003. This evidence is said to lead to a conclusion that the petitioner has failed to establish an intent to engage the beneficiary." Further, counsel asserts that the notice of intent to revoke, "failed to include those factual allegations . . . to the extent that the notice of revocation relies upon the factual allegations of paragraphs 3-8, the petitioner has been denied the opportunity to present rebuttal evidence in violation of . . . 8 CFR § 205.2." Specifically, counsel relies on 8 CFR § 205.2(b), which allows that the petitioner must be given the opportunity to offer evidence in support of the petition and in opposition to the grounds alleged for the approval's revocation. Additionally, counsel contends that the director did not address any of the points raised in the petitioner's Response to Intent to Deny.

We note that instant petition approval was revoked on more than one issue. The petition was revoked for failure to establish an intent to engage the beneficiary, failure to submit a statement of monthly expenses for the petitioner's family to demonstrate the petitioner's ability to pay, as well as a result of the U.S. Consulate investigation.

We find that the petitioner has failed to provide evidence to overcome the findings of the Consulate investigation. The investigation sought to confirm that the beneficiary had the required two years of prior experience listed on the ETA 750. The beneficiary listed on the ETA 750B that she had worked at [redacted], Seoul, Korea, from March 1993 to August 1997 as a Korean Cook. The beneficiary had initially provided a letter to document her experience signed by the restaurant's owner[3] that confirmed she had worked at the restaurant from March 1, 1993 to August 30, 1997 as a Chef (Korean Specialty). This was the only experience that the beneficiary had listed.

Subsequent to the beneficiary's adjustment of status interview at a local CIS office, the director initiated, and a U.S. Embassy Special Agent conducted an overseas investigation to confirm the beneficiary's experience abroad. As clearly set forth in the director's January 26, 2005 decision:

> On November 20, 2003, Special Agent from the American Embassy conducted an unannounced investigation . . . to the restaurant, located at [redacted] Seoul, Korea. The restaurant was out of business and now occupied by a furniture shop [since] September 2001. On February 5, 2004, Special Agent from the American Embassy conducted an unannounced investigation ... to a neighbor in the vicinity of the beneficiary's residence in Korea. She stated that the beneficiary did not have a job and stayed home to raise her kids.

In response to the allegation, the petitioner provided an additional letter from an individual who listed that she resided at [redacted] Seoul, Korea, which would appear to be near the former restaurant. The letter provides that the individual was employed at the restaurant from 1995 to 2000 as a cashier. Further, the letter provides that the beneficiary "was employed as a Korean food cook from the time I began to work there until 1997 or 1998," and that the beneficiary worked full time.

The petitioner did not provide any other evidence to independently confirm the beneficiary's experience, such as pay stubs, or any documents to verify taxes that the beneficiary may have paid. Given the content of the

[3] We note that the owner has the same surname as the beneficiary. However, it is unclear from the record whether the author of the letter is related to the beneficiary.

Consular investigation and the documents provided by the petitioner in response, we cannot conclude that the petitioner has overcome the conclusion of the Consular investigation. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) 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." Further, "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." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Further, counsel alleges that the director failed to raise the issue that the petitioner filed for multiple beneficiaries in the NOIR, but instead only raised this issue in the denial, and the petitioner did not have an attempt to respond to this issue. We note that the petitioner could have provided evidence related to this issue on appeal, but did not provide any evidence related to the employment of the other sponsored beneficiaries. Counsel has failed to address this issue beyond to suggest it was unfair not to list the issue in the NOIR.

As the petition was denied on multiple grounds, and we find that the petitioner has not submitted documentation sufficient to document the beneficiary's work experience, and overcome the Consular investigation, we conclude that the issue related to the other sponsored employees is not relevant. Further, on appeal, counsel has failed to provide any evidence related to the petitioner's employment, or sponsorship of the other beneficiaries.

Based on the evidence submitted, the petitioner cannot demonstrate that the beneficiary meets the qualifications as set forth in the certified ETA 750, and the petition's approval was therefore properly revoked for good and sufficient cause. 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.