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

PUBLIC COPY

[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 15 2007
WAC-00-013-50216

In re: Petitioner:
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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center ("director") initially approved the employment-based preference visa petition. Following approval, the director served the petitioner with a Notice of Intent to Revoke the Approval of the Petition ("NOIR"). Subsequently, the director revoked the Form I-140 approval. The petitioner appealed and the matter is now before the Administrative Appeals Office ("AAO"). The appeal will be dismissed.

The petitioner is a bakery and seeks to employ the beneficiary permanently in the United States as a baker ("Baker Pastries/Breads"). 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 As set forth in the director's August 23, 2006 Notice of Revocation, the petition's approval was revoked based on a determination that the beneficiary did not provide sufficient evidence to show that he had the two years of experience required by the certified labor certification. Further, we find that the petitioner has not adequately demonstrated its ability to pay the beneficiary the proffered wage.

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).[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 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 as follows:

- On October 24, 1995, the petitioner filed Form ETA 750 on behalf of the beneficiary for the position of baker, 40 hours per week, at a pay rate of $9.00 per hour, equivalent to an annual salary of $18,720;
- On September 18, 1999, the Form ETA 750 was approved;
- On October 18, 1999, the petitioner filed the I-140 Petition on behalf of the beneficiary, and listed the following information: established: 1987; gross annual income: $8 Million; net annual income: not listed; and current number of employees: 135;
- On August 27, 2000, the director approved the I-140 petition;
- On April 7, 2006, following a U.S. Consulate investigation of the beneficiary's experience abroad, the director issued a Notice of Intent to Revoke ("NOIR").

Citizenship and Immigration Services ("CIS") requested that the U.S. Embassy in Mexico investigate the beneficiary's listed prior experience as the letter submitted to document the beneficiary's experience did not provide information related to how many hours the beneficiary had worked. The investigator provided in his report that a check with the Mexican Social Security Institute "revealed no employment on record for the named alien." Further, the investigator also attempted to visit the employment address and found that the business did not exist at the address listed, and that there were no other reliable sources through which to verify the beneficiary's claimed employment.

Counsel responded to the NOIR on behalf of the petitioner. Counsel provided in response to the NOIR that the fact that information related to the beneficiary's employment did not appear within the Mexican social security system should not be read as indicative that the beneficiary was not employed as claimed. Counsel explained that the Mexican labor market is a "dual market" comprised of both formal and informal sectors and that large amounts of workers were employed outside of the formal labor market. Further, counsel provided that the beneficiary's prior employer did exist. In support, he provided documentation, including a recent bank statement, and a utility bill for the employer.

On August 23, 2006, the director issued a Notice of Revocation ("NOR").[2] The director noted in the decision that the documents provided in response to the NOIR showed a slightly different address listed for the beneficiary's prior employer. The documents provided listed CP14250 and CR14091 in the prior employer's address, numbers which were not listed on either the Form ETA 750B or on the employment verification letter. The director provided in the NOR that the evidence "does appear to suggest that the identified employer . . . does certainly exist. The evidence, however, does not establish that the business existed during

[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 a petition's approval at any time for good and sufficient cause.

the claimed employment period of January 1984 through June of 1990." Further, the director provided that the petitioner did not submit any evidence to overcome the "non-specific" nature of the prior letter to document the beneficiary's experience as raised in the NOIR. No evidence was provided to show the amount of hours that the beneficiary worked. Further, the NOIR had raised an issue that the beneficiary had not documented prior experience that the beneficiary listed as a "cook" from January 1991 through 1992. No evidence was provided in response to the NOIR to document this experience, although the director noted that this experience would be different than that of a baker. Based on the foregoing, the director determined that the petitioner had not overcome the basis of the NOIR and failed to demonstrate that the beneficiary had the required two years of experience.

Additionally, the director notes that although the I-140 petition was approved on August 27, 2000, evidence in the record showed that the petitioner had not yet employed the beneficiary, and that the beneficiary had been employed elsewhere as an "M/C Operator." This raised an additional issue that the record did not support the petitioner's intent to employ the beneficiary in accordance with the terms of the job offer. The director revoked the petition's approval effective the date of the petition's approval. The petitioner appealed and the matter is now before the AAO.

On appeal, counsel provides: (1) that the beneficiary does have the required experience, and submitted an additional letter to attest to the beneficiary's prior employment; (2) that the beneficiary's prior employer, Super Nazar, does exist, and submitted documentation to show that the business was in operation during the time period in question; and (3) that the petitioner will employ the beneficiary in accordance with the terms of the certified Form ETA 750, and provided copies of paychecks in support.

In examining the issue of the beneficiary's experience, CIS must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date 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 beneficiary must demonstrate that he had the required skills by the priority date. On the Form ETA 750A, the "job offer" provides:

> Our bakery offers a large variety of cakes, pastries, and rolls, as well as specializing in bakery items for the holidays, such as Christmas cookie, Easter Breads, etc. Duties are: Mix ingredients and bake the cakes, pastries and rolls by hand or by electric mixer to form and shape the baked goods. Prepare fillings and fill cakes and pies, decorate birthday or other cakes for special occasions, place baked goods in oven, regulate temperature of ovens and take out baked goods on time.

Form ETA 750 states that the position requires two years of experience in the job offered as a Baker Pastries/Breads. The petitioner listed that only a sixth grade education was required in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, signed by the beneficiary on August 21, 2000, the beneficiary listed his prior experience as: (1) [redacted], Baldwin Park, CA, June 1994 to present (date of signature, October 19, 1995), Polisher/Metal; and (2) [redacted] Inc., Cerrito, CA, April 1992 to May 1994, Polisher/Metal; (3) Golden Specialty Food, Norwalk, CA, January 1991 to January 1992, cook; (4) unemployed, July 1990 to January 1991, and February 1992 to March 1992; (5) Super Nazar S.A. DE C.V., Tlalpan, D.F. Mexico, January 1984 to June 1990, Baker.

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(l)(3):

> (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.

As evidence to document the beneficiary's qualifications, the petitioner submitted:

> Letter from the [redacted] General Manager, [redacted], Mexico, dated October 13, 1995;
> Position title: Baker;
> Dates of employment: January 1984 to June 1990;
> Description of duties: "specialized in Fine Pastries and the making of all types of cookies."

The letter initially provided did not list the hours per week that the beneficiary worked, which would be relevant to determining whether the experience was full-time or part-time and if the hours worked would be equivalent to two years of experience. As a result, CIS requested, and the U.S. Embassy conducted, an investigation of the beneficiary's claimed experience with Super Nazar.

In the NOIR, the director noted that the experience letter did not account for the number of hours that the beneficiary worked as a baker for Super Nazar. The petitioner did not provide any further letters regarding the beneficiary's prior experience in response to the NOIR,[3] but did provide an additional letter, subsequent to revocation, on appeal. The second letter provided:

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[3] The purpose of the request for evidence, is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and

Letter from the [redacted] Legal Representative, Super Nazar S.A. DE C.V., Mexico, dated September 20, 2006;
Position title: Baker;
Dates of employment: January 1984 to June 1990, "full time position, being a job of 40 hours a week;"
Description of duties: "mix ingredients by hand, elaborate cakes and breads, bake bread and take out on time, use mixer to shape the bread and bake. Prepare fillings and fill cakes and pies, Decorate cakes for special occasions."

The second letter submitted does address the issue of the beneficiary's hours of work. However, the issue related to whether the company existed from 1984 to 1990, the years that the beneficiary lists for his employment with Super Nazar, must still be addressed.

Related to this issue, counsel provided the following documents for [redacted] a translated statement from the Mexican Institute of Social Security; a translated water bill for the time period January 24, 2006 to March 27, 2006; a translated bank account statement for the time period February 1, 2006 to February 28, 2006; business tax statements for the years 1984, 1985, 1986, 1987, and 1988; a statement for purchase of oil dated August 23, 1999; and a statement for servicing two vehicles dated October 19, 1990.

We note that the translated business tax statements provide under business "activity" that [redacted] merchandise sold included "fried meet [sic], by-products, fruits, vegetable, liquor, and mixer." The business tax statements do not provide that Super Nazar made or sold bread, pastries, cookies, cakes or the like. From the business tax statements, it would appear that [redacted] was a grocer or small market, but does not indicate that the market had a bakery, or would need to employ a baker.

This discrepancy still raises doubts in the evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), which states: "Doubt raised 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,

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(12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

The petitioner's response to the NOIR focused on the informalities of the Mexican work sector, and why the beneficiary might validly have not appeared in the Mexican Social Security system. The director raised in the NOIR that the experience letter provided did not address the beneficiary's hours of work, and further, questioned that the employer existed at the location specified. Counsel only addressed the beneficiary's work experience in conclusion and provided that "the experience letter filed in support of the application for Labor Certification is evidence of the required two years experience." Counsel did not provide that he could not obtain an additional letter to evidence the beneficiary's experience at an earlier date in response to the RFE. Under such circumstances, the AAO need not accept this evidence on appeal, as the petitioner was previously on notice of the deficiencies. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

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. at 591-592.

The director revoked the approval for good and sufficient cause based on Section 205 of the Act, 8 U.S.C. § 1155. On appeal, the petitioner has failed to overcome the reason for revocation, and demonstrate that the beneficiary has the required two years of experience.

Further, although not raised in the director's decision, the petitioner has not demonstrated its ability to pay the beneficiary the proffered wage. 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).

As noted above, the regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part the petitioner must demonstrate its ability to pay at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence.

In the case at hand, the petitioner filed Form ETA 750 on behalf of the beneficiary on October 24, 1995. In support of the petitioner's ability to pay the proffered wage, the petitioner provided only its Form 1120S federal tax return for the year 1998. While the 1998 tax return would demonstrate the petitioner's ability to pay the proffered wage in that year, the petitioner failed to provide evidence for other years, including the year of the priority date, 1995, as well as for the years 1996, and 1997.

On appeal, the petitioner provided a 2005 W-2 statement showing that the beneficiary received $15,119.77 from Viktor Benes Continental Pastries,[4] which would be below the proffered wage. The beneficiary's 2005 Form W-2 lists Viktor Benes Continental Pastries, Inc.'s Federal Employment Identification Number ("FEIN") as [redacted] with an address of 703 S. Main St., Burbank, CA 91506. The petitioner also provided copies of paychecks. The paychecks from the dates of January 1, 2006 to March 31, 2006 list the employer as [redacted] and exhibit that the beneficiary was paid at an hourly rate of $11.95, which is above the hourly proffered wage. A number of paychecks reflect payment for 35 hours of work. We note that the Form ETA 750 lists that the petitioner will employ the beneficiary 40 hours per week.[5]

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[4] Subsequent to filing Form ETA 750, the petitioner responded to an assessment notice from the Employment Development Department ("EDD"), the California State Workforce Agency, which provided that the petitioner conducts its business "under [the name] Mamolos Continental & Bailey's Bakery Inc." Further the assessment response indicated that the EDD should "amend the name on all forms, from Victor Bene's to Mamolos Continental & Bailey's Bakery Inc."

Information from http://kepler.ss.ca.gov/corpdata/ShowAllList?QueryCorpNumber=C054662&printer=yes accessed on October 22, 2007, the California Business Portal, shows that the petitioner's corporate registration in California State lists Viktor Benes Continental Pastries, Inc.

[5] Upon approval of permanent residence, the petitioner must employ the beneficiary in the position offered, in accordance with the terms of the approved Form ETA 750. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. *See* 20 C.F.R. § 656.30(c)(2).

Subsequently, from the date of April 2, 2006 onward, the beneficiary's paystubs list "[redacted]" with an address of 15424 Sunset Blvd., Pacific Palisades, CA 90272. The petitioner's federal tax returns list FEIN as [redacted]. The paychecks similarly list a pay rate of $11.95 per hour, which is above the hourly prevailing wage of $9.00 per hour, and reflect varying hours between 24 to 40 hours, although more consistently list 40 hours of employment per week.

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. *See* 20 C.F.R. § 656.30(c)(2).

In any further proceedings, the petitioner should provide evidence of its continued ability to pay the proffered wage and that [redacted] and [redacted] operate on a "doing business as" relationship, or that they are related since the information contained in the record exhibits that the two businesses have separate tax identification numbers.[6]

Related to the issue raised in the revocation regarding the petitioner's intent to employ the beneficiary, the petitioner provided evidence to show that it presently employed the beneficiary at an hourly wage higher than the proffered wage, so that this part of the revocation has been overcome.

Accordingly, the petition will remain denied for the above stated reasons. Further, the AAO exercises its de novo authority, and finds that the petitioner has failed to demonstrate its ability to pay the beneficiary the proffered wage from the time of the priority date until permanent residence, 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.

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[6] A corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Alternatively, to continue processing under the labor certification, Viktor Benes Continental Pastries, Inc. would need to establish that it was the successor-in-interest to Mamolos Continental & Bailey's Bakery Inc. To show that the new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Moreover, the petitioner must establish that the predecessor enterprise had the financial ability to pay the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).