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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]

Office: CALIFORNIA SERVICE CENTER

Date:

APR 22 2008

WAC 02 073 50615

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the employment-based preference visa petition on June 20, 2002. In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485) interview, the director issued a Notice of Intent to Revoke (NOIR) the petition. On October 28, 2005, former counsel¹ submitted a response to the director's NOIR. In a Notice of Revocation (NOR), dated November 23, 2005, the director 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 to the director.

The petitioner is a manufacturer and wholesaler of women's clothing. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established the beneficiary's identity because the beneficiary's birth certificate indicated her first name was [REDACTED], while the I-140 petition, and the Form I-485 submitted to the record indicated the beneficiary's first name was [REDACTED]. The director revoked the approval of the petition accordingly.

The record contains an I-290B form submitted by Diana Cobar, Law Offices of Michael J. Gurfinkel, Glendale, California to Citizenship and Immigration Services (CIS) on December 8, 2005. On December 27, 2005, the director rejected the appeal as improperly filed, stating that counsel filed the appeal for the beneficiary and that pursuant to 8 C.F.R. § 103.3(a)(1)(iii)(B), the beneficiary was not the affected party and was not eligible to file the appeal. The petitioner then submitted a motion to reopen/reconsider dated January 5, 2006, with an accompanying G-28 that identified Diana Cobar, from the Gurfinkel firm, as the petitioner's attorney. On February 4, 2006, the director dismissed the petitioner's initial motion to reopen or reconsider stating that the motion to reopen did not state new facts, and the motion, if considered a motion to reconsider, did not state the reasons for reconsideration supported by pertinent precedent decisions to establish that the director's decision was based on an incorrect application of law or CIS policy.

Counsel then submitted a second motion to reopen/reconsider dated February 20, 2006 that stated that the applicant's birth certificate, baptismal certificate, and marriage contract conclusively established her identity and that new evidence was previously submitted. On March 25, 2006, the director again dismissed counsel's motion to reopen or reconsider, stating that the second motion also did not state new facts and that the motion, if considered a motion to reconsider, did not state the reasons for reconsideration supported by pertinent precedent decisions to establish that the decision was based on an incorrect application of law or CIS policy. The petitioner then submitted a timely appeal to the Administrative Appeals Office dated February 23, 2006. The appeal will be remanded to the director.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1155, states that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good

¹ Based on the initial G-28 submitted to the record, initial counsel was Daniel Korenberg, Korenberg, Abramowitz & Feldun, Los Angeles, California. Tasha Lani Huber, of the Korenberg & Abramowitz firm, prepared the brief for the response to the director's NOIR. Current counsel appears to have taken over the petitioner's and/or beneficiary's representation as of the initial I-290B submitted to the record.

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).

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

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

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

In order to properly revoke a petition on the basis of an investigative report, the report must have some material bearing on the grounds for eligibility for the visa classification. The investigative report must establish that the petitioner failed to meet the burden of proof on an essential element that would warrant the denial of the visa petition. Observations contained in an investigative report that are conclusory, speculative, equivocal, or irrelevant do not provide good and sufficient cause for the issuance of a notice of intent to revoke the approval of a visa petition and cannot serve as the basis for revocation. *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988).

In his NOIR, the director stated that questionable information had surfaced during the beneficiary's adjustment of status interview held on February 4, 2005 with regard to the beneficiary's identity. The director noted that the beneficiary's birth certificate indicated the beneficiary's first name was [REDACTED] while the beneficiary had submitted the Form I-485 application to adjust status, using the first name ' [REDACTED] '. The director stated that the beneficiary was asked why she was attempting to adjust her status using the name [REDACTED] and the beneficiary stated that she used [REDACTED] because that is what appeared on her baptism certificate.² The director noted that after her adjustment of status interview, the beneficiary initiated correspondence to make a name change on her birth certificate with the Office of the City Registrar of the City of Malabon. The director further noted that the request for change of name was paid for by [REDACTED] who appeared to be the beneficiary's brother. The director then stated that the beneficiary's true identity could not be established and therefore doubt was cast on whether the beneficiary met all the minimum requirements as stated in parts 14 and 15 of the Form ETA 750, as of the 2001 priority date.³ The

² The record indicates that on a Form WR-827 dated February 8, 2005, the director requested that the petitioner submit documentation from "NSO" to provide a birth certificate for [REDACTED] DOB 01/30/1950.

³ The record reflects that based on the Form ETA 750, the beneficiary had to have six years of grade school and four years of high school, along with two years of experience as a bookkeeper, or two years of experience in a related position performing bookkeeping duties.

director requested that the petitioner provide the beneficiary's original birth certificate, and also her original baptismal certificate.

In response to the director's NOIR, former counsel submitted the following evidence:

A birth certificate for [REDACTED], a handwritten document on pink and green paper with background letters of "NSO." This document has a seal on the back lower left hand corner, and also states "A Certified True Copy Office of The Civil Registrar-General", and is signed by [REDACTED], Statistician Aide, and dated August 17, 1998. This document is accompanied by a Joint Affidavit of Discrepancy signed by [REDACTED] and [REDACTED] dated January 9, 2002. The affiants stated that they knew the parents of [REDACTED] and for this reason, they knew that [REDACTED] and Jesucita Santos were one and the same person;

A birth certificate for [REDACTED] printed on green paper with an National Statistics Office logo in the background. On the bottom of the document under "Remark", it is stated "pursuant to the Decision of CCR, [REDACTED] dated March 4, 2005, under R.A. 9048 with Petition No. [REDACTED] and affirmed by CRF, NSO dated March 16, 2005, the child's first name in the birth Certificate bearing registry number 260 is hereby changed from [REDACTED] to [REDACTED]". This section is signed by [REDACTED], City Civil Registrar, City of Malabon. It contains a document seal and a stamp that states "a certified true copy" and is signed by [REDACTED]. The back of the document also had a stamp that stated the document was issued by a local civil registry personnel who is authorized to issue the same and whose authority was confirmed by the civil registrar general and that the signature of the sample local civil registry personnel which appears on the document is similar to the signature specimen officially submitted and filed with this office. Two more individuals verified this document on March 16, 2005;⁴

The beneficiary's notarized affidavit dated October 25, 2005. In her affidavit, the beneficiary states that she was born [REDACTED] on January 31, 1950 and baptized [REDACTED] on December 16, 1950. According to the beneficiary, her aunt [REDACTED] told her parents to change her name from [REDACTED] to [REDACTED] because children in school could call the beneficiary "[REDACTED]" as a nickname, which in Tagalong meant monkey. The beneficiary further stated that she did not find out about the name change until she was 39 years old, and needed to get a passport to travel to Hong Kong. When she asked for a copy of her birth certificate at the civil registry office, they could not locate her record. Her parents then told her that the birth certificate had the name [REDACTED]. The beneficiary stated that she had never been called [REDACTED] and had been enrolled in school as [REDACTED]. The beneficiary stated that she was never required to show her birth certificate to enroll in elementary, high school or

⁴ The record also contains a document that appears to be the brief submitted subsequent to filing of the I-290B document and prior to receiving the director's notice rejecting the appeal for an improperly filed appeal. Although this document was never discussed by the director, it contains both the beneficiary's certificate of birth and marriage contract, printed on yellow paper with "NSO" noted in very small letters in the background. These two documents are signed by [REDACTED] Administrator and Civil Registrar General, National Statistics Office, and have a blue seal in the upper left hand corner of both documents. There are no stamps from NSO personnel on the reverse of the two documents.

college, but rather only had to produce report cards from the previous school. The beneficiary stated that when the interviewing officer asked her about the use of the name [REDACTED] instead of [REDACTED], she told her that [REDACTED] was the name she had used her whole life, that it appeared on her baptismal certificate and that she had never used the name [REDACTED]. The beneficiary further states that she asked her brother [REDACTED] to go to the record office in the Philippines to have her birth certificate reflect the name [REDACTED] and that on May 5, 2005, the City Civil Registrar granted the petition and added a remark to her birth certificate to indicate the change;

Copy of Certificate of Finality, dated March 16, 2005 that indicates the petition for change of a first name submitted by [REDACTED] had become final and executory. This document is accompanied by a receipt from the city of Malabon that indicates a payment of 3,000 pesos was made by [REDACTED] for the change of name at entry of birth of a child's first name from [REDACTED] to [REDACTED];

An original certificate with a seal from the Muzon United Methodist Church dated October 22, 2005, that states [REDACTED] was baptized on December 16, 1950 in Malabon, [REDACTED]. [REDACTED] also submits a sworn affidavit that states he is the pastor of Muzon United Methodist Church and that sometime in 1955, the records of the baptismal certificates of the church that contained the baptismal certificate of [REDACTED] were damaged by a flood. A second affidavit sworn to by the beneficiary's brother, [REDACTED] Santos accompanies the baptismal certificate. Mr. [REDACTED] identified himself as a Barangay Kagawad (barrio official) at Brgy Muzon, Malabon City, and as the beneficiary's brother, and then states that the baptismal records at the United Methodist Church of Muzon were damaged in 1955;

An affidavit from the beneficiary's aunt, [REDACTED], dated October 27, 2005 that stated she is the beneficiary's godmother and she was present when the beneficiary was baptized. Mrs. [REDACTED] stated that she suggested to her brother and his wife to change the name of their daughter from [REDACTED] to [REDACTED], and that [REDACTED] and [REDACTED] were one and the same person;

Four additional sworn affidavits: Two affidavits dated October 27, 2005 jointly signed by [REDACTED]s, and [REDACTED] in which both women described their knowledge of the beneficiary's grandparents, parents, aunt, and the beneficiary. The two women, in pertinent part, stated that the beneficiary had used the name [REDACTED] as her name. The other two affidavits were signed by [REDACTED] another aunt of the beneficiary, and by [REDACTED], a U.S. citizen and the beneficiary's cousin. The cousin stated that she was aware that the beneficiary always used the name [REDACTED] as the beneficiary was a constant companion and friend in the affiant's early years. The affiant stated that they both resided in the same community, attended Sunday services in the same church, and went to the same elementary school.

Former counsel stated that in response to the director's request for an original birth certificate, he was submitting two certified birth certificates. Former counsel stated that the first certified copy obtained from the

⁵ [REDACTED] previously signed the joint affidavit of discrepancy dated 2002 with regard to the variance in the beneficiary's birth certificate first name and the beneficiary's first name on her baptismal certificate.

National Statistics Office in 1998 was presented to CIS along with the Joint Affidavit of Discrepancy at the time of the beneficiary's adjustment of status interview, and that the 1998 certified copy differs from the second birth certificate submitted that was certified by the National Statistics Office on March 16, 2005. Former counsel stated that the beneficiary's 2005 birth certificate was obtained by the beneficiary's brother, and that although the paper on which the birth certificates are printed appeared different, the discrepancy was due to the time in which the documents were issued. Former counsel states that the National Statistics Office used to print certified copies on pink and blue paper and now it used green paper. Former counsel noted that despite any difference in paper, the National Statistics Office issued both documents as evidenced by the repeating of the name "National Statistics Office" or "NSO" on the background and by the office's official stamp.

Former counsel stated that even though the two birth certificates appear to be handwritten by a different person, both documents contain the same information, namely, that when the beneficiary was born, she was named [REDACTED]. Former counsel also noted that the 2005 birth certificate had an additional notation about the name change. Former counsel stated that the petition referred to in the "remark" section was a petition submitted by the beneficiary's brother to the local civil registrar to officially change the beneficiary's name. Former counsel identified the certified copy of the brother's petition for the change of name and the receipt for the petition as being in the exhibit materials submitted with the response.

On November 23, 2005, the director revoked the instant petition's approval. In his decision, the director stated that the petitioner failed to provide the originals of the beneficiary's birth and baptismal certificates, and that there was no explanation provided as to why the original birth certificate could not be obtained, rather than the two certified copies submitted to the record that counsel claimed were certified by the National Statistics Office on August 17, 1988 and March 16, 2005, respectively.

The director noted that the second certified copy noted a first name change from [REDACTED] to [REDACTED]; however the name change occurred after the beneficiary's adjustment of status interview and appeared highly suspect. The director noted that the birth certificates appeared different in all respects, ranging from the handwriting penmanship that differed on the two documents to the paper on which the two documents were written.

The director stated that the petitioner provided no explanation as to why there were two birth certificates to begin with, particularly since both had supposedly been generated out of the same office. The director then noted that more importantly, the document that the beneficiary claimed was the source of her being baptized and named [REDACTED]" according to an affidavit submitted to the record, was not obtainable.⁶ The director also noted the other affidavits submitted by individuals claiming to be the beneficiary's relatives who attested to the reason the beneficiary was named [REDACTED], but also noted that other than these statements there were no substantiating documents or evidence that clearly established the beneficiary's identity. The director then revoked the petition's approval.

As stated previously, current counsel submitted a Form I-290B dated December 8, 2005, and a brief with exhibits, but the G-28 Notice of Entry or Appearance as Attorney or Representative submitted to the record was signed by the beneficiary. The documents submitted by counsel consisted of a copy of the beneficiary's initial birth certificate, a copy of the baptismal certificate submitted by former counsel, and a copy of a marriage contract between [REDACTED]s and [REDACTED] dated 1973. All three documents had

The director did note the affidavit from [REDACTED] that claimed that the baptismal certificate of [REDACTED] was damaged by a flood sometime in 1955, but did not comment further on this document.

an original stamp on them signed by the Gurfinkel law firm that stated the copies had been compared to the original documents and that they were true copies.

Counsel also stated that the original documents would be submitted to the AAO in the brief, and that certified copies of these documents had already been submitted to CIS by prior counsel. Counsel also submitted an additional declaration from the beneficiary dated December 30, 2005. In this statement, the beneficiary stated that the reason for the change in her first name from [REDACTED] to [REDACTED] was because of the similarity between “chita”, the nickname for [REDACTED], and “cheetah”, the name of Tarzan’s monkey.⁷

On December 27, 2005, the director rejected the appeal as improperly filed. Current counsel then submitted a motion to reopen/reconsider dated January 6, 2006, along with a properly signed Form G-28 and further evidence. This evidence consisted of copies of the beneficiary’s initial birth certificate, baptismal certificate, her marriage contract and a new submission of a college diploma and course transcripts for Yolanda Santos. The director dismissed the motion after determining that no new evidence had been submitted to the record, nor had any precedent decisions been introduced to the proceedings with regard to a motion to reconsider.⁸

Counsel then submitted a second motion dated February 24, 2006, resubmitting all the documents either previously submitted with the appeal/motion to reconsider, or with the first motion. Counsel stated on motion that her office had obtained the beneficiary’s original birth certificate, baptismal certificate, and marriage contract, and reiterated again that original certified copies of these documents were already submitted to CIS by former counsel. On March 25, 2006, the director dismissed the second motion again stating that no new evidence had been submitted to the record, nor had any precedent decisions been introduced to the proceedings with regard to a motion to reconsider. Counsel then submits her appeal to the AAO on April 21, 2006.

On appeal, counsel resubmits the beneficiary’s declaration dated December 30, 2005, submitted with the initial appeal; and copies of the birth certificate for [REDACTED] obtained from the Office of the Civil Registrar in 2002; the certification from Muzon United Methodist Church dated December 2005 as to the beneficiary’s baptism; copies of the beneficiary’s marriage contract, college diploma and transcripts, and copies of the affidavits previously submitted by [REDACTED] and [REDACTED]

Counsel states that the beneficiary did not commit any misrepresentation or fraud when she used the name [REDACTED] as her first name of the Form I-485, rather than [REDACTED], the name on her birth certificate. Counsel notes that the beneficiary has always used the name [REDACTED]. Counsel states that the discrepancy in the beneficiary’s identity resulted from a change by her parents in her first name from [REDACTED] to [REDACTED]. Counsel states that [REDACTED] is the name the beneficiary has always used and the name change was not done to

⁷ Counsel, in both the initial appeal/motion to reconsider, and the subsequent motions, stated that prior counsel’s assertion that the name “chita” means monkey in Tagalog was not entirely accurate. Counsel asserted that the Tagalog term for monkey was “unggoy”, and that the family discussion about changing the beneficiary’s name was based on the similarity between “chita” and “Cheetah”, Tarzan’s monkey.

⁸ The AAO notes that current counsel submitted two new documents with the first motion to reopen/reconsider dated January 5, 2006, namely, a copy of the beneficiary’s claimed college transcript and her college diploma, both documents identifying [REDACTED] as the holder of the two documents. Based on these two documents that had not previously been submitted to the record, the director could have reopened the matter with particular regard to whether these two documents established the beneficiary’s identity any more conclusively. The AAO will comment on these two documents further in these proceedings.

deceive immigration officials. With regard to any misrepresentation by the beneficiary, counsel cites *Matter of S- and B-C-*, 8 I & N Dec. 436, at 448, 449 (A.G. 1961) for the proposition that a misrepresentation made in connection with an application for visa or other documents is material if either (1) the alien is excludable on the true facts, or 2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well result in a proper determination that the beneficiary be excluded. Counsel also notes that 9 FAM (Foreign Affairs Manual) 40.63 N6.3-3 explicitly states that misrepresentations concerning residence and identity are not always considered material.

Counsel also cites *Kungys v. U.S.* 485 U.S. 759 (1988) a Supreme Court decision that noted the misrepresentation of a person's date or place of birth is not material absent any suggestion that the facts were themselves relevant to the alien's eligibility, or a showing that the true date and place of birth would have disclosed other facts relevant to the applicant's qualifications, and would have likely resulted in either an outright denial or a further investigation. The court noted that materiality is a legal question of whether the misrepresentation or concealment was predictably capable of affecting (i.e. had a natural tendency to affect the official decision.)

Counsel notes that in the instant petition, the only reason for the revocation of the beneficiary's I-140 petition was a discrepancy in her first name (emphasis added by counsel.) Counsel states that based on the cases cited previously, the beneficiary's name change is not material, as her application would have been approved if she used the name given to her at birth, namely, [REDACTED]

Counsel repeats the assertion that the reason for the change was due to the fact the nickname of Jesusita was "Chita" and this was similar to the name of Tarzan's chimp, Cheeta. Counsel notes that the change, as documented by the beneficiary's birth certificate, occurred months after her birth. Counsel then notes that although the beneficiary's birth certificate states her first name is [REDACTED], the beneficiary's baptismal certificate, her marriage contract, and her diploma and transcript record from the Philippine College of Commerce all list her first name as [REDACTED]. Counsel notes that the beneficiary's college records date from 1966, some forty years ago.

Counsel notes that the beneficiary's documents all show that [REDACTED] and [REDACTED] share the same date of birth, same place of birth, and same parents.⁹ Counsel reiterates that the beneficiary was not aware of the variance between her first name on her birth certificate and her first name that she used throughout her life until she wanted to apply for a passport to travel outside the Philippines. Counsel also refers to the affidavits submitted by the beneficiary's friends and family to support her use of the name [REDACTED]. Counsel states that all the documents submitted establish that [REDACTED] and [REDACTED] are one and the same person, and therefore the beneficiary did not commit fraud or misrepresentations. Counsel cites to 8 C.F.R. § 103.5 (a)(6) that states a field officer's decision made as a result of a motion may be appealed to the [AAO] only if the original decision was appealable to the [AAO].

The AAO notes that the director in his NOR noted that the petitioner had not submitted the requested original documents with regard to the beneficiary's birth certificate, and also stated that the more important original document, namely the beneficiary's baptismal certificate that allegedly identified her as [REDACTED] was not provided to the record. The AAO also notes that current counsel in the various motions submitted to the record did not address the director's questions with regard to original documents, but rather claimed that while

⁹ Counsel is not entirely correct in this statement. The beneficiary's school records do not indicate the beneficiary's birthdate, place of birth or name of parents.

counsel had the original documents, the documents would be submitted on appeal to the AAO. Upon review of the materials submitted on appeal, the AAO does not find any of the beneficiary's original documents submitted to the record., but rather copies of documents or certified true copies of documents.

Pursuant to the submission of original documents when they are requested by CIS, 8 C.F.R. 103.2 (a)(5) states in pertinent part:

(5) Request for an original document. Where a copy of a document is submitted with an application or petition, [CIS] may at any time require that the original document be submitted for review. If the requested original, other than one issued by [CIS], is not submitted within 12 weeks, the petition or application shall be denied or revoked. There shall no appeal from a denial or revocation based on the failure to submit an original document upon the request of [CIS] to substantiate a previously submitted copy. Further, an applicant or petitioner may not move to reopen or reconsider the proceeding based on the subsequent availability of the document.

Based on the record, former counsel did not submit the beneficiary's original birth certificate in response to the director's NOIR, but rather submitted two certified copies of her birth certificate. The director questioned the differences between the two documents, and determined that the petitioner had not established the beneficiary's identity. However, the AAO is not convinced that the certified true copies of the beneficiary's initial birth certificate are not sufficient, in combination with copies of other documents submitted to the record, to meet the petitioner's burden of proof with regard to the beneficiary's identification. In other words, the record is not clear as to whether an original birth certificate exists, and whether a certified true copy from the Philippines can be utilized in lieu of an original birth certificate.

The AAO notes that the two birth certificates submitted to the record, the second of which has a first name change, contain the same registry number, name of parents, and birth information. The initial birth certificate is written on a form identified as Municipal Form No. 102 (revised Jan. 1945) Modelo No. 102 and apparently copied on pink and green paper with large NSO (National Statistics Office) letters printed on it. The second birth certificate is also on Modelo No. 102 and copied on green paper with "NSO" written in small letters. Both documents have seals on them, and certifications that the documents are true certified copies of the original documents. The paper could be security paper used by the Philippine National Statistics Office that the German Embassy in Manila refers to as SECPA on its consular website. On its website, the consular office explains what kind of Philippine certificates it will examine on behalf of Philippine citizens attempting to use such documents in Germany.¹⁰

As noted previously the second birth certificate has a section entitled "remark" that notes the change of the first name from [REDACTED] to [REDACTED]. This procedure appears to be in accordance with a law passed by the Philippine Government entitled the Republic Act 9048, which went into effect April 22, 2001 and authorized city or municipal civil registrars or consul generals to correct a clerical or typing error in an entry and/or change the first

¹⁰ See

http://www.manila.diplo.de/Vertretung/manila/en/01/Visabestimmungen/MB_checking_of_documents_0506_property=Daten.pdf. (accessed April 11, 2008.)

name or nickname in the civil register without a judicial order.¹¹ Prior to the passage of this law, such name changes could not be done without a judicial proceeding. The new law allows other family members, such as brothers and sisters, to file petitions on behalf of their siblings for such typographical changes or first name changes. General information with regard to procedures for a first name change also mention copies of newspaper publications and a posting of a petition. If this is pertinent to the beneficiary's claimed name change, the record does not reflect any such materials.

One reason for a proposed first name change outlined on the Republic Act 9048 website is that the new first name or nickname has been habitually and continuously used by the petitioner and he [or she] has been publicly known by that first name or nickname in the community. This website also indicates that besides a certified machine copy of the certificate containing the alleged error of entry or entries, not less than two public or private documents upon which the correct entry shall be based should be submitted. Examples of these documents are identified as a baptismal certificate, voter's affidavit, employment record, Social Security Service Record, medical records, school records, driver's license, police clearance, among others.¹² This website indicates the fee for a petition submitted under the new 9048 law is 3,000 pesos (which is what the beneficiary's brother paid, based on receipts submitted to the record). The AAO notes that the record provides some validation for the beneficiary's ability to change her first name as of the passage of the 2001 law; however the record is not complete, as it does not contain any documentation as to the beneficiary's brother's petition submitted to request the name change and the reasons for such a first name change. Nor does the record reflect any newspaper publications or posting of the petition, if this procedure is followed.

In addition, the record does not reflect why there is a second birth certificate apparently transcribed from the original birth certificate, and whether the certified birth certificates submitted to the record are authentic. Prior counsel's explanation as to the change of paper by the NSO explaining the two document's physical appearance is not persuasive. First, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Of more probative weight would have been some authoritative explanation of the weight to be given to certified copies of documents by the Philippine National Statistics Office, and further authentication of the two documents submitted by former counsel and the one document submitted by present counsel in the initial failed appeal.

Nevertheless, both certificates, as counsel notes, contain the same information as also identified on the beneficiary's marriage contract, her baptismal records, namely the beneficiary's name of Yolanda, date of birth, and parents. In addition her school records contain the same name and coursework as indicated on the Form ETA 750. Also, the weight placed by the director on the submission of the beneficiary's original birth certificate is questionable. The director did not indicate that the certificate of baptism submitted to the record is fraudulent. Furthermore, the record contains an affidavit from the pastor of the Methodist Church and a local official who both state the church records containing the beneficiary's original 1950 birth certificate had been damaged by flood.¹³ The record also contains evidence of the beneficiary's claimed school records, and marriage contract, the contents of which are corroborated throughout the beneficiary's I-485 application and I-140 petition that support

¹¹ See <http://www.census.gov.ph/CARAGA/html/RA9048.html>, (accessed April 11, 2008.)

¹² See <http://www.census.gov.ph/data/civilreg/primerra9048.html#Q6> (Accessed April 11, 2008.)

¹³ The AAO notes that this local official is also the beneficiary's brother.

the beneficiary's claim that as long ago as her first marriage in the Philippines in 1973 she was known as [REDACTED]. While her school records do not establish her birth date and parents, the beneficiary's records corroborate further information that she submitted on the Form ETA 750 and which she signed on April 20, 2001 under penalty of perjury. While the affidavits submitted by the beneficiary's friends and family on motion do not constitute evidence, the signature of one affiant, the beneficiary's aunt, [REDACTED] is also found on the beneficiary's marriage contract that she signed as a marriage witness in 1973.¹⁴

The AAO does find the explanation provided by former counsel and by the beneficiary in her first affidavit as to why her first name was changed from [REDACTED] to [REDACTED] to be puzzling. According to her affidavit submitted on appeal, the beneficiary appears to have changed her testimony with regard to why her name was changed based on counsel's knowledge of Tagalog. Based on the record, the beneficiary and some relatives did not know the word for monkey in Tagalog, and present counsel had to both provide an alternate explanation for the meaning of the word "chita" and then have the beneficiary adapt her testimony to follow current counsel's explanation of the change in her second affidavit submitted to the record with counsel's first motion. Nevertheless this change in testimony with regard to an incident that the beneficiary would only know by hearsay would not be sufficient in and of itself to support the revocation of the petition's approval.

The AAO also notes that the record contains the Question and Answer format notes from the beneficiary's adjustment of status interview. The AAO further notes that the eight page Question and Answer interview contains only two questions asked by the interviewing officer with regard to her use of the first name [REDACTED]. These questions are as follows:

- Q: Why do you use [REDACTED] as your legal name?
A: I use it from the start because it is name used on baptism.
Q: Did you have any questions posed to you at the embassy when you asked to get visa and passport under [REDACTED]?
A: No.

On page nine of the interview questions, someone in a different handwriting added a notation that "subject stated under oath nickname for [REDACTED] is "Chita" which means "monkey."

The remainder of the interview consisted of questions about the beneficiary's job in Los Angeles, and the decline in the petitioner's business in late 2002, among other topics.¹⁵ It is not clear as to whether current counsel has any knowledge of the beneficiary's adjustment of status interview that her former counsel did not attend. Current counsel's assertion that no two people could have the same name, date of birth and parents is erroneous. If the beneficiary had a twin sister, the twin's last name, date of birth and parents would be identical to the beneficiary's. The AAO notes that both birth certificates contain a section for multiple births. Although the initial birth certificate has a handwritten slash going into the box that reflects multiple births, the record does not reflect

¹⁴ The AAO notes that Mrs. [REDACTED]'s last name was mistyped in the section identifying witnesses as [REDACTED] while her name and signature on the bottom of the document appear identical to her affidavit signature.

¹⁵ The AAO will address these other topics later in these proceedings.

any further information on any multiple births. The second birth certificate does not have any handwriting slash in the multiple birth section. Thus, the AAO would determine that no evidence has been presented to the record that would support the beneficiary being a twin.

In sum, the AAO finds parts of the beneficiary's testimony, and the testimony of others to be questionable; however, in weighing the materiality of the statements, it does not find the conflicting statements over why the beneficiary was allegedly renamed [REDACTED] to be of sufficient weight and materiality to revoke the petition's approval based on the beneficiary's identity. The record also contains copies of such documents as the beneficiary's college diploma and transcripts, and marriage contract for [REDACTED] or [REDACTED], a divorce decree for [REDACTED] and [REDACTED]. Furthermore the I-140 petition, as well as the I-485 application, contain consistent information as to the beneficiary's claimed education, previous marriage and children, entry into the United States, date of birth, and parents. There are other links between persons signing affidavits for the beneficiary and their previous involvement in the beneficiary's life.¹⁶ While all such coincidences could be viewed as simply establishing that an individual named [REDACTED] did get married, divorced, and went to school, rather than establishing that the beneficiary is actually [REDACTED] the director did not raise this concern in his revocation.

The AAO also notes that there are three examples of copies of the original birth certificate in the record that the director has not declared fraudulent. The director rather questioned why the original birth certificate was not submitted. It is beyond the purview of the AAO to evaluate the authenticity of any of the copies of birth documents submitted to the record; however, the AAO does not view the submission of the certified copies of the beneficiary's birth certificate to be evidence of fraudulent evidence, or misrepresentation.

Thus, the AAO will withdraw the director's decision with regard to the beneficiary's identity and remand the matter back to the director for further consideration of whether any of the birth certificate copies are authentic certified copies that would establish the beneficiary's identity. Furthermore, the AAO remands the matter back to the director to provide current counsel the opportunity to provide more information as to why the original birth certificate was never provided to the record, and as to the use of and authentication of any of the documents submitted to the record as true certified documents establishing the beneficiary's identity. Finally the AAO would suggest that counsel be given the opportunity to provide further information for the rationale behind the different handwriting on the second certified birth certificate submitted by former counsel.

Beyond the decision of the director, there is another reason why the petition's approval could be revoked. The record is not clear that the petitioner established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary receives lawful permanent residency.

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

¹⁶ For example, Mrs. [REDACTED]'s signature as a witness to the beneficiary's wedding in 1973 prior to her signing an affidavit as to the beneficiary's use of the name [REDACTED] in 2005.

(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).

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 nature, for which qualified workers are not available in the United States.

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 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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$15.54 an hour or \$32,323.20 per year. The Form ETA 750 states that the position requires two years of work experience in the job offered or two years of experience in a position performing bookkeeping.

With the initial I-140 petition, the petitioner submitted its Form 1120S for tax year 2000, along with Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return, for tax year 2000. This document indicated that the petitioner had taxable income of \$68,255. In an Request for Further Evidence dated March 12, 2002, the director requested further evidence as to the petitioner's ability to pay the beneficiary's wages, and asked the petitioner to submit tax information for tax year 2001 in the form of copies of annual reports, complete federal tax return, or complete audited financial statements, as well as the beneficiary's Form W-2 Wage and Tax Statement for tax year 2001. The director also requested copies of the petitioner's California Employment Development Department (EDD) Form DE-6 Quarterly Wage Reports for all employees for the last four quarters that were accepted by the state of California. The director stated that the forms should include the names, social security numbers and number of weeks worked for all employees.

In a response dated January 4, 2002, former counsel stated that the petitioner had not filed its 2001 tax return and submitted another Form 7000, for tax year ending December 31, 2001 that requested an extension of time

until September 2002 to file the petitioner's 2001 tax return. Counsel also submitted the petitioner's unaudited income statement for the period of time that ended in December 31, 2001. This document indicates a net income of \$44,663. The petitioner also submitted the beneficiary's W-2 form for tax year 2001 that indicated the petitioner paid the beneficiary, identified as [REDACTED] annual wages of \$9,830.90. The petitioner also submitted DE-6 Forms from the first quarter of tax year 2001 to the first quarter of tax year 2002. These forms indicated a work force of up to ten persons in the first three quarters of 2001, with a work force of four or five persons in the last quarter of 2001 and first quarter of 2002. Based on this evidence, the director approved the petition.

The AAO notes that the petitioner submitted its tax return for tax year 2000 which is prior to the 2001 priority date. Thus the petitioner's net income as of December 2000 is not dispositive of the petitioner's ability to pay the proffered wage, although at the time of filing the instant petition, it appears that the petitioner's 2000 tax return was the most current tax return available. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Furthermore, the AAO notes that the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statement that counsel submitted in response to the director's request for further evidence was not persuasive evidence, and the instant petition was not approvable on the record as constituted when the director approved the petition.

The AAO notes that the beneficiary in her application to adjust her status did submit the petitioner's Form 1120S for tax years 2001, and 2003, and her Forms 1040 for tax years 2001, 2002, and 2003. The petitioner's 2001 tax return provides the Employer Identification Number of 95-4471981 and indicates that the petitioner had ordinary income from trade or business activities of \$35,643. This return does not contain a complete Schedule K, so it is not possible to determine whether the petitioner's other businesses activities would have reduced this ordinary income for tax year 2001.

Included in the documents submitted with the beneficiary's Form I-485 is a letter dated February 2, 2005 signed by [REDACTED] and [REDACTED] owners of [REDACTED]. The letterhead of the letter identifies the business of "[REDACTED] and [REDACTED]" The letter states that [REDACTED] and [REDACTED] owned both [REDACTED] and [REDACTED] and that [REDACTED] is working in the company located at [REDACTED] Los Angeles, California as a bookkeeper. The record also contains a document filed with the state of California Secretary of State entitled "Statement of Partnership Authority" that identifies [REDACTED] as a partnership. This document is filed and endorsed on March 11, 2003.

The beneficiary's 2002 W-2 Form indicates the petitioner paid her \$16,069.64 in tax year 2002. In tax year 2003, the beneficiary's W-2 form indicates that her employer was [REDACTED] and [REDACTED] EIN number [REDACTED]

and she was paid \$6,047, although her Form 1040 indicates she received wages of \$25,216.¹⁷ The beneficiary also submitted [REDACTED]'s Forms 1065 for tax years 2002 and 2003 that indicates no gross receipts or sales for either year and identified the business of [REDACTED] as "property rental, real estate."¹⁸ With regard to the beneficiary's W-2 Form for tax year 2004, this document identifies her employer as [REDACTED] Los Angeles, California and indicates this business paid her \$27,180.78.

Thus, evidence submitted to the record indicates that the beneficiary worked for the petitioner in 2001, and 2002, while [REDACTED] became her employer in tax year 2003 and she continued to work for them in 2004. The record also indicates that [REDACTED] and [REDACTED] c., based on distinct Employer Identification Numbers (EIN) on their tax returns, are two distinct businesses. Although a letter submitted to the record with the beneficiary's I-485 application indicates that the owners of [REDACTED] also own [REDACTED], this statement is not considered persuasive that one business is doing business as the other under a fictitious name. Further the state of California corporate and partnership databases contains no information on the [REDACTED] partnership although it does indicate that the Basement Clothing USA, Inc as of September 11, 2007 has active status. See <http://kepler.sos.ca.gov/corpdata/showALLList?Query=CorpNumber=C1740350&printer=yes>.¹⁹ The record also does not indicate that [REDACTED], qualifies as a successor-in-interest to the petitioner. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage.

The beneficiary in her Q&A statements provided at her adjustment of status interview, talked extensively about her employment with the petitioner. On page four of the statement, the following exchange takes place:

- Q: how many employees with you now.
A: Only 2[two], me and one other person.
Q: What is his name?
A: [REDACTED]
Q: When did business slow down.
A: Last part of 2002.
Q: How many employees there before
A: About 13 employees.

¹⁷ The beneficiary also submitted a Social Security report produced by the Los Angeles, California office and dated March 21, 2005. This document indicates that [REDACTED] also paid the beneficiary \$19,169.17 in tax year 2003.

¹⁸ The 2003 Form 1065 indicates net income of \$116,979 on line 1, page four, Analysis of Net Income (Loss); however, this sum is derived from the petitioner's ordinary income identified on line 1 of Schedule K, which should be identical to line 22, page 1 of the tax return.

¹⁹ The same database refers to [REDACTED] C in Beverly Hills, California, and [REDACTED] San Diego L.L.C., Northridge, California, but contains no information on [REDACTED]

.....

Q: Why did they let them go [and] not you

A: Those assigned to manufacturing & design were let go. They needed bookkeeper to organize records.

Thus the petitioner's business appears to have diminished considerably in late 2002, and the beneficiary began working for her current employer whose business is real estate rentals in 2003 and continued in 2004. Thus the petitioner has not established that it has the continuing ability to pay the proffered wage to the beneficiary as of the 2001 priority date. This raises an additional question as to whether the proffered job is a realistic job offer as of the 2001 priority date and continuing until the beneficiary obtains lawful permanent residency.²⁰

Upon review of the record, based on the lack of clarity as to why the director revoked the instant petition, and the actual weight to be given to the beneficiary's certified certificates from the National Statistics Office in the Philippines, as well as the petitioner's continuing ability to pay the proffered wage, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issues identified previously in these proceedings. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director with regard to the beneficiary's birth and baptismal documentation and to the petitioner's continuing ability to pay the proffered wage as of April 2001. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which is to be certified to the AAO for review.

²⁰ The AAO notes that neither the petitioner nor counsel indicated at any point in these proceedings that the beneficiary wished to explore the possibility of "porting" her approved I-140 to another employer pursuant to the provisions of *American Competitiveness in the 21st Century Act* (AC21), Pub.L.No. 106-313. Thus, the AAO will comment no further on this issue.