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

U.S. Citizenship
and Immigration
Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 0 6 2008

WAC-05-260-51545

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: 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. Based on information obtained during the beneficiary's application for adjustment of status processing at the United States Immigration Court in Los Angeles, California on November 6, 2007, the director consequently served the petitioner with a notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now certified to the Administrative Appeals Office (AAO) for review. The director's April 2, 2008[1] NOR will be withdrawn; however, because the petition is not approvable, it is remanded for further action and consideration.

The petitioner is a towing company. It seeks to employ the beneficiary permanently in the United States as a first-line supervisor/manager of office and administrative support worker (operations supervisor). As required by statute, a Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification) approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the response to her NOIR, the director determined that the petition was approved in error and that the petitioner does not qualify for the benefits sought. Accordingly, the director revoked the petition's approval.

Certifications by regional service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

The regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) states in pertinent part:

> (iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;
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> . . .
>
> (B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act;

Pursuant to the delegation cited above, the AAO exercises the appellate jurisdiction formerly exercised by the Associate Commissioner for Examinations. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on certification. The director advised the petitioner in her NOR that the petitioner was afforded 32

[1] The director misdated her NOR April 2, 2007 instead of April 2, 2008; however, this error does not alter the ultimate outcome of the certification.

days in which he submit a brief or written statement. As of this date, more than approximately four months later, this office has received nothing further. The AAO will make its decision upon evidence in the record.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

The petition was approved on May 6, 2006. The director noted that at the November 6, 2007 hearing the petitioner testified that that at the time of the filing the labor certification application, the proffered position was in fact filled and that the same position remains filled and unavailable on the day of the hearing. Therefore, the director issued a NOIR on February 20, 2008 giving the petitioner 30 days to submit evidence in opposition to the proposed revocation. The director revoked the approval of the petition on April 2, 2008.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security (DHS)], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

The primary issues to be discussed in this case are whether or not job offer was realistic as of the priority date, whether the petition was approved in error and thus whether the director had good and sufficient cause to revoke the approval of the petition.

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

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, was filed on April 25, 2001 and the position offered by the employer to the beneficiary is a full-time "Operations Supervisor" for the employer's, now the petitioner's, business located at [redacted] Item 21 of the ETA 750A states that "[the petitioner has] tried to recruit for this job but ha[s] been unsuccessful." [redacted] the president of the petitioner also certified at item 23(f) of the ETA 750A: "The job opportunity is not (1) Vacant because the former occupant is on strike or is being locked out in the course of a labor dispute involving a work stoppage (2) At issue in a labor dispute involving a work stoppage," and that "The job opportunity's term, conditions and occupational environment are not contrary to Federal, State or local law" and that "The job opportunity has been and is clearly open to any qualified U.S. worker." [redacted] signed the form under declarations that "pursuant to 28 U.S.C. 1746, I declare under penalty of perjury the foregoing is true and correct." Accordingly, on June 21, 2005 the DOL certifying officer certified that "pursuant to the provisions of section 212(a)(14) of the Act as amended I hereby certify that there are not sufficient U.S. workers available and the employment of the above will not adversely affect the wages and working conditions of workers in the U.S. similarly employed."

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). The director determined that [redacted] testified inconsistently when asked about the availability of the job opportunity at the November 6, 2007 hearing. This testimony formed the basis of the director's NOIR:

> The attorney for DHS to [redacted]
>
> Q. Now, is there a person who is performing the duties for which you said you want to hire[sic] this job? Is there a person now in your company?
> A. I know there is somebody.
> Q. Okay. What's the name of that person?
> A. We call him [redacted]
> Q. [redacted] Do you know his last name?
> A. [redacted] Last name is [redacted]
> Q. Is he a relation to you?
> A. Yes.
> Q. How is he related to you?
> A. He is my second cousin I think.
> Q. Okay. And he started as what, general manager?
> A. Yes.
> Q. How long has he been doing that?
> A. Probably about 10 years.
> Q. And is he going to be replaced?
> A. I think he's opening his own company, he's going.
> Q. Does he know he's going to be replaced?
> A. Oh, he, he, he already told me he's leaving pretty soon.
> Q. Do you know ... when the position for which you petitioned [the beneficiary] will actually be open for him to work?
> A. I don't know when he's leaving. He already ... told me as soon as he opens his own company, he's leaving.
> Q. So, is it correct that at the present time –
> A. There is somebody there, yes.
> Q. -- that -- let me finish my question. At the present time, this position for [the beneficiary] is not available. Is, is that correct?
> A. At the time I have somebody working down there right now.

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[2] Although in the court records [redacted] used a different spelling variation for his name from the one on the Form ETA 750A and the Form I-140, the AAO considers that they are the same individual and recognizes [redacted] in the court record as the same individual as [redacted] herewith. *See Transcript of Hearing,* In Removing Proceedings of Matter of [redacted]

Q. All right. So right now as we speak, as we sit today, this position for [the beneficiary], it is not available to him?
A. Not right now.
Q. It's not. Correct?
A. No, it's not, right.
Q. Do you have any ... idea when the position will be available for him to perform?
A. Well, I would say probably about two months.
Q. Two months?
A. Yes, sir.

See Transcript of Hearing, In Removing Proceedings of Mater of [redacted] R.O.P. at 119-121, 124-125.

In response to the director's NOIR, counsel stated that during the testimony under oath, the petitioner was asked the following questions by the undersigned counsel: "Q: when do you intend to hire [the beneficiary]? A: When his application's been approved." (R.O.P. Page 117 line 18) Counsel asserted that this exchange leaves no doubt that the petitioner intends to hire or employ the beneficiary immediately when the application is approved. Counsel asserted that during questions by the government attorney, responses were misconstrued by the government attorney; that [redacted] had earlier explained his cousin, [redacted] who had been the vice president of the company, was helping out by performing the duties of the operation supervisor, sporadically and temporarily but had already indicated to the employer that he would not be able to continue because he was leaving to run his own business, and that in fact, [redacted] is now a shareholder at O.A.L. Tow, Inc. and spends the bulk of his time at that concern. Counsel continued to argue that 20 C.F.R. § 656.10 requires that the job not be "filled" but that the position is available and open; and here [redacted] who had been helping the employer, a relative, by performing the duties of the position, had already indicated he was unable to continue and was interested in running his own business, and therefore, the position was in fact available at the time of filing of the ETA 750. Counsel also submitted an affidavit dated March 13, 2008 from [redacted] and a certificate dated April 2004 from [redacted] the secretary of O.A.L. Tow, Inc. certifying that Naser Noori owned 1,600 shares (16%) of the company stock as of that date to support the response to the director's NOIR.

[redacted] states under the penalty of perjury in his affidavit that:

> During the court proceedings, related to [the beneficiary], on November 6, 2007, certain responses by me were misconstrued by the government attorney, and some of my responses were as a result of my misunderstanding of the questions since English is not my primary language.
>
> At the time of submitting of ETA 750 the position Operation Supervisor was not permanently filled, and the position was available.

Immediately prior to and at the time of submitting the ETA 750 the position was sometimes vacant sometimes filled by myself and sometimes filled by a relative, [redacted], who is my cousin, and had assumed the position of Vice President at the company.

At the time of filling[sic] the ETA 750, [redacted] had already notified the undersigned that he intended to start his own business and was only helping me temporarily since our company had a vacant position of an Operation Supervisor and had been unable to fill the same. [redacted] was in fact looking for a business to buy or start himself and was only helping my company on a temporary basis.

[redacted] eventually become a partner at Westside Towing, a neighboring business, and spends most of his time there. Because of the close proximity to our business, [redacted] has continued to help me from time to time as needed, as I help him and his partners if my assistance is needed.

[redacted] still helps me with my business, but only on a sporadic and temporary basis.

The position of Operation Supervisor is still open and available on a full time basis for [the beneficiary].

will help with a smooth transition to the new Operation Supervisor for a period of three months or less, as needed.

is currently not on our company's payroll, and had not been on payroll for over 3 years. His help to the undersigned is altruistic and as a close cousin.

It is the intent of [the petitioner] to put [the beneficiary] on payroll immediately upon approval of his immigrant visa or issuance of his work permit. The Position was open at the filing of ETA 750 and on the day of hearing on November 6, 2007.

While the AAO concurs with counsel's argument that the current regulations do not require that the position is unfilled but require that the position is open and available, the petitioner must establish that its job offer to the beneficiary is a realistic one, 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. That the position is not permanently filled and is open and available to the qualified U.S. workers is an essential element in evaluating whether a job offer is realistic. A job offer for a permanently filled and unopen or unavailable position obviously cannot be considered a *bona fide* and realistic job offer.

Although [redacted] testimony at the court indicates that the proffered position has been filled, he clearly testifies that [redacted] has been occupying the position temporarily, not permanently. His court testimony does not clearly state whether [redacted] notified him of his temporary occupancy of this **position at or prior to the time of filing the labor certification. However, [redacted] March 13, 2008** affidavit states that at the time of filing the labor certification the position was not permanent filled but was

available because [redacted] had already notified of his intent to start his own business and to help temporarily.

The AAO has not found any inconsistencies between [redacted] testimony in court and affidavit in response to the NOIR. Instead, it is noted that the director has no good and sufficient cause for revoking the approval of the petition because the fact that the proffered position was and has been filled by a person who notified the employer of his temporary service at or prior to the time of filing the labor certification is not sufficient to establish that the position is not open and available to the qualified U.S. workers and thus is not a realistic and *bona fide* job offer. Therefore, this ground of the director's revocation of the petition's approval is withdrawn.

The director also states in the NOR that the beneficiary of this petition filed the application for adjustment of status in December 2006, requesting provisions under the American competitiveness in the Twenty-First Century Act of 2000 (AC21). This office finds that the beneficiary has been working for a company other than the petitioner. The other company provided an employment verification for the beneficiary's qualifying experience. However, the record does not contain any evidence showing that the beneficiary requested to port his job to a new employer at the any stage of the instant immigrant petition and the beneficiary's application for adjustment of status. Therefore, the director's ground of revocation under AC21 is herewith withdrawn.

However, beyond the director's decision and counsel's assertions, the AAO has identified an additional potential ground of ineligibility.

The certified Form ETA 750 in the instant case indicates that the position requires two (2) years of experience in the job offered as an operations supervisor or in the related occupation as general manager-supervisor. The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he indicated that he has been working for OAL Towing Inc. (dba Westside Towing) as a full-time general manager from January 1998 to the present (the form was signed on April 12, 2001). He did not provide further information regarding his employment background on the form.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

In corroborating with the regulatory requirements, the petitioner submitted a letter on Westside Tow letterhead, signed by [redacted] as Vice President, and dated July 15, 2005. This experience letter states in pertinent part that:

> This is to verify that [the beneficiary] is an employee of OAL Towing Inc. He has been working as operations supervisor since January 1999. He is working 50 hours per week. He

directs and coordinates of towing service. Estimates work procedure and oversees personal maters such as hiring, training and termination. Recommends procedure to increase efficiency to meet company goals and requirements.

This experience letter is on the company letterhead, with address and was signed by the writer as Vice President. The letter verifies the beneficiary's more than two years of experience as a full-time operations supervisor prior to the priority date of April 25, 2001, and includes a specific description of the duties performed by the beneficiary. However, this experience letter does not provide the name of the beneficiary's employer clearly. While the letter is on the letterhead of Westside Tow, it verifies that the beneficiary is an employee of OAL Towing Inc. This office accessed California official business portal website which shows that a California corporation named O.A.L. Tow, Inc. with file number [redacted] and agent [redacted] was incorporated on September 2, 1998 and is active at the present, while a company named Westside Tow, Inc. with file number [redacted] and agent [redacted] was established on September 17, 2003 but is now dissolved.[3]

The record contains a certificate dated April 2004 from [redacted], the secretary of O.A.L. Tow, Inc. certifying that [redacted] owned 6,200 shares, [redacted] owned 2,200 shares and [redacted] owned 1,600 shares of the company stock as of that date. Both [redacted] testimony at the court and his affidavit in response to the director's NOIR state that [redacted] has been working for the petitioner as the vice president or general manager for ten years, from 1997 to 2007. However, the record does not contain any evidence supporting that [redacted] was the vice president of either OAL Towing Inc. or Westside Tow and had the authorization to represent the company to issue the experience letter on behalf of the company. Therefore, it is not clear whether the experience letter dated July 15, 2005 from [redacted] a letter from the beneficiary's current or former employer as required by the regulations.

The experience letter also provides inconsistent information about the starting date of the beneficiary's employment with that company. While the experience letter verifies that the beneficiary started this employment in January 1999, the beneficiary stated that he started in January 1998 on the Form ETA 750B and in the testimony at the court on November 6, 2007.

The director may wish to consider whether the petitioner has resolved the above inconsistencies with objective evidence, *see Matter of Ho,* 19 I&N Dec. at 590, such that the petitioner has established the beneficiary's qualifying experience with a specific employer by the submission of evidence conforming to 8 C.F.R. § 204.5(g)(1). The director may wish to request ownership and Federal Employer Identification Number (FEIN) information for all of the above companies.

In view of the foregoing, the previous decision of the director will be withdrawn; however, the petition is not approvable. **The petition is remanded to the director for consideration of the issues regarding the** beneficiary's requisite experience by the beneficiary as discussed above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a

[3] *See* http://kepler.sos.ca.gov/list.html (accessed on July 16, 2008).

reasonable period of time to be determined by the director. 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; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed notice of intent to revoke and final decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.