**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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DATE: NOV 0 1 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn, and the matter will be remanded to the director for further consideration and a new decision.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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 AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

In the director's April 30, 2009 denial, he notes that the petitioner's address is the residential address of [redacted] and [redacted] The director also notes that approximately 108 immigration petitions and/or applications have been filed from this address. The director cites section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

The director concludes that "the evidence submitted establishes a finding of fraud and the petition is hereby denied."

On appeal, counsel objects to the fact that the director did not afford the petitioner the opportunity to address the director's concerns through the issuance of a request for additional evidence or notice of intent to deny prior to concluding that the petitioner had committed fraud. Counsel also indicates that the director's decision was improper, incomplete and makes unfounded allegations against the petitioner.

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[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 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).

Counsel submits a May 27, 2009 affidavit from [redacted] that includes several points. Mr. [redacted] indicates that while the petitioner's corporate headquarters is run out of his private residence in Maryland, the restaurant is located at [redacted]. He notes that the submitted Form ETA 750 and Form I-140 both reflect as much. Mr. [redacted] also states, "That over the past 26 years I have owned and operated eleven successful Mexican restaurants, under various corporations in [redacted]. My home office has served as the corporate office for all of these businesses since 1983." Mr. [redacted] continues, "Due to the high turnover rate in the restaurant business, during the past 26 years, I have filed a number of labor certification applications and immigration petitions for workers for these restaurants, including [redacted] in Vienna, VA." He also notes, "Due to the fact that I have owned and operated several labor intensive businesses over the years, including [redacted] I have filed a number of I-140 Petitions with the Service. However, every one of these petitions has been completely valid and was filed to meet a *bona fide* requirement of the business." (Emphasis in the original.)

Also on appeal, counsel submits the following:

- Document from the Virginia Employment Commission listing the petitioner's corporate address in Darnestown, Maryland and physical address in Vienna, Virginia;
- Certificate from the Fairfax County Virginia that indicates [redacted] has the fictitious name of [redacted]; and
- The petitioner's liquor license from the Virginia Department of Alcoholic Beverage Control.

The petitioner should have been afforded the opportunity to rebut derogatory information prior to the issuance of the decision denying the petition. *See* 8 C.F.R. §103.2(b)(16)(i). The director entered a finding of fraud but failed to adequately articulate the grounds for such a finding and failed to properly notify the petitioner of derogatory information found in "outside public sources" before denying the petition. The petitioner has overcome the two concerns cited by the director in his decision, namely, the fact that the petitioner uses a residential address as its mailing address and the fact that it filed a number of petitions from that address. Thus, the decision of the director will be withdrawn.

However, the AAO notes two additional deficiencies in the record that should be considered by the director on remand. The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful

> permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

While the record establishes the petitioner's ability to pay the instant beneficiary's proffered wage[2] from 2001 through 2006, it does not establish the petitioner's ability to pay all of the beneficiaries of its pending immigrant and nonimmigrant petitions. The petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

In determining whether the petitioner has established its ability to pay the proffered wage to multiple beneficiaries, USCIS will add together the proffered wages for each beneficiary for each year starting from the priority date of the instant petition, and analyze the petitioner's ability to pay the combined wages. However, the wages offered to the other beneficiaries are not considered for the period prior to the priority dates of their respective Form I-140 petitions, after the dates the beneficiaries obtained lawful permanent residence, or after the dates their Form I-140 petitions have been withdrawn, revoked, or denied without a pending appeal.

The petitioner has not established its ability to pay all of the beneficiaries of its pending immigrant and nonimmigrant petitions.

Further, the beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In the instant case, the labor certification states that the offered position requires two years of experience in the offered position of cook.

On the labor certification, the beneficiary claims to have been employed as a chef/cook by [redacted] in New York from November 1997 to December 1999.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

> 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

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[2] The proffered wage as stated on the Form ETA 750 is $11.87 per hour ($24,689.60 per year).

the experience of the alien.

The record contains a letter dated December 1, 1999 from [redacted] Office Manager of [redacted], indicating that the beneficiary had been employed as a chef since November 1997. The letter does not state if the beneficiary was employed on a full-time or part-time basis. Further, the letter conflicts with the beneficiary's G-325A, Biographic Information, signed by the beneficiary on April 25, 2002, stating that he worked as a chef at [redacted] (the address of [redacted] from January 1997 to February 1999, and that he was self-employed from March 1999 onward. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not resolved the inconsistencies regarding the beneficiary's experience with independent, objective evidence of his employment with Baluchi's Indian Foods.

Therefore, the AAO will withdraw the decision and remand the case to the director to request and consider evidence (a) establishing the petitioner's ability to pay the proffered wage to each of the beneficiaries of its pending petitions, including federal tax returns, audited financial statements, or annual reports; and (b) establishing that the beneficiary met the minimum requirements of the offered position with independent, objective evidence of the beneficiary's prior work experience. 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 decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.