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

**U.S. Citizenship and Immigration Services**

(b)(6)

DATE: JUL 2 3 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

**DISCUSSION:** This case comes before the Administrative Appeals Office (AAO) on certification for review from the Director, Texas Service Center (the director), pursuant to 8 C.F.R. § 103.4(a).[1] Upon review, the AAO will withdraw the director's finding of fraud and misrepresentation and his decision to invalidate the labor certification and affirm the director's decision to revoke the approval of the petition.

The petitioner is a restaurant. It seeks to permanently employ the beneficiary in the United States as an Indian specialty cook, pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).[2] As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The petition was initially approved by the Director, Vermont Service Center on September 4, 2002; however, on February 18, 2009 the director reopened the matter and sent the petitioner a Notice of Intent to Revoke (2009 NOIR), stating:

> The Service [referring to U.S. Citizenship and Immigration Services or USCIS] is in receipt of information revealing the existence of fraudulent information in the petitions with Alien Employment Certificates (ETA 750) and/or the work experience letters in a significant number of cases submitted to USCIS by counsel for the petitioner in the reviewed files.[3]

The director also requested the petitioner to submit additional evidence to demonstrate that the petitioner conducted good faith recruiting efforts and that the beneficiary had the requisite work experience as a cook before the priority date.

The petitioner, through Mr. its previous counsel, responded to the director's 2009 NOIR and submitted newspaper advertisements and a letter from of the dated February 14, 2001, to demonstrate its recruitment efforts; and a letter, dated February 25, 2009, from the beneficiary's employer at the time. Mr.

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[1] Under 8 C.F.R. § 103.4(a)(1) allows certifications by district directors to the AAO for review "when a case involves an unusually complex or novel issue of law or fact."

[2] 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.

[3] The AAO notes that the counsel for the petitioner referred to in the text was who originally filed the Form I-140 in this case. Mr. has since been suspended from practice of law before the United States Department of Homeland Security for three years from March 1, 2012. He will be referred to throughout this decision by name or as previous counsel.

stated that it was impossible to obtain "conclusive, verifiable proof of [the beneficiary's] work at a restaurant in India from 11-13 years ago."

On July 30, 2009 the director revoked the approval of the petition, finding that the petitioner failed to demonstrate that it followed all of the DOL recruitment regulations.

Following the director's decision to revoke the approval of the petition, the petitioner through its previous counsel, filed a timely appeal with the AAO. Previous counsel contended that the director had inappropriately revoked the approval of the petition, because that decision was not based on good and sufficient cause, as required by section 205 of the Act; 8 U.S.C. § 1155. He stated that the director's decision to revoke the approval of the petition was based on unrelated cases and the notice did not contain specific information that the petitioner could rebut. Further, previous counsel asserted that USCIS lacked authority to conduct a *de novo* review of the DOL's labor certification.

On December 3, 2012 the AAO issued a decision, finding that while the director appropriately reopened the approval of the petition by issuing the NOIR, the director's NOIR was deficient in providing specifics of the derogatory information for the instant case. The AAO also concluded that the record contained insufficient evidence to support the director's finding that the petitioner committed fraud or willful misrepresentation during the labor certification process. However, the AAO concluded that the petition was not approvable because the record did not contain sufficient evidence to establish the petitioner's continuing ability to pay the proffered wage to the beneficiary or its sponsored workers from the priority date onward, nor did it demonstrate that the beneficiary had the requisite work experience in the job required as of the priority date. The AAO withdrew the director's decision to revoke and remanded the matter to the director for further action and consideration.

The director issued another NOIR on March 6, 2013 (2013 NOIR), indicating that the petitioner has not established the continuing ability to pay the proffered wage from the priority date, and that it has made willful misrepresentation during its recruitment efforts. The director provided 30 days (33 days if mailed) for the petitioner to respond to the 2013 NOIR. However, the petitioner failed to respond to the 2013 NOIR.

On April 10, 2013, the director, in a Notice of Certification (NOC), revoked the approval of the petition and invalidated the labor certification, finding willful misrepresentation involving the labor certification application. The director also concluded that the petitioner failed to demonstrate its continuing ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The director certified the decision to the AAO for review. On May 16, 2013, current counsel[4] for the petitioner requested 30 days to submit a brief in response to the director's decision, which the AAO granted. As of the date of this

[4] submitted a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, signed by the petitioner on March 11, 2013.

decision, the AAO has not received a brief from current counsel or any correspondence from the petitioner. Therefore, the AAO considers the record complete.

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. The AAO will consider all evidence submitted throughout these administrative proceedings in the adjudication of the matter.

As a threshold issue, the AAO will consider whether or not the director adequately advised the petitioner of the basis for revocation of approval of the petition.

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 [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] 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).

This means that the director must provide notice before revoking the approval of any petition. Specifically, 8 C.F.R. § 205.2 reads:

> (a) *General.* Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice to the petitioner** on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS]. (emphasis added).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

> (i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

> A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However,

> where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

The AAO finds that the 2013 NOIR contained specific deficiencies and derogatory information relating to the petition and the petitioner in this case. Both *Matter of Arias* and *Matter of Estime*, as noted above, held that a notice of intent to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof.

In this case, the director pointed out in the 2013 NOIR that the record contains insufficient evidence demonstrating the petitioner's continuing ability to pay the proffered wage from the priority date until the beneficiary receives lawful permanent residence, and that the petitioner's recruitment efforts were not in compliance with the DOL's requirements. Therefore, the AAO finds that the 2013 NOIR contains specific derogatory information relating to the current proceeding that would warrant a revocation of the approval of the petition if unexplained and unrebutted, and thus was properly issued for good and sufficient cause.

As noted above, the director revoked the approval of the petition, in part because the petitioner failed to establish the continuing ability to pay the proffered wage from the priority date. The AAO affirms the director's finding that the petitioner did not establish the ability to pay.

The regulation at 8 C.F.R. § 204.5(g)(2), in pertinent part, provides:

> *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.

The priority date is the date when the Form ETA 750 labor certification was accepted for processing by DOL. *See* 8 C.F.R. § 204.5(d). Here, that date is April 30, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is $12.75 per hour or $23,205 per year based on a 35 hour work week.[5] Therefore, the petitioner is required to demonstrate the ability

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[5] The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. § 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

to pay $12.75 per hour or $23,205 per year from April 30, 2001 and continuing until the beneficiary receives lawful permanent residence. For the purposes of this decision, the AAO will determine whether the director had good and sufficient cause to revoke the approval of the petition based on the petitioner's ability to pay the proffered wage as of the date of approval of the petition, September 4, 2002. As of the date of approval, September 4, 2002, the petitioner's 2002 taxes were not yet due. Therefore, the AAO will look at whether the record demonstrates that the petitioner had the ability to pay the proffered wage in 2001.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The record does not contain any evidence that the petitioner paid the beneficiary in 2001.[6]

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

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[6] The record contains an Internal Revenue Service (IRS) Form W-2, which indicates that the petitioner paid the beneficiary $16,960 in 2004, which is $6,245 less than the proffered wage. In addition, the petitioner submits two letters from the owner of the petitioner, dated September 18, 2002 and October 20, 2005 in which Mr. states that the petitioner paid the beneficiary $485 weekly. The record, however, does not contain any supporting evidence, such as the beneficiary's IRS Forms W-2 for 2002 and 2005. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The AAO does not accept the letters from Mr. as evidence of the petitioner's ability to pay in 2005 as they are not supported by independent, objective evidence. Therefore, the petitioner has not established that it employed the beneficiary and paid wages at least equal to or greater than the proffered wage as of the priority date and onward.

The record indicates that the petitioner was established and elected to become an S corporation in 1988. The petitioner's 2001 corporate tax return reflects that the petitioner's net income was $20,796, which is less than the proffered wage of $23,205.[7] The record contains no other evidence, i.e. payroll records, or IRS Forms W-2 or 1099-MISC, showing the petitioner's ability to pay the proffered wage in 2001.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets.[8] According to the petitioner's 2001 tax return, its net current assets were $7,672, which is less than the proffered wage of $23,205. Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage in 2001.

As noted earlier, 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* at 590. Moreover, where the petitioner of an approved visa petition is not eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for good and sufficient cause. Notwithstanding the USCIS burden to show good and sufficient cause in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

Here, the petitioner has not submitted sufficient evidence to establish ability to pay the proffered wage in 2001. Thus, the director had good and sufficient cause to revoke the approval as the petition was not approvable as of the date of approval in 2002. [9]

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[7] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S.

[8] Net current assets are the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

[9] Nor has the petitioner sown the ability to pay from 2002 until the beneficiary has obtained legal permanent resident status. The record does not contain any evidence of the petitioner's continuing ability to pay. In addition, the AAO notes that a review of USCIS electronic databases reveals that the petitioner has previously filed other Form I-140 immigrant petitions for other beneficiaries. Consistent with 8 C.F.R. § 204.5(g)(2), the petitioner is required to establish the ability to pay the proffered wage of the current beneficiary and also of all other beneficiaries from the date of filing each respective labor certification application until the date

The AAO will next discuss whether there is evidence in the record establishing that the petitioner willfully misrepresented a material fact during the labor certification application process and therefore warranting invalidation of the labor certificate.

With regards to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of DHS has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I).

The administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation for any issue of fact that is material to eligibility for the requested immigration benefit. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho* at 591-592.

Outside of the basic adjudication of visa eligibility, there are many critical functions of DHS that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.

It is important to note that, while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. *See* sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO and USCIS have the authority to enter a fraud or a material misrepresentation finding, if during the course of adjudication, the record of proceedings discloses fraud or a material misrepresentation.

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each beneficiary obtains lawful permanent residence. As noted above, the record contains insufficient evidence establishing the petitioner's continuing ability to pay the proffered wage during the relevant period. In view of the foregoing, the AAO agrees with the director that the petitioner has not established the continuing ability to pay the proffered wage from the priority date onward.

Section 204(b) of the Act states, in pertinent part, that:

> After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien . . . in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition . . . .

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true. Section 212(a)(6)(C) of the Act governs misrepresentation and states the following: "Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, 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 have resulted in a proper determination that he be excluded.

*Matter of S & B-C-*, 9 I&N Dec. at 447. Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

Furthermore, a finding of willful misrepresentation may lead to invalidation of the Form ETA 750. *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

> Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

The director concluded that the petitioner's advertisements did not comply with the requirements set forth in 20 C.F.R. § 656.21(g), and therefore, the petitioner had prohibited the job opportunity from being open to all qualified U.S. workers. The director found the petitioner's noncompliance with the recruiting requirements to be willful misrepresentation. The record contains copies of several newspaper advertisements through which the petitioner announced the position vacancy of an Indian specialty cook. These advertisements are very brief, averaging 11-12 words in total, and stating only the position title, and name and the address of the restaurant. While the AAO agrees with the director that these advertisements are deficient in the specific requirements enumerated in the regulation, the AAO cannot conclude that the petitioner did not conduct good faith recruitment and had engaged in fraud or material misrepresentation with respect to the recruitment process. There has been an insufficient development of the facts upon which the director can make a determination of fraud or willful misrepresentation in connection with the labor certification process based on the criteria of *Matter of S & B-C-*, 9 I&N Dec. at 447. Thus, the director's finding of fraud or misrepresentation is withdrawn. The AAO also withdraws the director's decision to invalidate the labor certification.[10]

Beyond the decision of the director, the AAO finds that the record does not demonstrate that the beneficiary had the requisite work experience in the job offered before the priority date. Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate that the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by DOL and submitted with the petition as of the priority date of April 30, 2001. The name of the job title or the position for which the petitioner seeks to hire is "Cook Indian Specialty." The job description listed on the Form ETA 750 part A item 13 states, "Prepare all types of Indian specialty dishes."

Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered. We note that the beneficiary listed on the following relevant work experience under item 15 of the Form ETA 750, part B:

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|---|---|
| Name and address of employer: | |
| Name of Job: | Cook – Indian specialty |
| Date started: | 1993 |

[10] A finding of fraud or misrepresentation may lead to invalidation of the Form ETA 750. The regulation at 20 C.F.R. § 656.30(d) provides in part: "[A]fter issuance, labor certifications are subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application." As no fraud or misrepresentation determination is made, invalidation of the labor certification is improper.

| | |
|---|---|
| Date left: | 1998 |
| Kind of business: | Restaurant |

The record contains a letter from dated December 27, 2000, stating that the beneficiary was employed as a cook at from 1993 to 1998. The letter, however, does not contain the title of the author or a detailed description of the beneficiary's position as required by regulations. *See* 8 C.F.R. §§ 204.5(g)(1) and 204.5(l)(3)(ii)(A).[11] In response to the 2009 NOIR, the petitioner's previous counsel stated that it was "impossible for [the beneficiary] to obtain conclusive, verifiable proof of her work at a restaurant in India from 11-13 years ago." Therefore, the AAO is not persuaded that the petitioner has established that the beneficiary possessed the minimum two years of experience as an Indian specialty cook as required on the ETA 750 labor certification.[12] In this case, the petitioner failed to provide secondary evidence to include two affidavits or other documentation such as paystubs, payroll records to establish that the beneficiary had the experience in the job offered.[13] Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). For this additional reason, USCIS had good and sufficient cause to revoke the approval of the petition.

In summary, the AAO finds that the petitioner has failed to establish that it had the continuing ability to pay the proffered wage in 2002 as of the date of the petition's approval, or from the priority date onward; and that the beneficiary possessed the minimum experience requirements for the proffered position as of the priority date. The petition's approval will remain revoked for the above stated reasons, with each considered as an independent and alternate basis for revocation. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

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[11] The regulations at 8 C.F.R. §§ 204.5(g)(1) and 204.5(l)(3)(ii)(A) provide, "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."

[12] The record also contains two experience letters from the petitioner's owner, dated September 18, 2002 and October 20, 2005; and a letter from dated February 25, 2009. Among other reasons, these letters cannot satisfy the experience requirements of the labor certification because they are after the priority date.

[13] 8 C.F.R. §103.2(b)(2) states in part, "the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence."

**ORDER:** The director's decision finding fraud and misrepresentation by the petitioner and to invalidate the labor certification is withdrawn. The director's decision to revoke the previously approved petition is affirmed.