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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

Date: MAY 2 4 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 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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On December 10, 2012 the Administrative Appeals Office (AAO) issued a decision withdrawing the director's decision to revoke the approval of the employment-based immigrant visa petition and remanding the matter to the Director, Texas Service Center (the director), for further action and review in accordance with the AAO's decision. On March 18, 2013, the director, after sending the petitioner a Notice of Intent to Revoke (NOIR) and receiving no response, revoked the approval of the petition, invalidated the labor certification, and certified the decision to the AAO for review pursuant to 8 C.F.R. § 103.4(a). Upon review, the AAO will affirm the director's decisions to revoke the approval of the petition.

The petitioner is a bakery store. It seeks to permanently employ the beneficiary in the United States as a baker 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).[1] As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). The petition was initially approved on November 16, 2002, but the approval of the petition was, as indicated above, later revoked and the labor certification invalidated in March 2013. The director found fraud or willful misrepresentation involving the labor certification process. Specifically, the director determined that the petitioner failed to demonstrate that it conducted good faith recruitment in accordance with the U.S. Department of Labor (DOL) recruitment procedures. Additionally, the director found that the petitioner failed to demonstrate the continuing ability to pay the proffered wage from the priority date and that the beneficiary did not have the requisite work experience in the job offered before the priority date.

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.[2]

The AAO notes that the director found fraud and/or willful misrepresentation involving the labor certification process, because the attorney who filed the Form ETA 750 and the Form I-140 petition had been suspended from practicing law before the Board of Immigration Appeals (BIA), the Immigration Courts, and the Department of Homeland Security (DHS) for three years from March 1, 2012 under 8 C.F.R. § 292.3(b). The AAO also observes that the director revoked the approval of the petition and invalidated the labor certification,

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[1] 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.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

because the person who signed the Form ETA 750 and Form I-140 petition, was not authorized to file the applications, as he was not a member of the petitioner's limited liability company (LLC).[3] In addition, the director found that the advertisements from the intended to demonstrate that the petitioner complied with DOL's recruitment regulations did not conform to several DOL's requirements as prescribed at 20 C.F.R. § 656.21(g) (2001), i.e. the advertisements did not describe the job opportunity, did not state the rate of pay, nor did they state the minimum job requirements.

The AAO disagrees. Upon *de novo* review, the AAO finds that the evidence of record does not support the director's conclusion that there was fraud or willful misrepresentation involving the labor certification. 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 documentation submitted to support the beneficiary's qualifications based on the criteria of *Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961).

In accordance with 20 C.F.R. § 656.30(d), U.S. Citizenship and Immigration Service (USCIS) may invalidate the labor certification based on fraud or willful misrepresentation. The term "willfully" in the statute has been interpreted to mean "knowingly and intentionally," as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) ("knowledge of the falsity of the representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary"). Materiality is determined based on the substantive law under which the purported misrepresentation is made. *See Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979).

In response to the director's NOIR dated January 26, 2009 and to demonstrate that the petitioner fully complied with the DOL recruitment requirements, counsel for the petitioner at the time submitted the following evidence:

- Two copies of the advertisements for the position of "Bakers," one published in the on Thursday, November 29, 2001 and the other in the on Sunday, January 28, 2001; and
- A copy of the letter dated February 14, 2001 addressed to from the stating that the advertisements he ordered would be run on

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[3] In the Notice of Certification (NOC) and the Notice of Revocation (NOR), the director noted that only were authorized to sign and file the Form ETA 750 and the Form I-140 as they were the only two members of the petitioning company whose names were listed on the petitioner's certificate of organization and filed with the Secretary of State of the Commonwealth of Massachusetts. The director found this information from the website of the Secretary of the Commonwealth of Massachusetts, Corporations Division (last accessed May 22, 2013).

At the time the Form ETA 750 labor certification was filed on April 13, 2001, DOL accepted two types of recruitment procedures – the supervised recruitment process and the reduction in recruitment process. *See* 20 C.F.R. § 656.21 (2004). Under the supervised recruitment process an employer must first file a Form ETA 750 with the local office (State Workforce Agency), who then would: date stamp the Form ETA 750 and make sure that the Form ETA 750 was complete; calculate the prevailing wage for the job opportunity and put its finding into writing; and prepare and process and Employment Service job order and place the job order into the regular Employment Service recruitment system for a period of thirty (30) days. *See* 20 C.F.R. §§ 656.21(d)-(f) (2003).

The employer filing the Form ETA 750, in conjunction with the recruitment efforts conducted by the local office, should then: place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication and supply the local office with required documentation or requested information in a timely manner. *See* 20 C.F.R. §§ 656.21(g)-(h) (2003). Under the reduction in recruitment process, the employer could, before filing the Form ETA 750 with the local office, conduct all of the recruitment requirements including placing an advertisement in a newspaper of general circulation and posting a job notice in the employer's place of business. *See* 20 C.F.R. §§ 656.21(i)-(k).

The AAO acknowledges, however, that employers filing labor certification before August 31, 2001 were allowed to convert their regular supervised recruitment cases into reduction of recruitment cases. *See* 20 C.F.R. § 656.21(i)(6) (2002). Here, we cannot determine whether the petitioner conducted the supervised recruitment or the reduction in recruitment, as the petitioner appears to have conducted recruitment before and after the priority date (April 13, 2001).

The AAO finds that the record does not contain any inconsistencies or anomalies in the recruitment process. We also note that at the time the petitioner filed the Form ETA 750 labor certification application with DOL for processing in April 2001, employers were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the DOL. *See* 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991.[4] For these reasons, we do not find fraud or willful misrepresentation involving the labor certification.

Moreover, the AAO acknowledges suspension from practicing law before the BIA, immigration courts, and DHS for three years from March 1, 2012. However, the record contains no evidence implicating involvement in the recruitment process or participation in interviewing or considering the job applicants in this case.

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[4] Not until 2005, when the DOL switched from paper-based to electronic-based filing and processing of labor certifications, were employers required to maintain records and other supporting documentation, and even then employers were only required to keep their labor certification records for five years. *See* 69 Fed. Reg. 77386, Dec. 27, 2004 as amended at 71 Fed. Reg. 35523, June 21, 2006; *also see* 20 C.F.R. § 656.10(f) (2010).

Finally, even though the director checked the record of the Secretary of the Commonwealth of Massachusetts and found that only [redacted] as members of the petitioning company, we find that [redacted] was the owner of the petitioner. Thus, the director's finding of fraud or willful misrepresentation is not substantiated by evidence of record and will be withdrawn. Further, the director's decision to invalidate the certified Form ETA 750 will also be withdrawn. Nevertheless, the approval of the petition cannot be reinstated, because the petitioner failed to demonstrate the continuing ability to pay the proffered wage from the priority date and to establish that the beneficiary possessed the requisite work experience in the job offered before the priority date.

Concerning the petitioner's ability to pay, 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. 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 and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As indicated above, the Form ETA 750 was accepted by the DOL for processing on April 13, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is $12.61 per hour or $22,950.20 per year (based on a 35-hour work per week).[5]

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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).

The petitioner submitted copies of the following evidence to show that it has the continuing ability to pay the proffered wage from the priority date:

- A copy of the beneficiary's Internal Revenue Service (IRS) Form W-2 Wage and Tax Statement for 2001; and
- A copy of the petitioner's Profit and Loss from January through December 2001.

The IRS Form W-2 reflects that the beneficiary was paid $17,435.75 by the petitioner in 2001. That amount is $5,514.45 less than the proffered wage. The petitioner's Profit and Loss does not seem to be audited, and therefore cannot be accepted as reliable. 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.

The record does not contain any other evidence with regards to the petitioner's ability to pay. Due to the lack of evidence, the AAO agrees with the director in finding that the evidence submitted above is not sufficient to demonstrate the petitioner's continuing ability to pay the proffered wage from the priority date onwards.

With respect to the beneficiary's qualifications for the job offered, the petitioner must demonstrate, that 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 – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany v. Smith*, 696 F.2d, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Here, as noted earlier the record shows that the petitioner filed the Form ETA 750 labor certification with DOL on April 13, 2001. The name of the job title or the position for which the petitioner seeks to hire is "baker." The job description under item 13 of the Form ETA 750, part A, is "mixes all kinds of doughs, bakes all kinds of breads, doughnuts, bagels, etc." Under item 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.

On the Form ETA 750, part B the beneficiary represented that he worked 35 hours a week as a cook at [redacted] in Brazil, from February 1996 to January 1999. The record contains an employment verification letter dated December 29, 2000 from [redacted]

stating that the beneficiary worked as a baker for from February 1, 1996 to January 29, 1999.

The record also contains:

- A letter of employment verification dated February 9, 2009 from confirming the dates of the beneficiary's employment with and stating that is out of business today; and
- Several copies of the beneficiary's paystubs issued by in 1996 and 1998 containing the word "Padeira" (baker) underneath the beneficiary's name.

On appeal, counsel for the petitioner stated that the evidence submitted above corroborates the beneficiary's dates of employment with the company (from 1996 to 1999) as well as her occupation (baker). Counsel further indicated that the payment receipts also list the CNPJ number under which the company operated during the time period that the beneficiary worked there, although it is now out of business.[6]

In reviewing the CNPJ number, we notice that the CNPJ number shown on the paystubs and the letters of employment verification does not belong to or but instead it belongs to It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Moreover, the AAO notes that the beneficiary did not include her employment abroad on her Biographic Information (Form G-325), which she filed in connection with his Application to Register for Permanent Residence or Adjust Status (Form I-485). Further, the two employment verification letters from did not include a sufficient description of the experience or training of the beneficiary, in accordance with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B).

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

> 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.

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[6] Cadastro Nacional da Pessoa Juridica or CNPJ is a unique number given to every business registered with the Brazilian authority; it is similar to Employer Federal Identification Number (FEIN) in the United States. CNPJ database can be accessed online at:

Simply stating that the beneficiary worked as a baker is not a sufficient description of the beneficiary's training or experience. For these reasons, we agree with the director that the petitioner failed to establish that the beneficiary possessed the minimum qualifications as of the priority date is affirmed.

In summary, the director's finding that there was fraud or willful misrepresentation involving the labor certification will be withdrawn. Similarly, the director's decision to invalidate the labor certification will be withdrawn. Nevertheless, the AAO finds that the director had good and sufficient cause to revoke the approval of the petition. The petitioner has failed to establish by a preponderance of the evidence that the beneficiary had the requisite work experience in the job offered prior to the priority date and that the petitioner has the continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 205 of the Act, 8 U.S.C. § 1155, states, "The Secretary 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. Such revocation shall be effective as of the date of approval of any such petition." 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).

Where the petitioner of an approved visa petition is not eligible for the classification sought, the director may seek to revoke the 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 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. The revocation of the previously approved petition is affirmed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

ORDER: The director's decision to revoke the previously approved petition is affirmed.

FURTHER ORDER: The director's finding of fraud or willful misrepresentation involving the labor certification process is withdrawn.

FURTHER ORDER: The director's decision to invalidate the alien employment certification, Form ETA 750, ETA case number is withdrawn.