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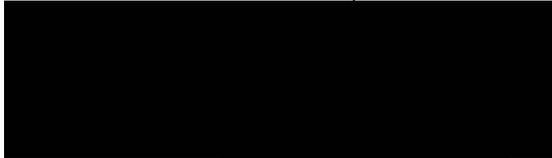
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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Services

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File: [Redacted]
EAC-98-155-52989

Office: VERMONT SERVICE CENTER

Date: DEC 27 2006

In re: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



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, Vermont Service Center (“director”). Following approval, the director 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 petitioner appealed to the Administrative Appeals Office (AAO). The AAO remanded the petition back to the Vermont Service Center to allow the petitioner a further opportunity to address specific points of the revocation. The petitioner provided additional documentation and the director affirmed his revocation decision. The petitioner has appealed to the AAO. The appeal will be dismissed.

The petitioner is an individual and seeks to employ the beneficiary permanently in the United States as an alterations tailor. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director’s April 7, 2005 decision, the petition’s approval was revoked based on a determination, after the beneficiary was interviewed at a local Citizenship & Immigration Services (“CIS”) office in connection with her I-485 adjustment application, that the petitioner did not have a full time need for a tailor as set forth in the labor certification. Further, we find that the petitioner has not demonstrated that the beneficiary is qualified for the proffered position.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. The procedural history in this case is long, and will be outlined in greater detail.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 nature, for which qualified workers are not available in the United States.

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

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

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 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).

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The history of the case is quite lengthy and complicated, but pertinent to the case, and in order to fully understand its progression, is summarized in a chronology as follows:

- On August 27, 1997, the petitioner, [REDACTED], filed Form ETA 750 on behalf on the beneficiary for the position of alterations tailor, for 40 hours per week, at a pay rate of \$8.99 per hour, equivalent to an annual salary of \$18,699.20;
- On April 6, 1998, the Form ETA 750 was approved;
- On May 1, 1998, the petitioner filed the I-140 on behalf of the beneficiary;
- On August 1, 1998, the director approved the I-140 petition;
- On September 20, 2000, the beneficiary attended an I-485 Adjustment of Status interview at a local Immigration and Naturalization Service Office (“INS” now Citizenship and Immigration Services, “CIS”) in Baltimore, Maryland, seeking to adjust status to lawful permanent residence on the basis of the approved I-140 Petition;
- On October 16, 2000, following the beneficiary’s interview to adjust her status to permanent residence, the district director issued a Notice of Intent to Deny her application for permanent residence, which summarized the deficiencies identified as a result of her interview.

At the interview, the petitioner explained that he did not own a tailoring business, but that the beneficiary would be performing alterations for the petitioner and his wife, and that from time to time the petitioner asked the beneficiary to do work for his family. Further, the petitioner knew the beneficiary because she was a friend of his wife. The beneficiary was unable to provide evidence that the petitioner had previously employed or paid her, despite the fact that she had obtained a work permit and had the ability to work in connection with the filing of her adjustment of status application. The beneficiary submitted evidence that she was employed by McDonald’s on a part-time basis through which income she supported herself. The district director concluded that the beneficiary did not have the intent to commence employment with the petitioner in accordance with the terms of the labor certification. Further, the district director concluded that it was unlikely that the petitioner had the legitimate need for individual tailoring services for 40 hours per week as he did not own an alterations business.

- On September 12, 2002, the director issued a Notice of Intent to Revoke (“NOIR”);
- On December 30, 2002, the I-140 was denied and accordingly revoked;²

² 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 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

- On January 17, 2003, the petitioner appealed revocation to the AAO;
- On September 17, 2004, the AAO remanded the petition back to the director to provide the petitioner with more specific information regarding the grounds of revocation and an opportunity for the petitioner to respond to those allegations;
- On November 24, 2004, the director issued a Notice of Intent to Revoke (“NOIR”) the petition;
- Following examination of the petitioner’s response to the NOIR, on April 7, 2005, the director remanded the petition’s approval for failure to overcome the grounds of revocation. Specifically, the petitioner’s response failed to convince the director that the petitioner required the beneficiary’s services as a tailor for 40 hours per week. Further, the petitioner was unable to convince the director that the beneficiary’s primary source of income was not McDonald’s based on information and paystubs provided during the beneficiary’s I-485 Adjustment of Status interview.

The petitioner appealed and the matter is before the AAO. On appeal, counsel provides: “the decision of [CIS] is an abuse of discretion and contrary to law since the Beneficiary would provide tailoring needs for the petitioner for at least 35 hours per week.” Counsel indicated that he would send an additional brief in thirty days. No brief or further information was received. Counsel’s office was contacted by fax and phone, however, no further information was provided.

Based on a review of the record of proceeding, we cannot conclude that the petitioner has overcome the grounds for revocation to show that the petitioner has a need for a full time tailor. The petitioner claims to be an individual physician. The petitioner’s tax returns show that he is employed by a hospital. Counsel provides in his prior December 22, 2004 response to the NOIR that “it was his intention as a physician to have the beneficiary perform all tailoring and alterations arising out of his business.” Counsel does not elaborate on the nature of the petitioner’s business. We note that in a January 5, 2001 letter counsel provides: “Also, note petitioner never purports to own tailoring business, he is a physician and employs her to alter fit his garments.” We note that these two statements potentially conflict with each other, and with other information in the record. The conflict in evidence raises significant doubts regarding the petitioner’s need for a full time tailor. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), which states: “Doubt raised on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.” Further, “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. at 591-592.

Further, the Form ETA 750 job description provides that the beneficiary’s job duties are to alter clothing “to fit individual customers.” This phrase would imply that the beneficiary would be performing alterations for a number of customers, rather than for the petitioner on an individual basis. Nothing demonstrates that as an individual, the petitioner would require the beneficiary’s services on a full time basis. The petitioner did not provide documentation to demonstrate his work at the hospital requires the alteration of an extensive work based wardrobe or uniform, and did not demonstrate extensive personal tailoring needs. We also note that the certified ETA 750 provides that the position is for 40 hours of work per week. On appeal, counsel has listed that the beneficiary would “provide tailoring needs for the petitioner . . . for at least 35 hours per week. The petitioner cannot now reduce the number of hours that the beneficiary will work. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See*

Dec. 582, 590 (BIA 1988). Accordingly, the director has the authority to revoke the petition at any time for good and sufficient cause. Whether the beneficiary is in the United States or not, has no bearing on this issue.

Matter of Izummi, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Further, as noted in the April 7, 2005 denial, the beneficiary provided paystubs at her adjustment interview to exhibit employment with McDonald's, which raised the issue of whether the beneficiary intended to commence employment with the petitioner.

The petitioner has failed to submit any evidence to allow us to conclude that the petitioner may overcome the director's decision to revoke the petition's approval, that the petitioner required the beneficiary's services for 40 hours per week, and that the beneficiary intended to commence employment with the petitioner. On that basis, we conclude that the director did have good and sufficient cause to revoke the petition's approval.

Additionally, although not raised in the director's decision, the petitioner has failed to document that the beneficiary has met the qualifications of the certified ETA 750. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision.³ See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS 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, *Mandany v. Smith*, 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d).

The beneficiary must demonstrate that she had the required skills by the priority date. On the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered, as a alterations tailor with job duties partially including: "alters clothing to fit individual customers or repairs defective garments, following alteration or repair tags or market on garments: examines tag or garment to ascertain necessary alterations. Removes stitches from garment, using ripper or razor blade." The petitioner listed education requirements of high school in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, the beneficiary listed her prior experience as: self-employed tailor from January 1970 to April 1990, Haiti, where she completed alterations for individual customers.

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(I)(3):

(ii) *Other documentation*—

³ We note that the September 17, 2004 AAO decision raised the issue that the petitioner had not provided any evidence of the beneficiary's work experience.

(A) *General.* 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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

As evidence to document the beneficiary's qualifications, the petitioner submitted: a certificate from "Magic Hands" and from Social Affairs Labor to certify that she completed sewing courses from October 1966 to July 1969. We note that this would document coursework rather than experience. No letters were provided to document the beneficiary's experience. As the record contains no confirmation of the beneficiary's work experience, the petition should have been denied on these grounds as well.

Accordingly, the petition's approval was properly revoked for good and sufficient cause. The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.