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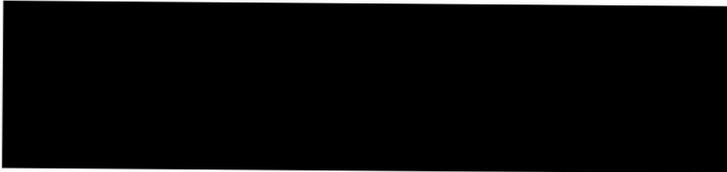
IN RE:

Petitioner:
Beneficiary:



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:



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.

A handwritten signature in cursive script, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Vermont Service Center. The director served the petitioner with notice of intent to revoke the approval of the petition. In a Notice of Revocation (NOR), the director revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a hostess. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that the beneficiary had two years of experience in the offered position as required on the Form ETA 750, and revoked the petition accordingly.

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. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 15, 2005 NOR, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The director noted inconsistencies in information pertaining the beneficiary's employment experience.

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 demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on June 2, 1997.¹

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 appeal². On appeal, counsel submits a brief, a copy of a memorandum dated June 18, 2002 from the American Embassy in Tashkent, Uzbekistan,³ a copy of a memorandum dated February 16, 2005 from William R. Yates, Associate

¹ The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

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).

³ The memorandum states that the Embassy was unable to verify the authenticity of the beneficiary's experience letter because the building is no longer in existence. The memo states that the building

Director, Operations, Citizenship and Immigration Services (CIS), regarding requests for evidence and notices of intent to deny, a previously submitted letter dated April 28, 1999 from Mamma Mia Pizzeria regarding the beneficiary's prior work experience, a previously submitted affidavit dated April 21, 2005 from the beneficiary, a previously submitted affidavit dated April 21, 2005 from [REDACTED] regarding the beneficiary's prior work experience, a previously submitted affidavit dated April 11, 2005 from [REDACTED] regarding the beneficiary's prior work experience, a previously submitted affidavit dated April 10, 2005 from [REDACTED] regarding the beneficiary's prior work experience, a previously submitted Certificate issued by the State Tax Inspection of Sergeliyskiy District in Uzbekistan regarding the beneficiary's former employer, and an affidavit dated June 1, 2002 from [REDACTED] regarding the beneficiary's prior work experience. Other relevant evidence in the record includes a letter dated May 22, 2002 from Mamma Mia Pizzeria regarding the beneficiary's prior work experience. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the director applied an erroneous standard of proof to the beneficiary's evidence of employment. Counsel states that the standard is "preponderance of the evidence" and that the director erroneously required the petitioner to "clearly establish" the beneficiary's previous employment. Counsel further states that the director failed to consider affidavits and other evidence submitted by the petitioner relating to the beneficiary's previous employment experience. Finally, citing *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir. 2004), counsel asserts that CIS did not have legal authority to issue a notice of intent to revoke because the notice was not issued prior to the commencement of the beneficiary's journey to the United States pursuant to 8 U.S.C. § 1155.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of hostess. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|-------------------------|-------|
| 14. | Education | |
| | Grade School | blank |
| | High School | blank |
| | College | blank |
| | College Degree Required | blank |
| | Major Field of Study | blank |

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

where the restaurant was located has been destroyed.

The beneficiary set forth her credentials on Form ETA-750B and signed her 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, she represented that she worked as a hostess for Mamma Mia Restaurant from June 1996 to the date she signed Form ETA-750B and that she worked as a hostess for Vzbekistan Tashkent in Russia from January 1994 to February 1996. She does not provide any additional information concerning her employment background on that form.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation*—

(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.

On appeal, counsel asserts that the director applied an erroneous standard of proof to the beneficiary's evidence of employment. Counsel states that the standard is "preponderance of the evidence" and that the director erroneously required the petitioner to "clearly establish" the beneficiary's previous employment. However, 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 Dec. 582, 590 (BIA 1988). The director reviewed the affidavits and other evidence submitted by the petitioner and determined that the evidence only supported the fact that the restaurant existed and that other people may have been employed at the restaurant. The director further determined that the record failed to clearly establish that the beneficiary had the necessary two years of work experience required by the Form ETA 750. Therefore, the director revoked the petition for what he deemed to be good and sufficient cause. There is no indication that the director applied an erroneous standard of proof in the instant case.

However, counsel's argument that the director failed to consider affidavits and other evidence submitted by the petitioner relating to the beneficiary's previous employment experience cannot be overlooked. We find that the findings by the Embassy noted herein constituted good and sufficient cause for revoking the approval under 8 U.S.C. § 1155. *See Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). However, the petitioner provided objective independent evidence to rebut the findings by the Embassy.⁴ Based on the foregoing

⁴ A petitioner may submit secondary evidence if the required documents do not exist or cannot be obtained. If secondary evidence does not exist or cannot be obtained, the 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. *See* 8 C.F.R. § 103.2(b)(2)(i). This office accepts the affidavits submitted by the

analysis, the decision of the director that the evidence submitted by the petitioner failed to establish that the beneficiary had the required experience as a hostess was incorrect. The assertions of counsel on appeal are sufficient to overcome the decision of the director.

In his brief, counsel draws the AAO's attention to an opinion issued by the United States Court of Appeals for the Second Circuit, *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir. 2004). In that opinion, the court interpreted the third and fourth sentence of section 205 of the Act, 8 U.S.C. § 1155 (2003), to render the revocation of an approved immigrant petition ineffective where the beneficiary of the petition did not receive notice of the revocation before beginning his journey to the United States. *Firstland*, 377 F.3d at 130. Counsel asserts that the reasoning of this opinion must be applied to the present matter and accordingly, CIS may not revoke the approval because the beneficiary did not receive notice of the revocation before departing for the United States, since she was already in the United States when the director issued the revocation.

According to the record, the petitioner is located in South Salem, New York; thus, this case did arise in the Second Circuit. Although this case did arise in the Second Circuit, *Firstland* is no longer a binding precedent. On December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (S. 2845). See Pub. L. No. 108-458, 118 Stat. 3638 (2004). Specifically relating to this matter, section 5304(c) of Public Law 108-458 amends section 205 of the Act by striking "Attorney General" and inserting "Secretary of Homeland Security" and by striking the final two sentences. Section 205 of the Act now reads:

The Secretary 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 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.

Furthermore, section 5304(d) of Public Law 108-458 provides that the amendment made by section 5304(c) took effect on the date of enactment and that the amended version of section 205 applies to revocations under section 205 of the Act made before, on, or after such date. Accordingly, the amended statute specifically applies to the present matter and counsel's *Firstland* argument no longer has merit.⁵

The issue is whether the beneficiary met all of the requirements stated by the petitioner in block 14 of the labor certification as of the day it was filed with the DOL. The petitioner has established that the beneficiary had the required experience.

However, beyond the decision of the director, the petitioner has not shown its continuing ability to pay the proffered wage beginning on the priority date.⁶ The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

petitioner as sufficient evidence of the beneficiary's previous work experience.

⁵ The *Firstland* opinion summarily overturned 35 years of established agency precedent. See *Matter of Vilos*, 12 I&N Dec. 61 (BIA 1967). Counsel's arguments illustrate the illogical effects of the Second Circuit's reasoning. In the present matter, the beneficiary entered the United States on March 1, 1996, more than three years prior to the filing of the Form I-140 immigrant petition and more than nine years prior to the revocation of the petition's approval. Accordingly, it was physically impossible for CIS to have notified the beneficiary of the revocation before she departed for the United States. In effect, counsel's interpretation of *Firstland* would have created a situation where any alien would have an irrevocable immigrant visa petition if the alien simply waited until after he or she arrived in the United States to file the petition.

⁶ 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. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683

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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 CFR § 204.5(d). Here, the proffered wage as stated on the Form ETA 750 is \$362.00 per week (\$18,824.00 per year). Relevant evidence in the record includes the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for fiscal year 1996 and the petitioner's bank statements for January through August 1998. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.⁷

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 determining the petitioner's ability to pay the proffered wage during a given period, CIS 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. In the instant

(9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews cases on a de novo basis).

⁷ CIS electronic records show that the petitioner filed five other I-140 petitions which have been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, 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. Comm. 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). See also 8 C.F.R. § 204.5(g)(2). The other petitions submitted by the petitioner in May 2000, August 2001, December 2001, April 2002 and April 2004 were approved in September 2000, October 2001, February 2002, July 2002 and January 2005, respectively. The record in the instant case contains no information about the proffered wage for the beneficiaries of those petitions, about the current immigration status of the beneficiaries, whether the beneficiaries have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. Furthermore, no information is provided about the current employment status of the beneficiaries, the date of any hiring and any current wages of the beneficiaries.

case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date or subsequently.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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).

For a C corporation, CIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on August 16, 1999. As of that date, the petitioner's fiscal year 1998 federal income tax return was not yet due.⁸ The petitioner's IRS Form 1120 stated net income of \$41,816.00 in fiscal year 1996.⁹ Therefore, for fiscal year 1996, the petitioner had sufficient net income to pay the proffered wage of \$18,824.00. However, the petitioner has not established that it has sufficient net income to pay the combined proffered wage for the instant petition and the five other approved petitions.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹⁰ 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. The petitioner's IRS Form 1120 stated net current assets of -\$320,420.00. Therefore, for fiscal year 1996, the petitioner did not have sufficient net current assets to pay the proffered wage.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

⁸ This office notes that the record does not contain the petitioner's 1997 federal income tax return. Therefore, the petitioner's net income and net current assets may not be analyzed against the difference between the wages actually paid to the beneficiary and the proffered wage in 1997.

⁹ This office notes that the petitioner incorrectly calculated Line 11 of its IRS Form 1120 for fiscal year 1996. It is doubtful that the IRS processed the return as submitted to the AAO by the petitioner. Doubt cast 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

¹⁰ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

In view of the fact that the petitioner has overcome the director's basis of revocation, but another ground of ineligibility exists that was not raised by the director in his NOR, the director's NOR will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent, including evidence that the petitioner had the ability to pay the proffered wage beginning on the priority date and continuing to the present. Similarly, the petitioner may provide additional evidence within a 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 NOR is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.