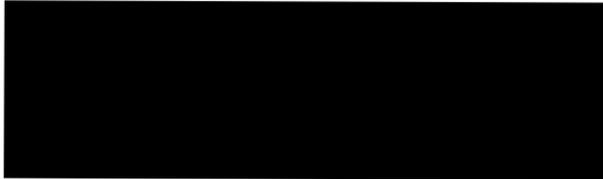


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U.S. Citizenship
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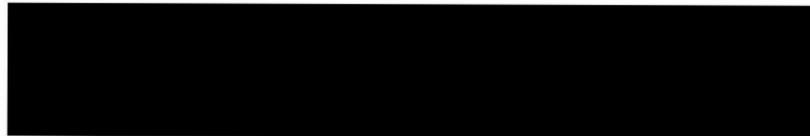
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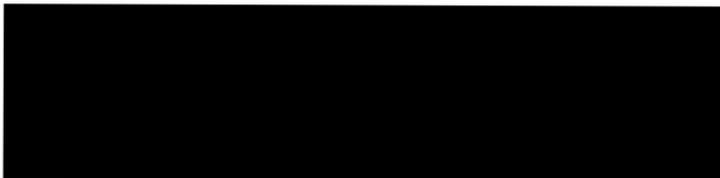
FILE: WAC 05 165 53263 Office: CALIFORNIA SERVICE CENTER Date: **AUG 28 2007**

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:

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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The director determined that the labor certification was not valid for the proposed employment, which the director found was not at the address listed on the labor certification. The director noted that non-Schedule A labor certifications are only valid within the area of intended employment as stated on the labor certification. As the intended employment and the address shown on the labor certification are not the same, nor within the same Metropolitan Statistical Area (MSA)¹ the director denied the petition.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact and is accompanied by new evidence. The procedural history of this case is documented in 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 decision of denial the sole issue in this case is whether or not the petitioner has demonstrated that the job offer is within the area of intended employment stated on the Form ETA 750 within the meaning of 20 C.F.R. § 656.30(c)(2).

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 granting 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 regulation at 20 C.F.R. § 656.30(c)(2) states that a labor certification is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the *Application for Alien Employment Certification* form. [Emphasis in the original.]

The AAO reviews *de novo* issues raised in decisions challenged on appeal. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.²

The Form ETA 750 Application for Alien Employment Certification in this matter was submitted on April 12, 2001. That application originally stated that the petitioner's address is [REDACTED] in Huntington Park, California. It was amended to state that the petitioner's address is [REDACTED] in [REDACTED].

¹ The DOL Technical Assistance Guide defines the "area of intended employment" as "area of normal commuting distances within the standard [MSA]."

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

Huntington Park, California.³ That amendment was approved and the position was certified. The Form I-140 petition also states that the petitioner's address is 6611 South Alameda Street.

In response to a request for evidence issued October 15, 2005 the petitioner submitted (1) a California State board of Equalization Seller's Permit, (2) a City of Fullerton Business Registration Certificate, (3) a California Department of Alcoholic Beverage Control Alcoholic Beverage License, and (4) Board of Equalization Sales and Use Tax Prepayment Forms. Each of those forms shows that the address of [REDACTED] is [REDACTED] in Fullerton, California.

Huntington Park, California is in Los Angeles County. Fullerton, California is in Orange County. Although an MSA may encompass two or more counties, Los Angeles/Long Beach is in a MSA separate from the Orange County MSA. Huntington Park and Fullerton are not, therefore, in the same MSA. The director determined that the evidence submitted did not establish that the approved labor certification is valid for the proposed employment and, on January 25, 2006, denied the petition.

On appeal, counsel submitted (1) a Los Angeles County Public Health Operating Permit, (2) a Department of Alcoholic Beverage Control Alcoholic Beverage License, (3) a California State Board of Equalization Seller's Permit, (4) a Huntington Park Business License, and (5) a Los Angeles County Fire Department Permit. Each of those documents states that the address of [REDACTED]'s Restaurant is [REDACTED] in Huntington Park, California.

On appeal counsel stated, "The address of Fullerton, Ca is the corporate's address where the payroll, and taxes originates." [Errors in the original.] Counsel stated that the petitioning business is at [REDACTED] in Huntington Park, California.⁴ Counsel did not state why, if the Fullerton address is only the location of the petitioner's administrative offices, rather than a restaurant, it requires a liquor license.

If the petitioner does not intend to employ the beneficiary at the Fullerton location, then why it provided evidence pertinent to that location in response to the request for evidence is unknown to this office. Counsel has failed to convince this office that the beneficiary would be employed within the Los Angeles MSA. The Form ETA 750, therefore, does not appear to be valid for the proposed employment. The petition was correctly denied on this basis, which has not been overcome on appeal.

³ Although the petitioner indicates on various forms that [REDACTED] is in Los Angeles, reference to the USPS website indicates that the area is more appropriately called Huntington Park.

⁴ An internet search at google.com on August 27, 2007 revealed the existence of a [REDACTED] at [REDACTED] in Huntington Park, rather than a restaurant, as such. Another google search demonstrated that a [REDACTED] Restaurant does exist at [REDACTED] in Fullerton, California, contrary to counsel's assertion, or at least implication.

The record suggests an additional issue that was not addressed in the decision of denial.⁵ Pursuant to 8 C.F.R. § 204.5(g)(2) the petitioner is obliged to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In the instant case the record contains the petitioner's 2001, 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation. Those returns do not show net income or net current assets sufficient to pay the proffered wage during any of the salient years. Further, although the beneficiary stated, on the Form ETA 750B, that he has worked for the petitioner since 1996, no evidence was submitted to show that the petitioner has paid him any wages at any time.

The petitioner does not appear to have demonstrated its continuing ability to pay the proffered wage beginning on the priority date as required by 8 C.F.R. § 204.5(g)(2). The petition should have been denied on this additional basis.

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.

⁵ 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*, 299 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).