

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

B6

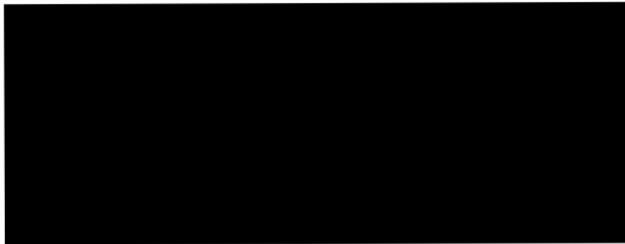


File: [Redacted] Office: VERMONT SERVICE CENTER Date: APR 21 2008  
EAC 03 140 50079

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 for*

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center (director) initially approved the employment-based preference visa petition. 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 matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant and bakery and seeks to employ the beneficiary permanently in the United States as a specialty cook, foreign food (Cook, Lebanese). 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 As set forth in the director's July 6, 2006 decision, the petition's approval was revoked<sup>1</sup> as the petitioner had "admitted to conspiring to commit visa fraud" with respect to a number of filings, and, therefore, the evidence submitted in the present matter regarding the beneficiary's prior work experience was in question, which the petitioner failed to overcome in response to the NOIR.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).<sup>2</sup>

The record shows that the appeal 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.

The petitioner seeks to classify the beneficiary as a skilled worker. 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.

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 C.F.R. § 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

---

<sup>1</sup> Section 205 of the Immigration and Nationality Act (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). Accordingly, the director has the authority to revoke the petition's approval at any time. Whether the beneficiary is in the United States or not, has no bearing on this issue.

<sup>2</sup> 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).

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:

*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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 30, 2001.<sup>3</sup> The proffered wage as stated on Form ETA 750 is \$11.87 per hour for an annual salary of \$24,689.60 per year based on a 40 hour work week. The labor certification was approved on July 12, 2002, and the petitioner filed the I-140 Petition on the beneficiary's behalf on March 21, 2003. The petitioner listed the following information on the I-140 Petition: established: January 10, 1992; gross annual income: \$2,765,045; net annual income: \$284,412; and current number of employees: 27.

On November 19, 2003, the director approved the petition. Subsequent to approval, on April 4, 2006, the director issued a NOIR. The director issued the NOIR as "the petitioner has admitted to conspiring to commit visa fraud, and the beneficiary is involved in this conspiracy." The director's NOIR stated that it provided the petitioner with a copy of the document on which the NOIR was based.

In response to the NOIR, the petitioner's president provided a statement that despite the acknowledged "fraudulently submitted fictitious petitions for other employees, [the beneficiary's] petition was a legitimate one." More specifically the petitioner's president provided that, "although the undersigned admitted to having filed fictitious 750A petitions [Form ETA 750] for at least seven aliens, the court records do not state

---

<sup>3</sup> We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was formerly permitted by the DOL. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR §§656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services ("CIS") based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

that I admitted to having filed a fictitious 750A petition for [the beneficiary].” In support, the petitioner resubmitted the beneficiary’s work experience letter, which was used to document that the beneficiary had the experience required by the labor certification. The resubmitted letter contained several additional original signatures, including the restaurant owner’s signature, and “two witnesses who own businesses adjacent to the restaurant.”<sup>4</sup>

On July 6, 2006, the director revoked the petition’s approval for good and sufficient cause as the petitioner failed to overcome the basis for revocation. The director provided in the NOR that the petitioner admitted to conspiring to commit visa fraud, and “part of this deception is a fraudulent work experience letter from Lebanon.”<sup>5</sup> You have elected to submit a letter you wrote and another work experience letter. Your track record precludes this service from treating these types of letters as authentic. Therefore, the approval of your petition is revoked.” The petitioner appealed and the matter is now before the AAO.

The record contains documentation from an action filed in the United States District Court for the Eastern District of Virginia, *United States v.* [REDACTED] including the Statement of Facts, as well as the Plea Agreement in the foregoing matter, which addresses the issue of the petitioner’s visa fraud. [REDACTED] is the petitioner’s president.

On appeal, counsel<sup>6</sup> provides that while [REDACTED] stipulated to visa fraud, neither the Plea Agreement nor the Statement of Facts reference that the beneficiary was part of the fraud.

In the Statement of Facts, [REDACTED] stipulates that he submitted an application to the Virginia Employment Commission, the Virginia State Workforce Agency, for a beneficiary, [REDACTED] to be employed with King of Pita Bakery [the petitioner in the instant matter] as a baker. [REDACTED] stipulated that he helped create and sign a false letter to allegedly document [REDACTED] prior work experience, which was necessary to show that [REDACTED] met the requirements of the certified labor certification. The statement further

---

<sup>4</sup> The restaurant’s general manager signed the letter that the petitioner initially submitted.

<sup>5</sup> The beneficiary in the instant matter provided a letter to document his prior work experience in Jordan. The director references a fraudulent letter that [REDACTED] helped write for another beneficiary, which formed the basis of the admitted visa fraud. As the beneficiary has a passport from Jordan, we note that the record does not contain evidence that the beneficiary registered in accordance with the National Security Entry Exit System (NSEERS). NSEERS was established September 11, 2002 to monitor individuals entering and leaving the U.S. NSEERS required nonimmigrants from Iran, Iraq, Libya, Sudan, and Syria as designated by the Federal Register to comply with NSEERS registration at ports of entry, as well as nonimmigrants designated by the U.S. Department of State, and any other nonimmigrant regardless of nationality, identified by an immigration officer in accordance with 8 C.F.R. § 264.1(f)(2). The NSEERS requirement was expanded to include other groups of nationals, and nationals from the designated groups were to report for Special Registration in four separate “call-in groups.” Lebanon, the beneficiary’s country of origin, was listed for call-in registration between January 27 and February, 7, 2003. *See* 68 Fed. Reg. 2366 (January 16, 2003). Group 2 additionally included: citizens or nationals of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen. *Id.* at 2366. Group 3 included citizens or nationals of Pakistan or Saudi Arabia. *See* 68 Fed. Reg. 33 (February 19, 2003). Group 4 expanded NSEERS and Special Registration to include citizens or nationals of Bangladesh, Egypt, Indonesia, Jordan, and Kuwait. *Id.* at 33. On December 2, 2003, the Department of Homeland Security (“DHS”) suspended the automatic 30-day and annual re-registration requirements for NSEERS. *See* <http://www.ice.gov/pi/specialregistration/index.htm> (accessed April 5, 2007).

<sup>6</sup> Current counsel took over the petitioner’s representation on appeal.

provides that [REDACTED] had never worked as a cook as required by the labor certification, but instead had been employed previously as a waiter/bartender. When [REDACTED] came to the U.S., he had worked as a store manager for King of Pita Bakery, but he was never employed on a full-time basis as a baker, as was listed on the certified Form ETA 750.

[REDACTED] acknowledged the following: that he and [REDACTED] “knowingly prepared fraudulent documents and submitted them to . . . [CIS];” that the false documents submitted “were designed to mislead . . . [CIS] concerning material facts, namely the work qualifications of [REDACTED] and the defendant’s intent to employ him at King of Pita as a baker;” and that [REDACTED] paid [REDACTED] approximately \$5,000 for his green card.

[REDACTED] additionally acknowledged: that between November 1999 and July 2004, the “defendant knowingly submitted fraudulent ETA 750 applications to the Department of Labor or [CIS] for at least six other aliens,” that those applications “were fraudulent for one or more of the following reasons: (1) they contained false job offers; (2) they contained fictitious information concerning the alien beneficiary; or (3) they contained forged signatures;” that he took such actions to mislead DOL and CIS; and that he undertook such illegal actions for profit.

The record further contains the Plea Agreement signed by [REDACTED] which provided that [REDACTED] pled guilty and was charged with conspiracy to commit visa fraud in violation of Title 18 United States Code, Sections 371<sup>7</sup> and 1546(a).<sup>8</sup>

---

<sup>7</sup> 18 U.S.C. § 371 provides that it is an offense “if two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose.” In *Hammerschmidt v. United States*, 265 U.S. 182 (1924), the Supreme Court defined defraud as:

To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention.

*Hammerschmidt*, 265 U.S. at 188.

<sup>8</sup> 18 U.S.C. § 1546(a) relates to fraud and the misuse of visas, permits and other documents, and provides:

Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

...

Counsel asserts that revocation is only proper where there is clear and convincing evidence of fraud. He asserts that in the present matter that there is no legitimate basis for revocation as there is no clear and convincing evidence of fraud related to the instant beneficiary.

As noted above, 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 petitioner’s president pled guilty to committing visa fraud. He specifically named one beneficiary in relation to the fraud. He admitted to filing at least six other fraudulent applications in the Statement of Facts pursuant to the Plea Agreement. The beneficiaries in the six other cases were not named. CIS records reflect that reflect that the petitioner filed at least seventeen employment-based immigrant petitions. Based on the petitioner’s statements, doubts were raised in relation to all the other filings. 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). 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. *Id.* at 591-592. As the petitioner’s statements raised doubts related to all the filings, the director had good and sufficient cause to issue the NOIR. Counsel failed to submit evidence to overcome doubts raised in the NOIR, and, accordingly, the director had good and sufficient cause to revoke the petition’s approval.

---

...

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact –

Shall be fined under this title or imprisoned.

*See also United States v. O'Connor*, 158 F.Supp. 2d 697 (2001):

To prove a charge of immigration fraud, in violation of 18 U.S.C. § 1546(a), as charged against ██████████ in Counts 2-25 of the Indictment, the government must prove each of the following elements beyond a reasonable doubt: (1) that defendants made a false statement in an immigration document, (2) that the false statement was made knowingly, (3) that the false statement was material to INS activities or decisions, (4) that the false statement was made under oath, and (5) that the false statement was made in an application required by the immigration laws or regulations of the United States. *See* 18 U.S.C. § 1546(a); *United States v. Chu*, 5 F.3d 1244, 1247 (9th Cir.1993). In this context, false information submitted to the INS is material if it would have influenced a decision of the INS. *See* *Kungys v. United States*, 485 U.S. 759, 770-72, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988); *United States v. Puerta*, 982 F.2d 1297, 1301 (9th Cir.1992).

*United States v. O'Connor*, 158 F.Supp. 2d 697.

Accordingly, the director has the authority to revoke the petition's approval.

Counsel provides that the beneficiary has been working for the petitioner for more than two years as a full-time cook, the position offered on Form ETA 750, in support of the claim that the petition is legitimate. Further, counsel provides that the beneficiary has also been working as a part-time driver. In support, he cites to the petitioner's testimony at the beneficiary's February 1, 2005 removal hearing.

However, [REDACTED]'s testimony does not clearly state that the beneficiary has been employed full-time as a cook for the claimed two-year time period. [REDACTED] testimony that counsel cites to provides, "He is doing multiple jobs right now for the company. He is working in the kitchens as well as driving as a part time to earn money." *Matter of [the beneficiary]*, Executive Office for Immigration Review, transcript of hearing, February 1, 2005, p. 28 ("Feb. 1, 2005 Hearing"). When asked about the beneficiary's hours, [REDACTED] estimated that the beneficiary worked, "Approximately right now 50 hours a week he working." *Id.* Mr. [REDACTED] testimony does not clearly establish that the beneficiary is employed full-time as a cook, the position offered in the certified Form ETA 750. "Working in the kitchens" is vague, and the beneficiary could be working in a position other than as a cook. Further, [REDACTED] did not provide how many hours the beneficiary was working in the kitchen, as opposed to how many hours the beneficiary was working as a driver.

Further, the petitioner did not provide any evidence to document the beneficiary's hours, such as submitted payroll evidence, or multiple pay stubs,<sup>9</sup> Forms W-2 or Forms 1099 to exhibit wages paid in 2004. While the record does contain the beneficiary's 2003 individual Form 1040, the tax return lists that the beneficiary was employed as a truck driver and not as a cook.<sup>10</sup> The record does not contain evidence that the beneficiary has been employed for two years on a full-time basis as a cook. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Absent payroll records, or evidence from tax returns, this leaves only [REDACTED]'s testimony, which based on his factual admissions in the Statement of Facts underlying the Plea Agreement, is questionable, and leaves substantial doubt. Where the petitioner could have provided clear evidence in the form of payroll records, W-2 statements, the petitioner failed to do so. Given the nature of the allegations of fraud, and the director's revocation, the need for documentation beyond mere statements was evident. 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. at 591. The petitioner has not resolved inconsistencies in the evidence through any independent objective evidence.

---

<sup>9</sup> The petitioner provided a copy of the beneficiary's pay stub for the time period December 19, 2004 to December 25, 2004, issued on January 3, 2005, which exhibited payment to the beneficiary in the amount of \$474 for 40 hours of work at the hourly wage of \$11.87 per hour. We note that the year to date total pay also lists \$474.80 in total wages paid, so that it appears the beneficiary only earned \$474.80 total in 2004. The petitioner did not provide the beneficiary's 2004 W-2 statement to show total wages earned for the year.

<sup>10</sup> Form 1099 listed that the petitioner paid the beneficiary income in the amount of \$23,732.33 in 2003.

Further, testimony conflicts with other documentation in the record, and, therefore, is not reliable. When asked when the beneficiary was placed on payroll, the [redacted] responded "Immediately after he started working for us, back in 2004, the beginning of 2004." Feb. 1, 2005 Hearing, pp. 28-29. Counsel<sup>11</sup> questioned his answer, "2004, maybe 2003, too?" *Id.* at 29. [redacted] then provided that the beneficiary had been employed since "2003, January 2003." *Id.*

The record, however, contains a letter dated January 12, 2005 from the petitioner indicating that it had employed the beneficiary since June 2, 2003. The letter did not state the capacity in which the petitioner employed the beneficiary, or that the beneficiary was employed full-time. *See Matter of Ho*, 19 I&N Dec. at 591.

Counsel provides that [redacted] testified that the beneficiary was not part of any fraudulent labor certification applications that he had submitted. Specifically that he testified, "I have not done anything with [the beneficiary] in, as far as fraud in any way shape or form." Feb. 1, 2005 Hearing, pp. 34. Counsel additionally provides that the beneficiary has worked for the petitioner as a cook.

However, [redacted]'s testimony does not support this, or that the petitioner even has a position for a full-time cook. [redacted] admits that the beneficiary has been employed in a different position as a truck driver, "Yes, immediately at the time he [the beneficiary] started as a truck driver so we can move him into that position." Feb. 1, 2005 Hearing, at p. 32. [redacted] stated that the beneficiary did not have any experience as a truck driver. He stated further, "but to get him working immediately, that's the only position was open at the time, while he's waiting for his position in the kitchens." *Id.* at 33. [redacted] was questioned, "So you had no position in the kitchens at that time?" He responded, "Not immediately, we didn't, no."<sup>12, 13</sup> *Id.*

---

<sup>11</sup> Different counsel represented the beneficiary with respect to the hearings related to his removal.

<sup>12</sup> Further, although not raised in the director's decision, from the documentation submitted, the petitioner has not demonstrated that the job offered to the beneficiary is a realistic job offer. 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 (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). 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.

Evidence in the record raises the issue of whether the petitioner intends to employ the beneficiary full-time in accordance with the terms of the certified Form ETA 750.

Following approval of the labor certification, that labor certification forms the basis for the job offer to the beneficiary. 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. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). It is within CIS' role to determine whether the job offer is realistic and that the petitioner intends to employ the beneficiary in accordance with the terms of the labor certification. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (R.C. 1979); *see also* 20 C.F.R. § 656.30(c)(2).

The certified ETA 750 states that the petitioner will employ the beneficiary as a cook. Mr. Tahan admits in his testimony that the petitioner did not have a position readily available as a full-time cook at the time that it

Additional doubts were raised concerning the evidence as [REDACTED] admitted to falsifying a letter for another beneficiary, [REDACTED] (phonetic sp.) . . . I helped create his experience letter.” Specifically, “His experience letter . . . The lawyer says it wasn’t good enough, there was some, you know, things missing in it, which we had, him and I, create to satisfy the information needed for his acceptance, for his sponsorship.” Feb. 1, 2005 Hearing, p. 31.

In seeking to overcome the issues outlined in the NOIR, the petitioner had submitted a second copy of the letter initially provided to document the beneficiary’s experience to show that he met the requirements of the labor certification. In the NOR, the director provided “part of this deception is a fraudulent work experience letter from Lebanon. You have elected to submit a letter you wrote and another work experience letter. Your track record precludes this service from treating these types of letters as authentic.”

Although not raised in the director’s decision, the petitioner has not demonstrated that the beneficiary has the required experience to meet the requirements of the labor certification. 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 (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 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> 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).

On the Form ETA 750A, the “job offer” position description for a Cook (Lebanese) provides:

Plan menu, cook Lebanese style dishes, dinners, salads, deserts such as shish Taook, kibba, Milukhiya, Med estrn [sic] herbs tea. Prepare meats, Chicken sauces & vegetables prior to

---

filed the labor certification, and, therefore, the beneficiary was employed as a truck driver. The regulation at 20 C.F.R. § 656.3 provides that employment means, “Permanent full-time work by an employee for an employer other than oneself.” While the petitioner is not required to employ the beneficiary in the position offered until the beneficiary obtains permanent residence, the petitioner must demonstrate that the job offer was realistic from the time of the priority date. As the petitioner did not have a full-time cook position available when it filed the Form I-140 on the beneficiary’s behalf, the petitioner cannot demonstrate that the job offer was not realistic from the time of the priority date onward. The record does not support a determination that the petitioner will actually employ the beneficiary on a permanent full-time basis in accordance with 20 C.F.R. § 656.3.

<sup>13</sup> In his testimony, the petitioner’s president described how the petitioner’s business was divided, “It’s a bakery, kitchens, catering, as well as a retail store.” He provided further, “The bakery about, I would say 60, 65 percent of the volume of the business. Kitchen’s approximately 25 percent.” He estimated that the petitioner employed between 37 to 40 employees.

cooking. Season cook & garnish food, estimate food consumption, list orders for purchase supplies.

The job offered listed that the position required prior experience of: 3 years in the job offered, Cook (Lebanese). The petitioner did not list any other special requirements.

On the Form ETA 750B, the beneficiary listed that he attended the Royal Academy (no location listed) from September 1990 to August 1992, where he earned an Associate's degree in Navigation. He listed his relevant experience as: (1) Spalding Car Care [no location listed], from August 1999 to the present (date of signature, March 3, 2003), position: Mechanic/Gas Attendant; (2) Captain Tourist Service, P.O. Box 823, Aqaba, Jordan, from January 1987 to June 1993; position: Cook.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3), which 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.

To document the beneficiary's experience, the petitioner submitted the following letter:

Letter from Rafiq A. Suliman, General Manager, Captain Tourist Service, Captain's Restaurant, Aqaba, Jordan, undated;  
Position title: "chef cook for both Arabic food and intercontinental;"  
Dates of employment: January 1, 1987 to June 30, 1993;  
Description of duties: not listed.

The petitioner also provided a second copy of the same letter, which contained an original signature on the reverse, alleged to be from the owner of Captain's Restaurant, although the name of the signatory is not clear, and does not list the title of the signator. The document contains two other signatures, one from [REDACTED] of Khatib Stores, Aqaba, Jordan, and the second by [REDACTED] of Luna Souvenir Shops, Aqaba, Jordan.

The additional signatures do not remedy the defects in the letter in that the letter does not provide the number of hours that the beneficiary worked, whether the position was full-time or part-time to confirm the number of years of experience, the letter does not list or provide his job duties, and does not provide that he has experience with Lebanese food specifically, or whether Lebanese food could be considered the same or similar to, or is encompassed by, "Arabic food." Further, the letter provided does not list a street address for the restaurant on the letterhead, but instead only lists a post office box number.

Additionally, we note that the beneficiary's Form ETA 750B lists that he attended the Royal Academy for navigation from 1990 to 1992, during which time the letter confirms that he was working as a cook. While it might be possible that the beneficiary worked while he attended school, this again raises the issue of whether the experience was full-time or part-time. **Other evidence in the record also conflicts with the listed experience as a cook.** We note that the beneficiary's passport issued in July 1992 lists the beneficiary's occupation as a commercial pilot, also during the time period that the letter provides the beneficiary was employed as a cook. 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). 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. *Id.* at 591-592.

The letter is insufficient to document that the beneficiary met the two years of experience to meet the requirements of the certified labor certification. We are not convinced by the documentation provided. CIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Further, additionally not raised in the director's decision, from the documentation submitted, the petitioner has not demonstrated its ability to pay the proffered wage. We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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. On Form ETA 750, signed by the beneficiary on March 3, 2003, the beneficiary did not list that he was employed with the petitioner.

The record contains a letter dated January 12, 2005 from the petitioner indicating that it had employed the beneficiary since June 2, 2003. The record contains a copy of the beneficiary's 2003 federal tax return along with his 2003 W-2 statements, and Form 1099. Those documents reflect that the petitioner issued the beneficiary a Form 1099, which listed income in the amount of \$23,732.33 in 2003.<sup>14</sup> Additionally, the petitioner provided a copy of the beneficiary's pay stub for the time period December 19, 2004 to December 25, 2004, issued on January 3, 2005, which exhibited payment to the beneficiary in the amount of \$474 for 40 hours of work at the hourly wage of \$11.87 per hour. We note that the year to date totals for what appears to be the final pay for 2004 also lists \$474.80 in total wages paid.

The petitioner must show that it can pay the full proffered wage in 2001, and 2002, and the difference between the proffered wage, and the wages paid in 2003. Wages paid to the beneficiary will be considered as partial payment of the proffered wage. Accordingly as the petitioner has not provided evidence of wages paid to the beneficiary for 2001 or 2002, and the wages paid in 2003 were less than the proffered wage, the petitioner cannot establish its ability to pay the beneficiary the proffered wage through prior wage payment alone.

Next, we will examine the net income figure reflected on the petitioner's federal income tax returns. 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)

---

<sup>14</sup> In 2003, the beneficiary's W-2 statements reflect that he received wages in the amount of \$2,338.28 from G D S Enterprises in Massachusetts, as well as \$7,520.63 from Genesis Consolidated Services, Inc.

(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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income.

The petitioner is a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. Line 24 demonstrates the following concerning the petitioner's ability to pay the proffered wage:

<u>Tax year</u>	<u>Net income or (loss)</u>
2001	\$14,152

Based on the above, the petitioner's net income would not allow for payment of the beneficiary's proffered wage in 2001. Further, we note that CIS records reflect that the petitioner has filed immigrant petitions for at least seventeen beneficiaries. The petitioner would need to demonstrate that it could pay the proffered wage for each of the sponsored beneficiaries.<sup>15</sup> Based on the petitioner's net income, it would not be able to do so. Further the record of proceeding does not contain any regulatory prescribed evidence for the year 2002 to demonstrate that the petitioner can pay the proffered wage for the instant beneficiary in this petition, or for the other sixteen sponsored beneficiaries.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>16</sup> Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18, or, if filed on Form 1120-A, on Part III. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and, thus, would evidence the petitioner's ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

---

<sup>15</sup> 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 and Form ETA 9089). See also 8 C.F.R. § 204.5(g)(2).

<sup>16</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<u>Tax year</u>	<u>Net Current Assets</u>
2001	\$219,789

The petitioner has established through its net income that it can pay the proffered wage in 2001 for the instant beneficiary. However, the petitioner is required to demonstrate that it can pay all the sponsored beneficiaries the respective proffered wages. As the petitioner has filed for seventeen workers, it is not clear that the petitioner's net current assets would establish its ability to pay all the sponsored beneficiaries' wages. Further, we cannot calculate the petitioner's 2002 net current assets as the petitioner did not submit any evidence for 2002. The record is deficient as the petitioner failed to provide any regulatory prescribed evidence for this year.

Based on the evidence in the record, the petitioner has not demonstrated its ability to pay the proffered wages for all the sponsored beneficiaries, and the petition should have been denied on this basis as well.

As the petitioner's president pled guilty to visa fraud related to multiple filings, the petitioner's actions raised doubts regarding the sufficiency of the evidence related to the instant beneficiary. 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. at 591. 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. *Id.* at 591-592. The petitioner failed to overcome the objections in response to the NOIR or on appeal of the revocation. Further, the petition should have been denied as the petitioner failed to demonstrate that has made a realistic job offer to the beneficiary, that the beneficiary met the qualifications of the certified labor certification, or that the petitioner had the continuing ability to pay the proffered wages to all of its sponsored beneficiaries.

Based on the foregoing, the petition's approval was properly revoked for good and sufficient cause. 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. The petition's approval remains revoked.