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U.S. Citizenship
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **FEB 27 2008**
SRC-05-033-51144

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, Texas Service Center. Based on the information obtained at a permanent residence interview, the director consequently served the petitioner with 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) because the record did not include a response to the NOIR. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director.

The petitioner is a Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a food service manager (restaurant manger). 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 found that the record did not include a response to the NOIR, and thus the grounds of revocation had not been overcome. The director revoked the approval of 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 November 9, 2006 NOR, the single issue in this case is whether or not the petitioner has overcome the grounds of revocation in the director's NOIR dated October 3, 2006.

The regulation at 8 C.F.R. § 103.2(b)(16)(i) states in pertinent part:

If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [Citizenship and Immigration Services (CIS)] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his /her own behalf before the decision is rendered, ...

On appeal counsel asserts that the petitioner did submit a timely response to the director's NOIR on November 1, 2006. However, the director returned the response stating that a decision had been made already. On November 9, 2006, the director issued a decision to revoke the petition's approval due to the petitioner's failure to respond on a timely basis. Counsel also submits supporting documents to support the assertions, including a FedEx shipping sheet showing a package (track No. [REDACTED]) was sent by counsel to Texas Service Center on October 31, 2006, a FedEx tracking result showing the above package was delivered on November 1, 2006, a letter from the Texas Service Center dated November 2, 2006 stating that the documents submitted were being returned because the adjudicative decision was completed prior to the documents being received and therefore, the information was no longer required, a copy of an envelope from the Texas Service Center to counsel post-marked November 3, 2006, a copy of request to expedite processing of petition/application and a letter from counsel to the director dated November 6, 2006, and a faxed letter from the director to counsel stating that the information submitted was being returned because the receipt number (SRC-05-033-51144) indicated in the fax is for an I-765 application not an I-140 petition as stated in the request.

The record shows that on October 3, 2006, the director issued the NOIR granting 30 days to respond. If the NOIR was mailed, the response must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). In the instant case, the 33rd day fell on Sunday, and the due date was Monday, November 6, 2006. The evidence submitted shows that the director received the response on November 2, 2006 and the faxed request on November 6, 2006 timely. The director was in error in stating that the adjudicative decision was completed prior to the document being received in her November 2, 2006 letter. CIS record shows that the receipt number SRC-05-033-51144 matches the instant I-140 petition, and thus the director also was in error in returning the submitted information because she thought the receipt number was for an I-765 instead of the instant petition. Therefore, it appears that the petitioner responded to the director's NOIR on a timely basis. The decision of the director revoking the approval of the instant petition based on no response to her NOIR will be withdrawn. The petition is remanded to the director to consider the petitioner's response to the director's NOIR.

Beyond the director's NOIR and counsel's response, the AAO has identified additional grounds of revocation and will discuss these issues. 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).

In the instant case, the approved labor certification requires high school education and two years of experience in the job offered, that is a restaurant manager. The record does not contain any evidence showing that the beneficiary has completed his high school education. Therefore, the petitioner failed to demonstrate that the beneficiary met the minimum educational requirement for the proffered position.

The approved labor certification is for the beneficiary to work in a supervisory position (restaurant manager supervising six employees) at the petitioner's restaurant at [REDACTED] Georgia 30039. The record does not contain any evidence showing the restaurant at [REDACTED] Snellville, GA had and has more than six employees to be supervised by the beneficiary. Without such evidence, it is not clear whether the petitioner's job offer to the beneficiary is a *bona fide* and realistic one.

In addition, the labor certification requires two years of experience in the job offered, that is restaurant manager, not in any related occupations. The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains an experience letter dated August 11, 2004 from [REDACTED] president of [REDACTED] [REDACTED]. Although this letter verifies the beneficiary's more than two years of

experience (from December 3, 1998 to April 30, 2001¹), the letter indicates that the beneficiary was the kitchen manager and head cook, and he reported to the restaurant manager. Therefore, the letter failed to establish the beneficiary's two years of experience as a restaurant manager, and thus, the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience as a restaurant manager prior to the priority date of April 30, 2001.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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.

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 U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also 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 U.S. Department of Labor 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$45,000 per year. The petitioner submitted Form 1120S, U.S. Income Tax Return for an S Corporation of [REDACTED] 18 for 2001 through 2004 as evidence to establish its ability to pay the proffered wage. However, the tax returns show that [REDACTED] was incorporated on April 1, 1995 and elected as an S corporation from January 1, 1996, and has its own

¹ Although the letter verifies that the beneficiary worked for the restaurant until June 24, 2001, the experience after the priority date of April 30, 2001 cannot be considered for the purpose of the beneficiary's qualifications.

[REDACTED]

federal employer identification number (FEIN) [REDACTED] while the petitioner claimed on the petition that it was established on June 24, 1994 with FEIN [REDACTED]. On the petition and the labor certification, the petitioner claimed that it is located at [REDACTED] and the beneficiary will work at the restaurant located at [REDACTED]. However, [REDACTED] uses [REDACTED] as its address on its tax returns.

The record does not contain any evidence showing that the petitioner and [REDACTED] 18 are the same business entity responsible for the obligations of each other, or that each of them is the successor-in-interest to the other. Nor is there any evidence verifying that [REDACTED] 18 owns and/or runs the restaurant located at [REDACTED] where the beneficiary will work. Therefore, the petitioner failed to establish its ability to pay the proffered wage beginning on the priority date of April 30, 2001 to the present with its own financial documents.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to provide the petitioner an opportunity to rebut the grounds of revocation either by considering the submitted response to the NOIR or by sending another NOIR regarding the additional issues of ineligibility discussed above. 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 decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.