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U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

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FILE:

EAC 01 229 54199

Office: VERMONT SERVICE CENTER

Date: JAN 22 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was initially approved by the Director, Vermont Service Center. In connection with the beneficiary's adjustment of status application, the Acting Center director served the petitioner with a notice of intent to revoke (NOIR) the instant petition's approval. In a subsequent Notice of Revocation (NOR), the director revoked the approval of the I-140 petition. A subsequent motion to reconsider the revocation was dismissed by the director. The matter was subsequently before the Administrative Appeals Office (AAO) on appeal, which was dismissed on August 15, 2006. The petitioner submits a motion to reopen/reconsider to the AAO on September 14, 2006. The motion is reopened is granted. Upon review of the motion, the AAO's August 15, 2006 decision is affirmed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as an assistant manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. In his revocation, the director determined that the beneficiary had previously conspired to enter into a marriage for the purpose of evading immigration laws, and that the beneficiary's record contained substantial and probative evidence of the beneficiary's attempt to procure an immigration benefit by virtue of a fraudulent marriage. On appeal, petitioner submitted a statement from the beneficiary that he knew nothing of a marriage between himself and an individual named [REDACTED], and that he had signed blank forms when applying for a work permit through a driving school in New York's Chinatown. On August 15, 2006, the AAO concurred with the director's decision to revoke the petition's approval based on marriage fraud, and also noted that a signature on blank forms represented a power of attorney that the signatory authorizes the agent to complete the forms as himself and on his behalf, and the signatory will be fully responsible for the contents of the forms as if the signatory completed the forms himself. The AAO then declared counsel's assertion that the alleged marriage certificate was obtained without the beneficiary's knowledge and that immigration forms were filed without the beneficiary's knowledge or consent to be misplaced. The AAO also stated that the beneficiary had signed both the I-485 Application to Register Permanent Residence or Adjust Status, and a G-325 A filed concurrently with the I-130 petition ostensibly signed by Betty Cortines. The AAO stated that the beneficiary's claim that he was unaware of the previously filed I-130 application was not credible.

The AAO also noted that the petitioner had not established its ability to pay the proffered wage as of the 2001 priority date onwards, based on the documents found in the record, namely the petitioner's corporate tax return for tax year 1999 which did not cover the 2001 priority date. The AAO also stated that the petitioner had filed I-140 employment-based petitions for two other workers in March 2000 and one other worker in August 2001, and approved in either November 16, 2002, or November 22, 2004, and filed for an additional worker on December 16, 2005. The AAO stated that given the period of time during which the additional workers were petitioned, the petitioner had to show its ability to pay all four workers. The AAO stated that the petitioner had failed to establish this ability to pay the beneficiary and the other three workers.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent

decisions to establish that the decision was based on an incorrect application of law or Service policy. The petitioner has submitted new documentation with regard to the petitioner's ability to pay the beneficiary's proffered wages as of the 2001 priority date and through tax year 2005, as well as copies of the beneficiary's IRS W-2 Form, Wage and Tax Statements from the 2001 priority year to tax year 2005.

The petitioner also made additional statements with regard to the AAO's concurrence with the director's denial of the beneficiary's I-485, Application to Register Permanent Residence or Adjust Status. The AAO notes that the determination of the beneficiary's eligibility for the I-485 petition, falls under the jurisdiction of the U.S. Citizenship and Immigration Services (USCIS) official adjudicating the beneficiary's I-485, namely, the director. *See* 8 C.F.R. 103.5(a)(1)(ii).

In these proceedings, the AAO does not have such jurisdiction, but rather the AAO can only review the revocation of the I-140 petition. For illustrative purposes and for further clarification of the record, after the petitioner's ability to pay the proffered wage is considered based upon the new evidence submitted on motion, the AAO will make brief comments on the petitioner's additional materials submitted to the record with the instant motion with regard to the director's decision to revoke the I-140 petition based on marriage fraud.

As set forth in the AAO dismissal of the petitioner's previous appeal dated August 15, 2006, the AAO affirmed the director's decision with regard to the revocation of the I-140 petition, and also questioned whether the petitioner, in an issue not considered by the director, has the ability to pay the proffered wage as of the 2001 priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO then examined copies of the petitioner's checking account, as well as the petitioner's 1999 federal tax return, and determined that the 1999 tax return was not dispositive of the petitioner's ability to pay the proffered wage, because the February 22, 2001 priority date fell within the petitioner's tax return for tax year 2000. The AAO also noted that the petitioner had filed three additional I-140 petitions for workers and that the petitioner had to establish its ability to pay the salaries of all four petitioned workers.

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 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 February 22, 2001. The proffered wage as stated on the Form ETA 750 is \$8.41 an hour, or \$17,492.80 per year. The Form ETA 750 states that the position requires two years of work experience in the proffered position.

The AAO maintains plenary power to review each motion 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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon motion.<sup>1</sup> On motion, counsel submits the petitioner's Forms 1120 Federal Tax Return for a Corporation, for tax years 2001 to 2005, as well as the beneficiary's W-2 Forms for tax years 2001 to 2005. With the initial petition, the petitioner submitted its Form 1120 for tax year 1999. This tax return indicated that petitioner filed its tax return based on a calendar year of June 1, to July 31 of the following year. The petitioner also submitted copies of the petitioner's checking account statements that were previously discussed in the AAO dismissal of the petitioner's appeal, and will not be further discussed in these proceedings. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On motion, counsel states that based on the Forms 1120 and the beneficiary's W-2 Forms, the petitioner has been running an active and viable business.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on November 3, 1988, has a gross annual income of \$326,176, and currently employs four full-time workers and three part-time workers. On the Form ETA 750B, the beneficiary claimed that he had worked for the petitioner from July 2000 to the date he signed the ETA 750, namely February 20, 2001.

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<sup>1</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 motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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, USCIS 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).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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. As stated previously, the petitioner's tax year runs from June 1, to May 31 of the following. Thus, the priority date of February 22, 2001 would fall in the petitioner's 2000 tax year. Thus the beneficiary's wages from tax year 2000 would be relevant in these proceedings. Since the petitioner did not submit any W-2 form or Form 1099-MISC for the beneficiary for tax year 2000, the AAO cannot determine whether the petitioner paid the beneficiary the proffered wage of \$17,492.80 in 2000. However, the petitioner has established that it paid the beneficiary the following wages in tax years 2001 to 2005: \$12,852.50 in 2001; \$18,851.48 in 2002; \$18,459 in 2003; \$16,461 in 2004; and \$15,583.50 in 2005. The petitioner therefore did not establish that it paid the beneficiary the proffered wage as of the 2001 priority date; however, it did establish that it paid the beneficiary more than the proffered wage in tax years 2002 and 2003. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax year 2000, and the difference between the beneficiary's actual wages and the proffered wage in tax years 2001, 2004, and 2005.<sup>2</sup>

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, USCIS 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and

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<sup>2</sup> The difference between the beneficiary's wages and the proffered wage in tax years 2001, 2004, and 2005 would be \$4,640.30, \$1,031.80, and \$1,909.30, respectively.

profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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 court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$17,492.80 per year from the priority date:

- In 2000,<sup>3</sup> the Form 1120 stated a net income<sup>4</sup> of \$23,905.
- In 2001, the Form 1120 stated a net income of \$18,383.
- In 2004, the Form 1120 stated a net income<sup>5</sup> of \$11,854.
- In 2005, the Form 1120 stated a net income of \$8,007.

Thus, the petitioner had sufficient net income in tax years 2000 to pay the entire proffered wage of \$17,492.80. Further the petitioner had sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage in tax years 2001, 2004 and 2005. As previously stated, these sums in tax years 2001, 2004 and 2005, were \$4,640.30, \$1,031.80, and \$1,909.30, respectively.

Nevertheless, the AAO previously noted in the dismissal of the petitioner's appeal that based on USCIS records, the petitioner filed I-140 petitions for three additional workers, with priority dates for two workers of March 13, 2000,<sup>6</sup> and a priority date of August 1, 2001 for the third worker. The

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<sup>3</sup> The tax year in which the February 22, 2001 priority date was established.

<sup>4</sup> The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

<sup>5</sup> The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

petitioner must show that it had sufficient income to pay all the wages for all petitioned beneficiaries at the priority date. The petitioner submitted no further evidence with regard to the wages paid to these three additional workers, or their proffered wages offered to these employees. Therefore, the record does not establish whether the petitioner could have paid either entire wages or differences between actual wages and proffered wage for the additional three workers based on the petitioner's net income.

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, USCIS will review the petitioner's assets. In the instant matter, the petitioner has sufficient net income to pay either the beneficiary's entire wage or the difference between the beneficiary's actual wages and the proffered wage of \$17,492.80 based on the petitioner's net income, but not to pay the respective wages for all the petitioned-for workers. However, the AAO will examine the petitioner's net current assets to determine whether the petitioner had the ability to pay additional beneficiaries based on the petitioner's net current assets.

The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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 net current assets during 1999<sup>8</sup> were \$57,883

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<sup>6</sup> For these two petitions, the petitioner's Federal tax return for tax year 1999 would be relevant, as the March 13, 2000 priority day is within the period of time covered by the petitioner's 1999 tax return, namely, June 1, 1999 to May 31, 2000. As stated in the previous AAO dismissal, the petitioner's net income in 1999 was \$18,228. If the wages for the other workers were similar to the beneficiary's proffered wage, this sum would be sufficient to cover only one worker's wages.

<sup>7</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.

<sup>8</sup> This figure is included in these calculations for illustrative purposes, because two of the additional workers had March 2000 priority dates. The petitioner would have had to establish its ability to pay the proffered wage for these two additional worker sin tax year 1999 and onward.

- The petitioner's net current assets during 2000 were -\$21,415.
- The petitioner's net current assets during 2001 were \$63,450.
- The petitioner's net current assets during 2002 were \$ 96,636.
- The petitioner's net current assets during 2003 were \$108,762.
- The petitioner's net current assets during 2004 were \$103,112.
- The petitioner's net current assets during 2005 were \$109,349.

Therefore, the record reflects that the petitioner may have had<sup>9</sup> sufficient net current assets to pay for additional workers for tax year 1999, 2002, 2003, 2004, and 2005. However, the petitioner's negative net current assets are not sufficient to establish that the petitioner could have paid the proffered wages of the two additional workers in tax year 2000 or three additional workers in tax year 2001.

Accordingly, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, while the petitioner can show that it had the continuing ability to pay the beneficiary the proffered wage as of the 2000 priority date and continuing through an examination of wages paid to the beneficiary, and its net income, the petitioner has not established that it can pay the wages of all the sponsored workers. The petitioner would need to establish that it can pay the respective wages for all sponsored workers in order to show that the petitioner had the ability to pay the proffered wage for the instant petition. Thus, the petitioner has not established its ability to pay the proffered wage, and the AAO's decision with regard to this issue is affirmed.

The AAO will now examine the new evidence submitted to the record on motion with regard to the director's revocation of the instant petition's approval.

Section 205 of the Act, 8 U.S.C. 1155, states: "The Attorney General 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." Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

*Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

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<sup>9</sup> As stated previously, the petitioner has provided no further evidence as to the proffered wages for these additional workers, or any actual wages paid to them.

On motion, counsel submits an additional notarized affidavit from the beneficiary. The beneficiary states that the I-130 petition, the I-485 and the G-325A documents filed by [REDACTED] and used by the USCIS director and the AAO against the beneficiary were a "huge surprise" to him.<sup>10</sup> The beneficiary states that the English language birth certificate allegedly used by [REDACTED] had a Korean language document attached, and that the birth certificate identifies his parents as [REDACTED] (father) and [REDACTED] (mother). The beneficiary states that his parents' names are [REDACTED] (father) and [REDACTED] (mother). The beneficiary also states that the signatures on the earlier G-325A and I-485 are not his, and that the director should compare his signatures on the current I-485, G-325A and on the I-765 that he signed previously.<sup>11</sup> The beneficiary also notes that his address was listed incorrectly on the documents allegedly filed by [REDACTED]. The beneficiary states that he lived in New York at [REDACTED] New York, New York, and submits his Drivers Learning Permit and a bank statement as evidence of his address.

The beneficiary further states that to accuse him of acting in concert with [REDACTED] with regard to a fraudulent marriage based on the document that the driving school or [REDACTED] submitted is "most unfair." Counsel also submits copies of the I-130 petition filed by [REDACTED], with the accompanying G-325A form. Counsel also submits a copy of the marriage certificate that listed the beneficiary and [REDACTED] to the record, as well as a notarized birth certificate that states the beneficiary was born in Zhuji City (the former Zhuji County ) of Chekiang province on August 17, 1967. His father is identified as [REDACTED]; and his mother is identified as [REDACTED].

The AAO notes that the record indicates that the marriage certificate submitted to the record initially with the I-130 petition is fraudulent. The director denied the I-130 petition on December 27, 1996 because legacy INS found the petitioner's<sup>12</sup> birth certificate and the petitioner's and beneficiary's marriage certificate to be fraudulent. Further in a motion to reconsider dated October 13, 2004, the petitioner submitted a letter from the city of New York, Office of the City Clerk, that examined the marriage certificate in specific areas and declared the actual document to be fraudulent. Thus, the record reflects that the beneficiary did not enter into any marriage with [REDACTED].

However, the AAO concurs with the director that this document along with the I-130 petition and the G325A were filed to fraudulently obtain an immigration benefit for the beneficiary, namely his employment authorization document. Whether the beneficiary was aware or not aware of how the driving school in New York obtained his work authorization is irrelevant in these proceedings. The beneficiary signed papers and would have been responsible for their content.

The beneficiary submitted a copy of his initial Employment Authorization Document (EAD) with the I-485 petition he submitted to legacy INS on November 23, 2001 in conjunction with the instant

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<sup>10</sup>The record is not clear as to how counsel had copies of the documents found in the record, although counsel mentioned in correspondence during the proceedings that he was pursuing a Freedom of Information Act (FOIA) request.

<sup>11</sup> The AAO notes that the record contains the beneficiary's name in both block letters and cursive script. Within these two styles of writing, the beneficiary's signatures appear consistent.

<sup>12</sup>[REDACTED].

I-140 petition initially approved by USCIS. This copy indicates that the document was issued on June 10, 1996 and was valid from July 11, 1996 to July 10, 1997. This copy also clearly indicates that the beneficiary was eligible for the employment authorization under the provisions of 8 C.F.R. § 274A.11(c)(09) that states in pertinent part: "An alien who has filed an application for adjustment of status to lawful permanent resident pursuant to part 245."

Thus, the beneficiary received his initial EAD based on the Form I-130 application to adjust his status to lawful residency that was fraudulently submitted to USCIS. The photo of the person on the EAD appears to be the beneficiary. Further the fingerprints card found in the record of proceedings that would have been used to process his EAD indicates the beneficiary was fingerprinted on May 6, 1996. The I-130 Petition was received by USCIS on May 28, 1996. The record contains no further evidence of any immigration petitions, other than the fraudulent I-130 petition. As there are no other applications, the beneficiary, who claims to have arrived in the United States for the first time on May 1, 1996, would not have been able to obtain an EAD card by the 1996 date listed on the EAD card.

Thus, the beneficiary has engaged in seeking and procuring an immigration benefit based on the filing of fraudulent marriage documents and petitions. The materials submitted by the petitioner on motion are not sufficient to warrant the approval of the instant petition. The AAO reaffirms the director's revocation of the instant petition.

The AAO also notes that the beneficiary's assertion on motion with regard to his parents' actual names, only further confuses the record. On motion, beneficiary states his parents' names are [REDACTED] (father) and [REDACTED] (mother) and submits a notarized birth certificate to further substantiate his assertion. However the record contains three versions of his parents' names. The I-485 petition signed by the beneficiary and filed with USCIS on November 23, 2001 states that his parents' first names are [REDACTED] (father) and [REDACTED] (mother). The G-325A submitted with the earlier I-130 petition filed by [REDACTED] state that his parents' names are [REDACTED] (father) and [REDACTED] (mother), and the I-181 Memorandum of Creation of Record of Lawful Permanent Residence also indicate the parents of [REDACTED] at [REDACTED] are [REDACTED] (father) and [REDACTED] (mother). Nevertheless the USCIS computer records referenced by the director when he commented on an earlier entry by the beneficiary into the United States on July 12, 1993, identified the beneficiary's parents as [REDACTED] (father) and [REDACTED] (mother). Therefore the beneficiary in his I-485 petition used the same names for his parents as those identified on the USCIS computer records that indicate an earlier entry into the United States. On motion, the beneficiary submits a third set of names not previously identified in the record.

While the legacy INS records could have been updated based on the I-485 document filed in 2001, the beneficiary's submission of distinct names for his parents on the I-485 that differ from the notarized document submitted to the record on motion, represents another significant discrepancy. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "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." Rather than clarify discrepancies in the record, the

beneficiary's affidavit and statement only further complicate the issue of credibility raised by both the director and the AAO in previous decisions. Further the AAO notes that the record contains photos of the person for whom the initial I-130 petition was filed and photos and passport photos of the beneficiary. These photographs appear to be of the same person.

The AAO further notes that the petitioner submitted travel documentation information from the Hong Kong immigration authorities to substantiate the beneficiary's claim that he had not entered the United States in 1993. In the letter sent to the beneficiary dated June 8, 2004, the Hong Kong authorities stated that they only kept recent exit/entrance records for ten years and that they could not provide records prior to January 1, 1994. Thus, while the Hong Kong documentation establishes the beneficiary's entry into the United States on May 1, 1996, it cannot establish that the beneficiary had no earlier 1993 exit date for travel to the United States. Thus, this evidence is not dispositive in these proceedings.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.