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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
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**U.S. Citizenship
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Services**



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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **MAY 20 2009**
WAC 05 260 51545

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.

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 Director, California Service Center, approved the immigrant visa petition on May 6, 2006. Subsequently, on February 20, 2008, the director issued a Notice of Intent to Revoke (NOIR) the approval of the petition, finding that the petition had been approved in error. The director issued a Notice of Revocation (NOR) on April 2, 2008. The matter came before the Administrative Appeals Office (AAO) on appeal. The AAO withdrew the director's decision, but found that the petition was not approvable on grounds not noted by the director. The petition was remanded to the director for issuance of a new NOIR and a final decision. The director issued a new NOIR on September 9, 2008. The director issued a final decision, again revoking the approval of the petition, on February 3, 2009. The matter was certified to the AAO for review. The approval is revoked, the petition will be denied.

The petitioner is a towing company. It seeks to employ the beneficiary permanently in the United States as an operations supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). Following the remand of the petition to the director, the director issued a new NOIR. The petitioner failed to submit a timely response to the NOIR. Accordingly, on February 3, 2009, the director revoked the approval of the petition.

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

Certifications by service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

The regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) states in pertinent part:

(iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;

(B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act;

Pursuant to the delegation cited above, the AAO exercises the appellate jurisdiction formerly exercised by the Associate Commissioner for Examinations. 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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

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.

Section 205 of the Act, 8 U.S.C. §1155, provides that "[t]he Attorney general [now Secretary, Department of Homeland Security (DHS)], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petitioner 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 issues to be discussed in this case are whether the petitioner has demonstrated that, on the priority date, the beneficiary had the qualifications stated on the ETA 750, whether the petition was approved in error and whether the director had good and sufficient cause to revoke the approval of the petition.

In its decision of August 6, 2008, the AAO noted that the certified Form ETA 750 indicated that the position requires two (2) years of experience in the job offered as an operations supervisor or in the related occupation of general manager/supervisor. The beneficiary, on Form ETA 750B, indicated that he had been working for OAL Towing, Inc. (d/b/a Westside Towing) as a full-time general manager from January 1998 until "present" (the form was signed by the beneficiary on April 21, 2001). No other employment history was provided on the Form ETA 750B.

The record contains a letter dated July 15, 2005 which is on Westside Tow letterhead and is signed by [REDACTED] Vice President. The letter states that the beneficiary "is an employee of OAL Towing, Inc." and that the beneficiary "has been working as operations supervisor since January 1999." The AAO noted in its previous decision that the letter did not clearly provide the name of the beneficiary's employer in that the letterhead listed the employer name as Westside Tow, yet the body of the letter referred to the beneficiary's employment with OAL Towing, Inc. The AAO noted that a search of the California official business portal website showed that a California corporation named O.A.L. Tow, Inc. with the file number [REDACTED] and agent [REDACTED] was incorporated on September 2, 1998 and was presently active, while a company named Westside Tow, Inc. with file number C2524744 and agent [REDACTED] was established on September 17, 2003 but is now dissolved.¹

The AAO further noted that the record contains a certificate dated April 5, 2004 from [REDACTED], secretary of O.A.L. Tow, Inc., certifying that [REDACTED] owned 6,200 shares, [REDACTED] owned 2,200 shares and [REDACTED] owned 1,600 shares of the company stock as of the date of the certificate. The AAO also noted that the petitioner's president, [REDACTED] testified before an Immigration judge that [REDACTED] had been working for the petitioner as general manager from approximately 1997 to 2007. The record contains an affidavit from [REDACTED] which states that [REDACTED] was working as Vice President for the petitioner at the time the Form ETA 750 was filed. However, the AAO noted that the record did not contain any evidence to establish that [REDACTED] was the Vice President of either O.A.L. Towing, Inc. or Westside Tow. Nor did the record contain evidence to establish that [REDACTED] had the authorization to issue the experience letter on behalf of the company. Therefore, the AAO noted, it was not clear whether the experience letter dated July 15, 2005 from [REDACTED] was a letter from the beneficiary's current or former employer as required by the regulations.

The AAO further noted that the experience letter provided inconsistent information in that it stated that the starting date of the beneficiary's employment with the company was January 1999, whereas the beneficiary stated on the Form ETA 750B that he had started with the company in January of 1998.

The AAO found that, because the petitioner had failed to establish that the beneficiary possessed the qualifications listed on the ETA 750, the petitioner was not approvable. The AAO remanded the petition to the director for issuance of a new NOIR. As stated above, the director issued a new NOIR on September 9, 2008. In the NOIR, the director requested that the petitioner provide further information and documentation regarding the beneficiary's work experience with O.A.L. Towing (d/b/a Westside Towing). The director provided the petitioner with thirty days in which to respond to the NOIR.

The petitioner failed to respond to the NOIR other than to submit a letter, dated October 8, 2008, requesting additional time to respond to the NOIR. The director issued a NOR on February 3, 2009

¹ This was confirmed through the California business portal website (<http://kepler.ss.ca.gov/list.html>) which was accessed by the AAO on July 16, 2008 and again on May 8, 2009.

finding that the petitioner had failed to establish that that beneficiary was eligible for the benefit sought.²

On certification to the AAO, counsel has submitted a brief, a Fictitious Business Name Statement, a copy of the Articles of Incorporation of O.A.L. Tow, Inc. and a letter from [REDACTED], dated March 2, 2009.

The Fictitious Business Name Statement establishes that the fictitious business name for O.A.L. Tow, Inc., organization number [REDACTED] is Westside Tow. The March 2, 2009 letter from [REDACTED] states "I am vice president at Westside Tow and I am authorized to represent Westside Tow and issue this experience letter." However, counsel has failed to submit any evidence to establish the [REDACTED] is, in fact, the Vice President of Westside Tow. 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)).

Further, counsel has failed to resolve the inconsistency regarding the dates of the beneficiary's employment with O.A.L. Towing, Inc. d/b/a Westside Tow through independent objective evidence. As stated in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (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." 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. *Id.* at 591.

Counsel states that the beneficiary began his employment with O.A.L. Tow, Inc. d/b/a Westside Tow in January of 1999 and that the date was incorrectly listed as January 1998 on the ETA 750B due to a "simple error." However, it is noted that on the Form G-325A, Biographic Information, signed by the beneficiary on June 21, 2000, the beneficiary listed his start date with O.A.L. Towing, Inc. as January 1998. The fact that the start date of January 1998 was listed on two forms indicates that this was not a "simple error." Further, counsel has not provided any documentary evidence such as payroll records to establish that the beneficiary began his employment with O.A.L. Tow, Inc. d/b/a Westside Tow in January of 1999.

The petitioner has not demonstrated that the beneficiary had the qualifications stated on the ETA 750 as of the priority date.

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 director's February 3, 2009 decision is affirmed. The approval is revoked, the petition is denied.

² The director noted in the NOR that, while USCIS is not authorized to grant an extension of time as requested by counsel in the October 8, 2008 letter, counsel had not submitted any additional evidence as of the date of the NOR.