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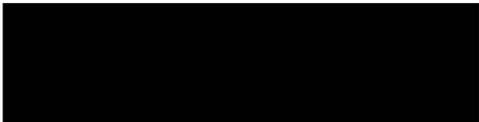


FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: NOV 02 2009
EAC 02 253 51495

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based Immigrant Petition for Alien Worker (Form I-140) was initially approved by the Director, Vermont Service Center. In connection with the adjudication of the beneficiary's Application to Register Permanent Residence or Adjust Status (Form I-485) by the district office, the director served the petitioner with Notice of Intent to Revoke the approval of the petition (NOIR). Upon receipt of the petitioner's response, the director certified the matter to the district office for a second interview on July 20, 2006. In a Notice of Revocation (NOR), the director revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The petitioner submitted a motion to reopen on October 5, 2006. On December 4, 2006, the director determined that the grounds for revoking the approval of the petition's approval had not been overcome and reaffirmed the previous decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision to revoke the petition's approval will be affirmed.

The petitioner produces jewelry. It sought to employ the beneficiary permanently in the United States as a mold maker. As required by statute, the petition was accompanied by an individual Application for Alien Labor Certification approved by the Department of Labor.

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).

Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that "[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(1)(B) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification." (Emphasis added.)

Section 212(a)(5)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(5)(i) provides that any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

- (I) there are not sufficient workers who are able, willing qualified (or equally qualified in the case of an alien described in clause (ii) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The petitioner must establish that its job offer to the beneficiary is a realistic one and that the opportunity is a *bona fide* job offer. 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 filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on November 24, 1997.

The record indicates that the I-140 was initially filed on July 29, 2002. It was approved on December 1, 2003. Based on the results of a telephone interview on October 5, 2005 by the district office with the petitioner in connection with the adjudication of the beneficiary's I-485, the director concluded that the I-140 was approved in error and issued a notice of intent to revoke the petition on December 28, 2005. The director informed the petitioner that the district adjudication officer (DAO) had talked to [REDACTED] the petitioner's owner, on October 5, 2005 about the beneficiary's work status with the petitioner. [REDACTED] verified that the beneficiary had worked for the petitioner about five years previously but had not passed his apprenticeship with the petitioner. [REDACTED] informed the DAO that the beneficiary had been fired and that there was no intention of hiring him back. [REDACTED] stated that a job offer letter dated July 13, 2005 (signed by [REDACTED]) was "fraudulent."

The petitioner was afforded thirty days to offer additional evidence or argument in opposition to the proposed revocation. In response, counsel offered another job offer letter signed by [REDACTED] as the petitioner's president and an affidavit signed by [REDACTED] as the petitioner's vice-president. In the affidavit, [REDACTED] recants the statements made to the [REDACTED] on October 5, 2005. He denies speaking about the beneficiary and claims that he was referring to a different employee that he had sponsored about five years previously and had terminated his employment. The affidavit states that [REDACTED] was not even asked about the sponsorship for the beneficiary and that he provided the [REDACTED] with the name and the spelling of the employee whom he did sponsor and subsequently terminated. [REDACTED] also denied claiming that the employment offer made by his "partner" was not accurate and that he could not verify the authenticity of a letter that he did not sign.

The director certified the case and sent it to the district office for another interview which took place on July 20, 2006. Based on the results of this interview and the documentation contained in the record, the director revoked the petition's approval on September 12, 2006, pursuant to section 205 of the Act, 8 U.S.C. § 1155. He observed that there were discrepancies in the signatures appearing on the job offer letters, differences in the job titles of [REDACTED] signing as a vice-president and [REDACTED] signing as a vice-president and also as a president of the petitioner, and a mismatch of some of the beneficiary's employment history as stated on the biographic form G-325, Part B of the ETA 750 and the letter of reference, which were never clarified. Finally the director cites the beneficiary's denial that he had ever worked for the petitioner because he did not have a green card in contrast to statements contained in [REDACTED] affidavit.

On October 12, 2006, counsel filed a motion to reopen the director's revocation of the I-140's approval. Counsel asserts that there is no clear difference in any of [REDACTED] signatures. He also maintains that the beneficiary never worked for the petitioner and that there was no assertion made in [REDACTED] affidavit that such employment had occurred. Further, counsel contends that the job titles of vice-president and president used by [REDACTED] were not inconsistent as he was promoted to "president" in 2003 and subsequently used that title. Finally, counsel asserts that the beneficiary's employment as stated on the G-325, Part B of the ETA 750 and the reference letter are consistent in stating that the beneficiary worked at [REDACTED] at [REDACTED] in Kolno, Poland, with the only difference being the shop name [REDACTED] did not appear on the G-325.

The director found that counsel's arguments raised in his motion to reopen were insufficient to overcome the reasons for revocation as previously set forth and affirmed the revocation of the petition's approval.

On appeal, counsel resubmits documentation previously offered and reiterates his arguments submitted in response to the director's NOIR and the director's revocation of the I-140. Counsel additionally provides an affidavit from [REDACTED] who affirms that he filed a genuine application for labor certification for the beneficiary and offers permanent employment as a mold maker as soon as the beneficiary achieves permanent residence. He claims that the beneficiary was never employed by his company because he has only temporary employment authorization.

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).

With reference to the director's inference that [REDACTED] signatures were "clearly different," it is noted that his signature is both written in cursive and printed on the ETA Form 750 signed in 1997 and the most current G-28 submitted to the record appear to be similar. The AAO has no expertise in handwriting analysis and without more, does not find this reason to revoke the petition's approval to be sufficient. **Similarly, although no specific statements from [REDACTED] or [REDACTED] were provided to explain the derivation of their respective job titles, we do not find this to be sufficient to warrant revocation of the petition's approval.** However it is noted that [REDACTED] affidavit referred to [REDACTED] as his partner not his superior. Additionally, as is set forth below, the director's reference to the mismatch of information on the G-325, Part B of the ETA 750 and the letter of reference fail to identify the specific discrepancies to which he is referring.

It is noted that 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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3) further 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.

The ETA 750 requires that the applicant for the certified position of mold maker must have acquired two years of work experience in the job offered as of the November 24, 1997 priority date. In this case, Part B of the ETA 750, signed by the beneficiary on October 7, 1997 lists one previous job for [REDACTED] at [REDACTED] where the beneficiary claimed to work as a full-time mold maker from June 1992 to June 1994. From June 1994 to the present (date of signing), he claimed to be unemployed.

The undated employment verification letter from [REDACTED] and [REDACTED] confirms this employment for [REDACTED] from June 1992 to June 1994.

The biographic information Form G-325-A, signed by the beneficiary on January 21, 2003, also lists his last employment abroad as working as a mold maker for the [REDACTED], at [REDACTED], in Kolno. The beneficiary's other jobs are listed as follows:

Self-employed [REDACTED] (From 01/98 to 12/99)
[REDACTED] (From 01/00 to 12/02)
[REDACTED] (From 01/03 to present)

These jobs, as listed, do not appear to be inconsistent with each other. However, it is noted that with reference to his past employment with the petitioner, there are clear inconsistencies in the record. Although not expressed in [REDACTED] affidavit, which recanted everything about his interview with [REDACTED] on October 5, 2005, except the fact that he talked with someone from U.S.

Citizenship and Immigration Services (USCIS), it is noted that the beneficiary's prior employment with the petitioner was confirmed in the [REDACTED] telephone interview with [REDACTED] on October 5, 2005. Further, on a change of address card (Form AR-11) signed by the beneficiary on September 13, 2004, he claims that "I work for or attend school at [the petitioning company]." This contradicts assertions made by [REDACTED] who claims that he has not hired the beneficiary because he only has temporary employment authorization.¹ Therefore, the petitioner's explanation of whether the petitioner has employed the beneficiary is not credible or probative of the beneficiary's employment history with the petitioner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner's explanation further contradicts the beneficiary's denial that he had ever worked for the petitioner as claimed at the district office interview on July 20, 2006.

Additionally, these inconsistencies relevant to the beneficiary's employment with the petitioner are related to the central issue of how the [REDACTED] account of her interview with [REDACTED] could have been as fundamentally different from [REDACTED] asserted account as described in the subsequently submitted affidavit which recanted everything he discussed with the [REDACTED]. It is noted that [REDACTED] never identified this other employee which he subsequently claimed to have discussed with the [REDACTED] and sponsored for a labor certification rather than the beneficiary. No records have been provided to substantiate such a claim. The AAO does not find [REDACTED] retraction to be credible or probative of the beneficiary's past employment with the petitioner or probative that the statements to the [REDACTED] made on October 5, 2005 were untrue. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th 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).

In this case, the AAO finds the [REDACTED] account of the interview to be reliable in establishing that the job offer to the beneficiary had been terminated. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, at 591-92. 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 at 591. 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). Furthermore,

¹ Any employment authorization card issued to the beneficiary either after the initial approval of the I-140 or during the I-485 proceedings would allow the petitioner to legally employ the beneficiary.

evidence that the petitioner creates after USCIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence.

In view of the foregoing, the AAO concludes that the director properly revoked the approval of the petition. 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 Esteime*, . . . 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 at 590(citing *Matter of Esteime*, 19 I&N 450 (BIA 1987)). In this case, the evidence contained in the record at the time the decision was rendered, warranted such denial.

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.