

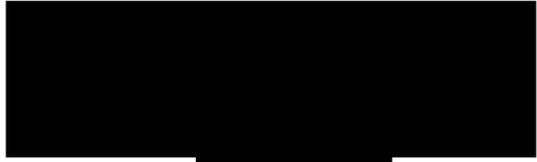


U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: NOV 30 2009
EAC 08 007 51591

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perky Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner filed an appeal which the director treated as a motion to reopen/reconsider. The director denied the motion to reopen/reconsider and invalidated the labor certification. The issue is now before the Administrative Appeals Office (AAO). The director's decision with regard to the denial of the motion to reopen/reconsider will be withdrawn. The AAO will adjudicate the appeal based on the record of proceeding. The appeal will be dismissed.¹

The regulation at 8 C.F.R. § 103.3(a)(2) states in pertinent part:

- (iii) *Favorable action instead of forwarding appeal to AAO.* The reviewing official shall decide whether or not favorable action is warranted. Within 45 days of receipt of the appeal, the reviewing official may treat the appeal as a motion to reopen or reconsider and take favorable action. . . .
- (iv) *Forwarding appeal to AAO.* If the reviewing official will not be taking favorable action or decides favorable action is not warranted, that official shall promptly forward the appeal and the related record of proceeding to the AAO in Washington, DC.

In the instant case, the reviewing official determined that favorable action was not warranted. Therefore, the appeal should have been forwarded to the AAO instead of treating the appeal as a motion to reopen/reconsider. However, from the outset, it should be noted that there are additional issues of ineligibility beyond the director's decision that renders the instant petition not approvable, and the labor certification subject to invalidation.² Those issues will be discussed below.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification), approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to establish that the beneficiary listed on the Form I-140, Immigrant Petition for Alien Worker, and the beneficiary listed on the Form ETA 750 were the same. The director noted that the beneficiary on the Form I-140 listed a birth date of January 9, 1976, and the beneficiary's date of birth listed on the Form

¹ The AAO notes that the petitioner and beneficiary have filed a "Complaint for Declaratory Relief and Petition for Writ of Mandamus" with the United States District Court for the Eastern District of New York, dated April 2, 2009.

² 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).

ETA 750 is March 21, 1948. The director denied the petition accordingly and invalidated the labor certification on motion to reopen/reconsider.³

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 September 18, 2008 denial, the single issue in this case is whether or not the petitioner has established that the beneficiary listed on the Form I-140 and Form ETA 750 are one and the same.

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 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.⁴

On the petition, the petitioner claimed to have been established on April 28, 2006, to have a gross annual income of \$515,215.00, and to currently employ nine workers. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary did not list the dates he has worked for the petitioner, although he did list the petitioner as an employer.⁵

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

³ The director failed to include and apply the proper legal standard for invalidating labor certifications.

⁴ 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).

⁵ It is noted that the beneficiary listed his employment with the petitioner on Form G-325A, Biographic Information, (filed with Form I-485, Application to Register Permanent Residence or Adjust Status on August 1, 2007) from 1999 to the present (July 26, 2007 when the Form G-325A was signed by the beneficiary).

and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour (\$39,291.20 per year). The Form ETA 750 states that the position requires two years of experience in the job offered of restaurant cook.

On appeal, the petitioner submits a copy of the beneficiary's birth certificate. The petitioner states:

[U.S. Citizenship and Immigration Services (USCIS)] denied the submitted petition on the assumption that the approved labor certification was filed on behalf of another person, other than the beneficiary, based on an error on listing the date of birth of the beneficiary on the application for alien employment certification. The fact is that the petition was submitted for the same beneficiary, as even [USCIS] indicated that the ETA 750 had his name, the same name as indicated on the form I-140. An "honest" error was made on the ETA 750, as in lieu of putting the date of birth of the actual beneficiary, the counsel put the date of birth of his father.⁶ We are enclosing a copy of the beneficiary's birth certificate, and it will be noted how this mistake was made (and never corrected or noticed).

It would be unfair and unreasonable to deny the petition and request for adjustment of status based on this "honest" and "understandable" error.

Based on the evidence, the petition should be approved and the application for adjustment granted.

All prior G-28s submitted on this matter are to be considered withdrawn and all communication forwarded to the address indicated on Page 1.⁷

⁶ The record of proceeding does not include a statement from counsel acknowledging that he made a mistake when entering the beneficiary's date of birth on the Form ETA 750.

⁷ The petitioner's request to forward all communication to the address indicated on Page 1 will not be honored. The individual indicated on Page 1, [REDACTED]

[REDACTED] is on a list of individuals who are prohibited from representing applicants or petitioners in matters filed with USCIS. This individual is on this list because he has falsely claimed to be an attorney when he is not, falsely claimed to be an accredited representative when he is not, or he is a notario or immigration consultant who has been the subject of federal, state or local court action to stop his unauthorized practice of law or theft of fees for legal services he may not lawfully provide. The AAO will not communicate with this individual on this list, even if he were to submit a "Notice of Entry of Appearance as Attorney or Representative" form (Form G-28) in this case. The regulation at 8 C.F.R. § 292.4(a) states in pertinent part:

An appearance shall be filed on the appropriate form by the attorney or representative appearing in each case. During Immigration Judge or Board proceedings, withdrawal and/or substitution of counsel is permitted only in

The issue in the instant case is whether or not the petitioner has established that the beneficiary listed on the Form I-140 and the beneficiary listed on the Form ETA 750 are one and the same.

The AAO notes that there are two copies of the beneficiary's birth certificate in the record of proceeding. While both birth certificates do show the date of birth for the beneficiary's father as March 21, 1948, the AAO notes that the beneficiary's date of birth was listed as January 9, 1976 on Form I-485 which was submitted on the same day as the Form I-140. It is unclear to the AAO why counsel would have marked the date of birth of the beneficiary's father on the Form ETA 750, even inadvertently, as the father's birth date was not required on the Form ETA 750. The AAO may not ignore the discrepancy between the date of birth listed on the Form I-140 and the date of birth listed on Form ETA 750, as the true identity of the intended beneficiary cannot be verified. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements.⁸ *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 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Beyond the decision of the director, the record in this case also lacks conclusive evidence as to the petitioner's ability to pay the proffered wage from the priority date of April 30, 2001. 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).

The regulation at 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

accordance with §§ 3.16 and 3.36 respectively. During proceedings before [USCIS], substitution may be permitted upon the written withdrawal of the attorney or representative of record, or upon notification of the new attorney or representative. When an appearance is made by a person acting in a representative capacity, his or her personal appearance or signature shall constitute a representation that under the provisions of this chapter he or she is authorized and qualified to represent. Further proof of authority to act in a representative capacity may be required. A notice of appearance entered in application or petition proceedings must be signed by the applicant or petitioner to authorize representation in order for the appearance to be recognized by [USCIS].

⁸ Thus, USCIS may not accept or correct mistakes on labor certifications that have been certified by DOL. The proper procedure would be to seek DOL's certified amendment of any errors on the labor certification either before or after certification.

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 either 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 DOL. *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 DOL 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 \$18.89 per hour (\$39,291.20 per year). The Form ETA 750 states that the position requires two years of experience in the job offered as a restaurant cook.

The regulation at 8 C.F.R. § 103.2 states in pertinent part:

(a) *Filing – (1) General.* Every application, petition, appeal, motion request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions (including where an application or petition should be filed) being hereby incorporated into the particular section of the regulations in this chapter requiring its submission.

The instructions for Form I-140 under “General Evidence,” question 2, Ability to pay wage, clearly state:

Petitions which require job offers must be accompanied by evidence that the prospective U.S. employer has the ability to pay the proffered wage. Such evidence shall be in the form of copies of annual reports, Federal tax returns, or audited financial statements.

In a case where the prospective U.S. employer employs 100 or more workers, a statement from a financial officer of the organization that establishes ability to pay the wage may be submitted. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted.

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

(ii) Initial evidence. If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS, in its discretion, may deny the application or petition for lack of initial evidence for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

(iii) Other evidence. If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the application or petition for ineligibility; . . .

The petitioner has not submitted any evidence of its ability to pay the proffered wage either initially or on appeal. The regulation does not state that USCIS is obligated to issue a RFE when the evidence in the record does not establish eligibility.

Another issue in the instant case is whether or not the petitioner misrepresented the job to DOL in the labor certification process, and therefore, the labor certification is deemed invalid.

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. To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, was filed on April 30, 2001 and the job offer consists of the name of job title: [REDACTED]; the name of employer: “[REDACTED] the instant petitioner; and the location of the employment: “[REDACTED].” The ETA 750A is signed by [REDACTED]. However, the Form I-140 is signed by [REDACTED] who claims that the petitioner was established in April 28, 2006. The New York Department of State, Division of Corporations, Entity Information, at http://appsext8.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_INFORMATION? (accessed on November 23, 2009) shows that there are three active corporations at the above address. One corporation is called [REDACTED], which was incorporated on March 13, 1995. Its chairman or chief executive officer is [REDACTED] (the supposed owner of the petitioner according to the Form ETA 750). The second corporation is entitled [REDACTED]. This corporation was incorporated on June 23, 1992, and the address to which the New York Department of State will mail process is [REDACTED]. The remaining corporation is entitled [REDACTED], and it was incorporated on April 28, 2008 with [REDACTED] as chairman or chief executive officer. This last corporation appears to be the actual petitioner since it was incorporated on the date given on the Form I-140.

Therefore, the record shows that the business did not exist, the position was not available and the job opportunity could not be open to any qualified U.S. workers as required by 20 C.F.R. § 656.20(c) at the time the labor certification was filed and the labor market tested for the proffered position. Therefore, the job offer was not a realistic one. The record does not contain any evidence showing that DOL knew that the business was not established yet during the certification application process. The Form I-140 also indicates that the position is not a new position. The petitioner did not explain how a non-existing business has an existing position of cook. The misrepresentation of a non-realistic job offer is of a material fact in the labor certification application processing. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).⁹

The regulation at 20 C.F.R. § 656.30(d) states in pertinent part:

Invalidation of labor certification. After issuance, a labor certification may be revoked by ETA using the procedures described in § 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a court of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.¹⁰

Furthermore, if the petitioner is purchased, merges with another company, or is otherwise under new ownership, a successor-in-interest relationship must be established. The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the petitioner listed on the labor certification and continues to operate the same type of business as the petitioner listed on the labor certification. In addition, in order to maintain the original priority date, the successor-in-interest must demonstrate that the petitioner listed on the labor certification had the ability to pay the

⁹ It is noted that a search of public databases (Business and SmartLinx® Business Report, Statewide Public Records Business Search, D&B FEIN, Secretary of State Filings, etc.) did not show a result for the employer's IRS Tax number supplied by the petitioner on Form I-140.

¹⁰ Section 212(a)(6)(C)(i) of the Act provides that "[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

proffered wage from the priority date in 2001 until the date of the change in ownership. Moreover, the successor-in-interest must establish its financial ability to pay the certified wage from the date of the change in ownership. *See Matter of Dial Auto Repair Shop*, 19 I&N Dec. 481 (Comm. 1981). The record does not establish that the current business is the successor-in-interest to the petitioner listed on the labor certification. The record does not contain an asset purchase agreement, bill of sale, or any other documentation evidencing that the petitioner listed on the labor certification was purchased by the current business entity. The fact that the petitioner is doing business at the same location as the predecessor or even using the same name does not establish that the petitioner is a successor-in-interest. 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)).

Finally, it is noted that the letter submitted to document the beneficiary's experience is insufficient. A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(1)(3), which provides that:

(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 petitioner has submitted a copy of a letter, dated December 27, 1997, from (not legible) [REDACTED]. The letter states:

This is to certify that [the beneficiary] of [REDACTED] has been employed by our Hotel from 25th January 1994 [to] 15th December 1997, as a cook.

He is a good employee very willing to listen and learn, always delivering a good standard of work. I take this opportunity to wish him well in his career ahead, and can recommend him to any future employer.

In the instant case, the letter from [REDACTED] does not meet the requirements of 8 C.F.R. § 204.5(I)(3) as it does not give a description of the beneficiary's duties nor does it indicate whether the beneficiary was employed full-time or part-time. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 director's September 18, 2008 decision is withdrawn. The appeal is dismissed.