

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**

**PUBLIC COPY**

B6



FILE: [REDACTED]  
LIN 06 168 51600

Office: NEBRASKA SERVICE CENTER

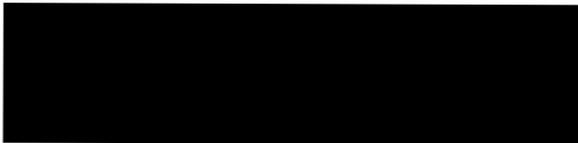
Date: SEP 21 2009

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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.

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** the Director, Nebraska Service Center, denied the preference visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director for further consideration and entry of a new decision.

The petitioner is an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as an Italian style cook. The director determined that the petitioner had not submitted with the petition an original labor certification (Form ETA 750, Application for Alien Employment Certification, or Form 9089, Application for Permanent Employment Certification) approved by the Department of Labor as required by statute and that the petitioner had not established its continuing ability to pay the proffered wage from the priority date of August 4, 2000. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 28, 2007 denial, the issues in this case are whether or not the petitioner submitted with the petition an original labor certification (Form ETA 750, Application for Alien Employment Certification, of Form 9089, Application for Permanent Employment Certification) approved by the Department of Labor as required by statute and whether or not the petitioner had established its ability to pay the proffered wage from the priority date and continuing until the present.

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) states in pertinent part:

*Initial evidence –(i) Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. . .

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

*Initial evidence. (1) General.* Specific requirements for initial supporting documents for the various employment-based immigrant classifications are set forth in this section. In general, ordinary legible photocopies of such documents (except for labor certifications from the Department of Labor) will be acceptable for initial filing and

approval. However, at the discretion of the director, original documents may be required in individual cases. 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.

(Emphasis added.)

The regulation at 8 C.F.R. § 103.2(b)(4) states:

*Submitting copies of documents.* Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, such as labor certifications, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, must be submitted in the original unless previously filed with the [U. S. Citizenship and Immigration Services (USCIS)].

The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1(2003). The AAO exercises appellate jurisdiction over the 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).

Among the appellate authorities are appeals from denials of petitions for immigrant visa classification based on employment, "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." 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.). However, in this case, counsel submitted a photocopy of the labor certification (ETA 750) with the original petition.

The regulation at 20 C.F.R. § 656.30(e) states:

*Duplicate labor certifications.*

- 1) The Certifying Officer shall issue a duplicate labor certification at the written request of a Consular or Immigration Officer. The Certifying Officer shall issue such duplicate labor certifications only to the Consular or Immigration Officer who initiated the request.
- 2) The Certifying Officer shall issue a duplicate labor certification to a Consular or Immigration Officer at the written request of an alien, employer, or an alien's or employer's attorney/agent. Such request for a duplicate labor certification must be addressed to the Certifying Officer who issued the labor certification; must include documentary evidence from a Consular or

Immigration Officer that a visa application or visa petition, as appropriate, has been filed; and must include a Consular Officer or DHS tracking number.

In the instant case, the record contains information from counsel on appeal explaining that the original labor certification was submitted with a prior petition (EAC 05 231 51159) for the same beneficiary. Counsel specifically stated that the original labor certification was in the control of U.S. Citizenship and Immigration Services (USCIS) and not his client. A review of the record of proceeding reveals that the original labor certification was submitted with another I-140 (EAC 01 005 50015).

The second issue in the instant case is whether or not the petitioner has established its ability to pay the proffered wage of \$41,600 from the priority date of August 4, 2000 and continuing until the beneficiary obtains lawful permanent residence.

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 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 August 4, 2000. The proffered wage as stated on the Form ETA 750 is \$41,600 per year. The Form ETA 750 states that the position requires two years of experience in the job offered of Italian style cook.

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.<sup>1</sup>

Although the director's decision was limited to the issue of the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the record in this case lacks conclusive evidence as to whether the beneficiary is eligible for an immigration benefit due to the marriage fraud bar under section 204(c) of the Act. 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). This issue must be addressed before a determination can be reached on the merits of the case and may ultimately make any other issues irrelevant.

A Form I-130, Petition for Alien Relative, was filed on the beneficiary's behalf on June 6, 1994. Concurrent with the filing of Form I-130, the beneficiary also sought lawful permanent residence and employment authorization as the immediate relative of a U.S. citizen.

An interview was conducted of the beneficiary and his spouse on November 14, 1994, after which a Stokes interview<sup>2</sup> was requested because of inconsistencies in information provided by the pair, which was subsequently held on December 5, 1995. The district director determined that the beneficiary failed to provide evidence either documentary or by testimony given at the time of the interview that the beneficiary's marriage was bona fide.

The beneficiary and his spouse filed an appeal on August 9, 1996 with the Board of Immigration Appeals (BIA), who subsequently remanded the case to the director on August 20, 1996.

Pursuant to the BIA remand, a second Stokes interview was conducted of the beneficiary and his spouse on April 25, 2000. The district director denied the Form I-130 again on July 18, 2000 based on discrepancies in information provided by the beneficiary and his spouse during the second Stokes interview.

The beneficiary and his spouse filed another appeal to the BIA on August 18, 2000. A prior Form I-140, EAC 01 005 50015, was approved by the director on May 8, 2001. The beneficiary was in removal proceedings so counsel corresponded with the assistant district counsel and stated that the beneficiary would withdraw the BIA appeal and pursue the employment-based immigrant visa with

---

<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 appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>2</sup> *Stokes v. INS*, 393 F. Supp. 24(S.D.N.Y. 1975) set forth procedures for governmental investigations of fraud. In marriage-based immigrant petitions, this involves separating the spouses and asking the same questions to each spouse separately.

his consent. Subsequent correspondence from the assistant district counsel granted the withdrawal request and noted that counsel could file the adjustment of status paperwork with USCIS instead of the immigration court if she wished to pursue the matter. The beneficiary filed Form I-485 with supporting forms and documentation on August 9, 2001, and the appeal to the BIA was withdrawn.

On January 2, 2003, the beneficiary's pending Form I-485 was relocated to the Vermont Service Center for consideration of revoking the underlying I-140 petition's approval pursuant to section 204(c) of the Act.

Section 204 of the Act governs the procedures for granting immigrant status. Section 204(c) provides for the following:

Notwithstanding the provisions of subsection (b)<sup>3</sup> no petition shall be approved if:

- 1) The alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws or,
- 2) The [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

On April 25, 2003, the director sent a Notice of Intent to Revoke (NOIR) to the petitioner which included a copy of the district director's July 18, 2000 decision.

On December 29, 2003, the acting director revoked the approval of the I-140 visa petition because she found counsel's response ineffective since, in her interpretation, the district director did deny the Form I-130 based on findings that the beneficiary and his spouse entered into a sham marriage.<sup>4</sup> Additionally, the district director noted that no additional evidence was provided to rebut the invocation of Section 204(c). On the same date, the acting director denied the adjustment of status application the beneficiary filed in connection with the previously approved Form I-140.

On appeal of the Form I-140, EAC 01 005 50015, the AAO found:

There is substantial and probative evidence to support a reasonable inference that the prior marriage was entered into for the purpose of evading immigration laws. The director correctly analyzed and noted the discrepancies in factual representations throughout the multiple testimonials provided by the beneficiary and [his spouse] and

---

<sup>3</sup> Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.

<sup>4</sup> The acting director also issued a decision on October 1, 2003 stating that no response was received to the NOIR and revoked the petition's approval, to which counsel filed an appellate form proving she had submitted a response.

failure to provide corroborating evidence. There is ample evidence that the beneficiary attempted to evade the immigration laws by marrying [his spouse] and that attempt is documented in the alien's file. Thus, the director's determination that the beneficiary sought to be accorded an immediate relative or preference status as the spouse of a citizen of the United States by reason of a marriage determined by USCIS to have been entered into for the purpose of evading the immigration laws is affirmed.

In the instant case, the petitioner filed Form I-140, LIN 06 168 51600, on May 17, 2006 which was denied by the director on April 28, 2007 due to a lack of an original labor certification (Form ETA 750, Application for Alien Employment Certification, or Form 9089, Application for Permanent Employment Certification) approved by the Department of Labor as required by statute and because the petitioner had not established its continuing ability to pay the proffered wage from the priority date of August 4, 2000. Following the petitioner's response to the instant notice of intent to dismiss (NOID), the petition may be denied on these additional grounds as well.

The AAO notes that current counsel has represented the petitioner and the beneficiary before the BIA and with the filings of the prior petition and current petition. Therefore, counsel is aware of the directors' and the AAO's findings regarding the beneficiary's ineligibility under section 204(c) of the Act as set forth fully in decisions related to EAC 01 005 50015.

The regulation 8 C.F.R. § 204.2(a)(1)(ii) states in pertinent part:

Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

Due to the AAO's prior determination that the beneficiary sought to be accorded an immediate relative or preference status as the spouse of a citizen of the United States by reason of a marriage determined by USCIS to have been entered into for the purpose of evading the immigration laws, the AAO is remanding the visa petition to the director for further investigation, for further consideration, and for entry of a new decision.

The director must afford the petitioner reasonable time to provide evidence relevant to the beneficiary's eligibility for this immigration benefit or any other immigration benefit. In addition, the director may request any other evidence that he deems appropriate. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.