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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS2090  
Washington, DC 20529-2090

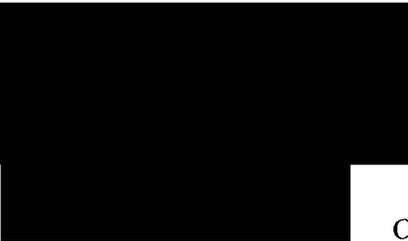


U.S. Citizenship  
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Office: VERMONT SERVICE CENTER

Date: **JAN 21 2010**

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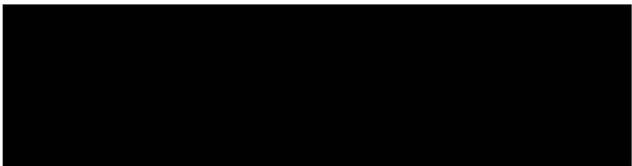
Petitioner:



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).

Perry Rhew

Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was initially approved by the Director, Vermont Service Center. On December 19, 2006, the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The petitioner then filed a motion to reopen/reconsider the revocation of the approval. On May 4, 2007 the director granted the petitioner's motion to reopen/reconsider and affirmed his decision revoking the approval of the petition. The petitioner appealed the director's decision. The appeal will be rejected as untimely filed pursuant to 8 C.F.R. §§ 205.2(d), 103.5(a)(6), and 103.3(a)(2)(v)(B)(1). However, as the untimely appeal meets the requirements for a motion, the matter will be remanded to the director for further consideration. 8 C.F.R. §103.5(a)(2)(v)(B)(2).

The petitioner is a stationery store. It seeks to employ the beneficiary permanently in the United States as a manager. 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). On May 4, 2007, the director determined that the petitioner had failed to resolve discrepancies in the record relating to the beneficiary's employment with the petitioner. The director also determined that the petitioner had failed to establish that the beneficiary had the qualifications stated on the Form ETA 750. The director therefore revoked the approval of the petition pursuant to Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155.

The regulation at 8 C.F.R. § 205.2(d) requires an affected party to file the complete appeal within 15 days after service of the notice of revocation, or, in accordance with 8 C.F.R. § 103.5a(b), within 18 days if the notice was served by mail. The record indicates that the notice of revocation was sent to the petitioner on May 4, 2007. Counsel to the petitioner filed an appeal with the Vermont Service Center on June 5, 2007, 32 days after the decision was served. Thus, the appeal was not timely filed and must be rejected on these grounds pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1). The fact that the May 4, 2007 decision was rendered in response to the petitioner's filing of a motion will not extend this appeal period. *See* 8 C.F.R. § 103.5(a)(6).<sup>1</sup>

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. § 103.5(a)(2) or a motion to reconsider as described in 8 C.F.R. § 103.5(a)(3), the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii).

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<sup>1</sup> It is noted that the director, in his Notice of Revocation dated May 4, 2007, indicates that the petitioner had 30 days to appeal the revocation of the petition to the AAO. However, this timeframe does not apply to an appeal of a notice of revocation, which is limited to 15 days in 8 C.F.R. § 205.2(d). While it is unfortunate that the director noted the incorrect appeal period in the Notice of Revocation, the instant appeal is nevertheless untimely and the AAO must reject it under the regulations. 8 C.F.R. § 103.3(a)(2)(v)(B)(1). The AAO does not have the authority to waive set appeal periods nor does it have jurisdiction to consider untimely appeals.

The petitioner's Form ETA 750 was filed with DOL on March 20, 2001 and certified by DOL on June 28, 2002. The petitioner subsequently filed Form I-140 with U.S. Citizenship and Immigration Services (USCIS) on July 29, 2002, which was approved on April 6, 2003. The beneficiary filed Form I-485, Application to Register Permanent Residence of Adjust Status, on November 26, 2002.

The approval of the I-140 petition was revoked as a result of statements made by the beneficiary during the course of an interview of the beneficiary conducted by USCIS in connection with the Form I-485 application.

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." A notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, 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. *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Where a notice of intention to revoke is based upon an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained, even if the petitioner did not make a timely response to the notice of intention to revoke. *Id.*

A notice of intent to revoke (NOIR) "must include a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence (e.g., the investigative report)." *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). See also *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988)(stating "where the petitioner is unaware and has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained").

On December 19, 2006, the director sent a NOIR to the petitioner stating the following:

It has now come to the attention of this office that during the interview testimony provided by the beneficiary as to his employment with the petitioner appears to be in direct conflict with other information provided by the petitioner on the labor certification submitted with the initial filing, which in turn provided the basis for the eventual approval of the beneficiary's immigrant visa petition.

Attached to the notice was a memorandum from the Adjustment of Status Unit of the New York City District of USCIS. The memo stated that, "[a]ccording to the labor certification, [redacted] hired a manager who [sic] duties include supervise requisition of supplies, customer relations, hire, train and discharge workers, arrange credit and loans from the bank earning \$62,400 per year." The memo also referenced an employment letter dated May 15, 2005 that had been submitted by the petitioner in support of the beneficiary's Form I-485 application. This letter stated that the beneficiary was currently employed by the petitioner as a manager, at a salary of \$40,800 per year, and that his duties were essentially the same as those listed on the labor certification application.

The memo also noted that the beneficiary had been interviewed at the New York City District Office

on November 4, 2004. The memo stated that, during the interview, the beneficiary disclosed that “his main responsibilities at [REDACTED] are working as a cashier, selling lottery tickets, making sure items are in stock, helping to arrange the store.” The beneficiary further indicated that, at the time of the interview, he did not “directly manage other employees, assign their shifts, or pay them.” Instead, according to the beneficiary, the owner performed those duties. The memo concluded:

According to [the beneficiary’s] statements, he is working more as a cashier than as a manager. The position on the labor certificate was for a manager not a cashier. In view of the foregoing, we suggest that the approval of the petition be revoked and ultimately that the petition be denied.

Although the instant appeal has been rejected, it appears that the reasons stated in the notice of intention to revoke did not provide “good and sufficient cause” for the issuance of the notice and cannot serve as the basis for revoking approval of the visa petition. The fact that the beneficiary was not, at the time of his adjustment interview, performing the duties listed on the ETA 750 is not grounds for revocation of the approval of the Form I-140 petition. A labor certification application represents a job offer made by a U.S. employer to an alien. 20 C.F.R. §656.21(a)(2)(2004). Thus, the Form ETA 750 filed by the petitioner did not indicate that the petitioner “hired a manager,” but instead indicated that the petitioner was making an *offer of employment* to the beneficiary for the position of manager.

The beneficiary is not required to work in the proffered position until such time as the Form I-485, Application for Adjustment of Status, is approved. The fact that the beneficiary was not working in the proffered position prior to approval of the adjustment application is not grounds for revocation of the approval of the Form I-140 petition. Therefore, it appears that the NOIR was not properly issued for good and sufficient cause.

Nevertheless, because the untimely appeal meets the requirements of a motion, this matter will be remanded to the director. It is suggested that the director issue a new NOIR which details the evidence in the record which supports revocation of the approval of this petition. Specifically, it appears that the petitioner failed to establish that the beneficiary has the qualifications stated on the Form ETA 750.<sup>2</sup>

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

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<sup>2</sup> As noted above, on May 4, 2007, the director issued a decision granting the petitioner’s motion to reopen/reconsider and affirming the revocation of the I-140 approval. In the May 4, 2007 decision, the director stated that the petitioner had not established that the beneficiary met the work experience requirement as specified on the Form ETA-750. However, that ground had not been identified in the NOIR issued on December 19, 2006. Thus, the petitioner had not been provided sufficient notice of this ground of revocation. *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987).

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.

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the alien 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 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

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

In the instant case, the Form ETA 750 states that the position requires two years of experience in the job offered. On the Form ETA 750B the beneficiary indicated that he had been employed as a manager by [REDACTED] located at [REDACTED], from January 1991 until January 1993. The alien did not list any other professional experience on the Form ETA 750B.

With the petition, the petitioner submitted a letter from [REDACTED] dated March 20, 1995. The letter is on the letterhead of [REDACTED], and the address listed is [REDACTED]. The letter states that the beneficiary "worked in our supermarket as manger [sic] from January 1991 through January 1993." The experience letter submitted by the petitioner fails to comply with the regulation at 8 C.F.R. §204.5(l)(3)(ii)(A) in that it fails to provide any description of the beneficiary's experience. Therefore, the petitioner has failed to establish that that, on the priority date, the beneficiary had the qualifications stated on the Form ETA 750

Further, the information in the letter and on the Form ETA 750 conflicts with other information in the record. Specifically, the record contains a sworn affidavit signed by the beneficiary in January 2007 in which the beneficiary states that, prior to coming to the United States, he had managed a store in Saudi Arabia for approximately eight (8) years. No such experience is listed on the Form ETA 750. The affidavit does not mention the beneficiary's alleged experience at a supermarket in Yemen. Further, the record contains a sworn affidavit executed by the beneficiary on November 4, 2004, the date of the beneficiary's adjustment interview. In the affidavit, the beneficiary stated that he was hired by the petitioner because "I had a store in Saudi Arabia and knew how to manage it so he hired me to do the same thing." 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner has failed to resolve the inconsistencies in the record with respect to the beneficiary's experience and therefore the petitioner has failed to establish that, on the priority date, the beneficiary had the qualifications stated on the Form ETA 750.

In addition, statements made in the record by both the petitioner and the beneficiary indicate that the beneficiary was not qualified to perform the duties of the position listed on the Form ETA 750 at the time that the Form ETA 750 was filed. 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 record contains a letter dated January 17, 2007 and signed by [REDACTED], the petitioner's president, which states that, when the beneficiary was first hired "[h]e had no supervisory duty over the other employees as he had not been trained to be a manager." Similarly, the record includes an affidavit from the beneficiary in which the beneficiary states that he "slowly began training for the management position" with the petitioner in January 2003. Thus, it appears that the beneficiary's prior experience, if he in fact had any, did not qualify him for the proffered position.

Finally, the record contains inconsistencies regarding the date on which the beneficiary assumed the position of manager with the beneficiary. The beneficiary indicates in the sworn affidavit of January 2007 that he was working as a cashier at the time of his interview in November 2004 but that he had assumed the position of manager by May 15, 2005. Similarly, the January 17, 2007 letter from the petitioner's president states that the beneficiary was working for the petitioner as a cashier prior to May 2005, and assumed the position of manager in May 2005. However, the record also contains a letter dated August 19, 2004 which is on [REDACTED] letterhead and is signed by [REDACTED]. This letter states that the beneficiary "is currently working with us as a manager." Once again, 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. *Matter of Ho*, 19 I&N Dec. at 591-592. Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States, unless the petitioner is able to overcome the findings of the U.S. Consulate investigation. See INA Section 212(a)(6)(c), [8 U.S.C. 1182], regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material

fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible.”

This matter will be remanded to the director to be treated as a motion. As noted above, it is suggested that the director issue a new NOIR which details the evidence in the record which supports revocation of the approval of this petition.

**ORDER:** The appeal is rejected; however, the petition is remanded to the director for consideration as a motion to reopen/reconsider.