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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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

B6

Date:

APR 27 2011

Office: TEXAS SERVICE CENTER

FILE:

WAC 05 086 53627

IN RE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, California Service Center. On September 14, 2007, the Director, Texas Service Center, served the petitioner with notice of intent to revoke the approval of the petition (NOIR).¹ In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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).

The petitioner is a mortgage banker. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. 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). United States Citizenship and Immigration Services (USCIS) approved the petition on May 25, 2005. The director determined that the petition had been approved in error as petitioner had not established that the beneficiary possessed the required two years of experience as a bookkeeper as of the priority date. The director revoked the previously approved petition accordingly.

The AAO issued a Notice of Derogatory Information and Request For Evidence (NDI/RFE) on October 8, 2010, informing the petitioner that evidence in the record indicated that a familial relationship existed between the beneficiary and the petitioner’s owner.² The AAO noted a familial relationship between the beneficiary and the petitioner’s owner may indicate that the job opportunity was not available to U.S. workers, and/or that this is the functional equivalent of self-employment. The AAO further noted that the petitioner certified to the DOL that the job opportunity “has been and clearly is open to any qualified U.S. worker,” on the Form ETA 750.

¹ The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that 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. The director’s NOIR sufficiently detailed the evidence of the record, pointing out such evidence did not establish that the beneficiary possessed the required two years of experience as a bookkeeper as of the priority date of March 4, 2002, and thus was properly issued for good and sufficient cause.

² The AAO reviewed the record of proceeding under its *de novo* review authority. The authority to adjudicate appeals is delegated to the AAO by the Secretary of Homeland Security pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. The AAO’s *de novo* authority has been long recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

If the job opportunity was not, in fact, open to qualified U.S. workers, this misrepresentation would also close off a line of relevant inquiry which would have revealed that the labor certification should actually have been denied.

Accordingly, the AAO requested that the petitioner state what relationship, if any, exists between the beneficiary and the petitioner's owner(s), shareholder(s), and/or officer(s). If a relationship does exist between the beneficiary and the petitioner's shareholder(s) and or officer(s), the AAO requested that the petitioner please provide verifiable evidence that the DOL was cognizant of that relationship when it certified the labor certification for the beneficiary. The petitioner was also asked to submit evidence to establish that a *bona fide* job opportunity exists. The AAO noted that such evidence may include, but was not limited to, whether the beneficiary:

- is in the position to control or influence hiring decisions regarding the job for which labor certification is sought;
- was an incorporator or founder of the company;
- has an ownership interest in the company;
- is involved in the management of the company;
- is one of a small number of employees;
- has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and/or
- is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue in operation without the alien.

The petitioner was informed that if it did not submit evidence to establish that a *bona fide* job opportunity exists, the AAO may invalidate the labor certification based on fraud or willful misrepresentation and dismiss the appeal.

Furthermore, the AAO noted that the Form ETA 750 contained in the record states that the position of bookkeeper requires two years of experience in the job offered. In support of the petition, the petitioner submitted a letter from the Iran Drop Irrigation Company stating that the beneficiary had been employed as a bookkeeper beginning in January 1994. The director informed the petitioner in both the NOIR and NOR that the Consulate General in Abu Dhabi, U.A.E. contacted the Iran Drop Irrigation Company and was informed that the company had no record of the beneficiary as an employee.

Subsequently on appeal, the petitioner submitted letters from [REDACTED] former chairman of the board of the Iran Drop Irrigation Company and from [REDACTED] former managing director of the Iran Drop Irrigation Company. These letters state that the beneficiary was employed by Iran Drop Irrigation Company as a bookkeeper beginning in January 1994. The petitioner also submitted a statement from the beneficiary in which he explains that, following his interview, he was forced to leave his employment with the Iran Drop Irrigation Company. The beneficiary further states that

employees of the company were forced to cut ties with him. Finally, the petitioner submitted a copy of a letter purportedly sent by the beneficiary's former employer to the U.S. Consulate in Abu Dhabi confirming the beneficiary's employment.

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. The letters submitted on appeal are insufficient to establish that the beneficiary had two years of experience as a bookkeeper as of the priority date. Consequently, the AAO requested that the petitioner submit objective evidence of the beneficiary's employment with the Iran Drop Irrigation Company such as pay stubs, payroll records and/or employment contracts such as the one referenced in the beneficiary's statement submitted in support of this appeal.

Finally, according to the regulation at 8 C.F.R. § 204.5(g)(2), the petitioner must demonstrate the ability to pay the proffered wage until the beneficiary obtains lawful permanent residence. The instant petition is pending with the AAO and the beneficiary has not obtained his lawful permanent residence yet. The record contains copies of the petitioner's Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2002 and 2003. Therefore, the AAO requested that the petitioner submit copies of annual reports, federal tax returns, or audited financial statements for the years 2004 through 2009, as well as any Forms W-2 issued to the beneficiary for the years 2002 through 2009.

In addition, it is noted that the petitioner filed a Form I-140 petition (SRC 07 088 51714) which has a priority date of August 23, 2006 and which was pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). The AAO requested that the petitioner provide evidence to demonstrate it had the continuing ability to pay both the beneficiary of the instant petition during its pendency and the beneficiary of the petition, SRC 07 088 51714, since its priority of August 23, 2006.

In the NDI/RFE, the AAO specifically alerted the petitioner that failure to respond to the NDI/RFE would result in dismissal since the AAO could not substantively adjudicate the appeal without the information requested. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Because the petitioner failed to respond to the NDI/RFE, the AAO is dismissing the appeal.

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.