

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

Be



Date: **DEC 26 2012**

Office: TEXAS SERVICE CENTER FILE:



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:

SELF-REPRESENTED

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On July 14, 2003, the Director, United States Citizenship and Immigration Services (USCIS) Vermont Service Center, approved the employment-based immigrant visa petition. However, on April 11, 2012, the Director, Texas Service Center (the director), revoked the approval of the petition, invalidated the labor certification, and certified the decision to the Administrative Appeals Office (AAO) for review pursuant to 8 C.F.R. § 103.4(a). Upon review, the AAO will affirm the director's decisions to revoke the approval of the petition.

The petitioner is a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). The petition was initially approved, but the approval of the petition was later revoked and the labor certification invalidated. The director found that the petitioner failed to demonstrate that it conducted good faith recruitment in accordance with the U.S. Department of Labor (DOL) recruitment procedures and that there was fraud or willful misrepresentation involving the labor certification process. Additionally, the director found that the beneficiary did not have the requisite work experience in the job offered before the priority date and that the petitioner had closed and no longer could continue to employ the beneficiary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

First, the AAO agrees with the director that if the business has been dissolved, then there is no *bona fide* job offer available to the beneficiary, and the petition is subject to automatic revocation. *See* 8 C.F.R. § 205.1(a)(3)(iii)(D).

The AAO will next address the following issues: (a) whether there was fraud or willful misrepresentation involving labor certification and (b) whether or not the beneficiary had the requisite work experience in the job offered prior to the priority date.

a) Whether there was fraud or willful misrepresentation involving labor certification.

The AAO notes that the director found fraud or willful misrepresentation involving the labor certification application and invalidated the labor certification because the petitioner failed to provide a response to the director's Notice of Intent to Revoke dated September 29, 2010 (NOIR).

¹ Section 203(b)(3)(A)(i) of 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.

Pursuant to 20 C.F.R. § 656.31(d) (2004), USCIS may invalidate the labor certification based on fraud or willful misrepresentation. The regulation stated:

If a Court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefor shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

Upon *de novo* review, the AAO finds that the evidence of record does not support the director's conclusion that there was fraud or willful misrepresentation involving the labor certification. There has been an insufficient development of the facts upon which the director can make a determination of fraud or willful misrepresentation in connection with the documentation submitted to support the beneficiary's qualifications based on the criteria of *Matter of S & B-C*, 9 I&N Dec. 436, 447 (A.G. 1961). Thus, the director's finding of fraud or willful misrepresentation is withdrawn. Further, the director's decision to invalidate the certified Form ETA 750 is withdrawn.

Nevertheless, the approval of the petition cannot be reinstated because of the following reasons.

b) **The beneficiary did not have the requisite work experience in the job offered before the priority date.**

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, 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, *Madany v. Smith*, 696 F.2d, 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).

Here, the record shows that the petitioner filed the Form ETA 750 labor certification with DOL on April 30, 2001. The name of the job title or the position for which the petitioner seeks to hire is "Cook." The job description under item 13 of the Form ETA 750, part A, is "Prepare all types of dishes." Under item 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered.

On the Form ETA 750, part B the beneficiary represented that he worked 35 hours a week as a cook at [REDACTED] ME from December 1993 to November 1996. Submitted along with the approved Form ETA 750 and the Form I-140 petition was an employment verification letter dated January 10, 2001 from [REDACTED] stating that the beneficiary worked for her establishment as a cook from December 1, 1993 to November 3, 1996.

In reviewing the evidence submitted, the director found multiple inconsistencies in the record pertaining to the beneficiary's claimed prior employment in Brazil as a cook. The director found that the beneficiary lived about 150 miles away from the location of [REDACTED] ME, where the beneficiary claimed to have worked as a cook between 1993 and 1996.² In addition, [REDACTED] according to the CNPJ information, was not established until October 1, 1997.³ Therefore, the director concluded that it is not feasible that the beneficiary was employed as a cook by [REDACTED] from 1993 to 1996.

The director asked the petitioner to submit independent objective evidence, i.e. copies of pay stubs, payroll records, tax documents, and/or the beneficiary's booklet of employment and social security, to resolve the inconsistencies in the record as identified above. The petitioner failed to respond to the director's NOIR.

In addition to the petitioner's failure to resolve the inconsistencies in the record pertaining to the beneficiary's claimed employment in Brazil as noted above, we find that the employment verification letter dated January 10, 2001 from [REDACTED] did not include a sufficient description of the experience or training of the beneficiary, in accordance with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) provides:

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.

² The beneficiary claimed on his Form G-325 (Biographic Information), which he filed in connection with the Application to Register Permanent Residence or Adjust Status (Form I-485), that he lived in Cuparaque, Minas Gerais, Brazil from 1980 to 1998. The location of Marisa de Abreu Oliveira ME, according to the evidence submitted, was in Vila Velha, Espirito Santo, Brazil.

³ Cadastro Nacional da Pessoa Juridica or CNPJ is a unique number given to every business registered with the Brazilian authority; it is similar to Employer Federal Identification Number (FEIN) in the United States. CNPJ database can be accessed online at: http://www.receita.fazenda.gov.br/PessoaJuridica/CNPJ/cnpjreva/Cnpjreva_Solicitacao.asp.

Simply stating that the beneficiary worked as a cook is not a sufficient description of the beneficiary's training or experience. For these reasons, we agree with the director that the petitioner failed to establish that the beneficiary possessed the minimum qualifications as of the priority date is affirmed.

c) **The Petitioner failed to establish the continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary ported to another similar employment.**

Beyond the decision of the director, we find that the petitioner has failed to establish the continuing ability to pay the proffered wage from the priority date until the beneficiary ported to work for another employer. 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review 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 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. 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 and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As indicated above, the Form ETA 750 was accepted by the DOL for processing on April 30, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$12.57 per hour or \$22,877.40 per year (based on a 35-hour work per week).⁴

The petitioner submitted copies of the following evidence to show that it has the continuing ability to pay the proffered wage from the priority date:

- A copy of the Internal Revenue Service (IRS) Form 1040 U.S. Individual Income Tax Return for 2001.

The tax return submitted above shows the petitioner is a sole proprietorship. Sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In this case, the petitioner, according to the tax return submitted, is married and does not support anyone. The petitioner reported adjusted gross income of \$491,885 in 2001. Thus, it is reasonable to conclude that the petitioner has the ability to pay the beneficiary's proffered wage of \$22,877.40 in 2001.

However, the record does not contain any other evidence with regards to the petitioner's ability to pay. Due to the lack of evidence, the AAO cannot conclude that the petitioner has the ability to pay the proffered wages from 2002 onwards.

In summary, the director's finding that there was fraud or willful misrepresentation involving the labor certification will be withdrawn. Similarly, the director's decision to invalidate the labor certification will be withdrawn. Nevertheless, the AAO finds that the director had good and sufficient cause to revoke the approval of the petition. The petitioner has failed to establish by a preponderance of the evidence that the beneficiary had the requisite work experience in the job

⁴ The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. See 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DoL Field Memo No. 48-94 (May 16, 1994).

offered prior to the priority date and that the petitioner has the continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary either obtains lawful permanent residence or ported to another similar employment.

Section 205 of the Act, 8 U.S.C. § 1155, states, "The Secretary of Homeland Security may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204. Such revocation shall be effective as of the date of approval of any such petition." 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).

Where the petitioner of an approved visa petition is not eligible for the classification sought, the director may seek to revoke the approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for good and sufficient cause. Notwithstanding the USCIS burden to show good and sufficient cause in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. 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. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984). The revocation of the previously approved petition is affirmed for the above stated reasons, with each considered as an independent and alternative basis for the decision.

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 director's decision to revoke the previously approved petition is affirmed.

FURTHER ORDER: The director's decision to invalidate the alien employment certification, Form ETA 750, ETA case number [REDACTED] is withdrawn.