

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

**PUBLIC COPY**

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

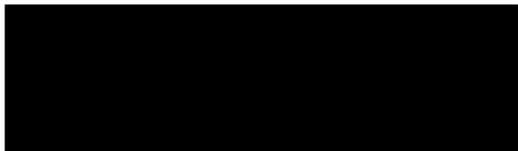


Date: **FEB 15 2012** Office: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), 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,

*Elizabeth McCormack*

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** On December 22, 2003, United States Citizenship and Immigration Services (USCIS), Texas Service Center (“the director”), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the director on September 11, 2004; however, the director reversed his earlier decision and revoked the approval of the immigrant petition on June 30, 2010. The petitioner subsequently appealed the director’s decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director’s decision will be withdrawn. The appeal will be remanded to the director for further action, consideration, and the entry of a new decision.

The petitioner is a poultry processing company. It seeks to permanently employ the beneficiary in the United States as a poultry worker, DOT job code 525.687-070 (poultry dresser), pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii).<sup>1</sup> As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). The director revoked the approval of the petition because the beneficiary had no intention to work for the petitioner. The director stated that the beneficiary did not work for the petitioner in [REDACTED] upon her arrival to the United States in May 2005. Instead of working for the petitioner, the director further indicated that the beneficiary opened up a floral shop in [REDACTED] California and worked there from May 2005 until after the Notice of Intent to Revoke was issued by the director on March 17, 2010.

On appeal to the AAO, counsel for the petitioner contends that the beneficiary is not required to work for the petitioner until after her Application to Register for Permanent Residence or Adjust Status (Form I-485) is approved. Counsel asserts that the director’s decision to revoke the approval of the petition is an abuse of discretion.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] 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).

However, before the Secretary of Homeland Security can revoke the approval of the petition, the regulation requires that notice must be provided to the petitioner. More specifically, 8 C.F.R. § 205.2 reads:

---

<sup>1</sup> Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(a) *General.* Any Service [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice** to the petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this Service [USCIS]. (Emphasis added).

In addition, the regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Further, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, the director notified the petitioner in the Notice of Intent to Revoke (NOIR) of the facts found by a USCIS investigation that the beneficiary neither went to work for the petitioner nor resided near the petitioner's business location upon her arrival in the United States. The beneficiary, according to the USCIS investigation opened up a floral shop in [REDACTED] California, and worked there. Thus, the director determined that the beneficiary would not leave her business in California and move to Georgia to work as a poultry dresser for a salary of \$7 per hour and that she had no *bona fide* intention to work for the petitioner.

The beneficiary stated on the Form ETA 750, part B, that she received a bachelor's degree in elementary education from [REDACTED] University" in Seoul, South Korea in February 1983 and that from January 2002 to January 2003, she was employed as a team leader/lecturer at the [REDACTED]. Her Form G-325A (Biographic Information) submitted in connection with the application to adjust status to permanent residence (Form I-485) indicates that she worked as an instructor at a school district from October 1998 to January 2002 and for the [REDACTED] as a staff member in 2004. She states on that form that she owned a floral shop in California from September 2006 to January 2009, the date of signing the form.

The record reflects that the beneficiary of the immigrant visa petition received a nonimmigrant B-1/B-2 visa on January 14, 2003 valid for 10 years and that she entered the United States on October 2, 2003;

September 26, 2004 in unknown status and on May 2, 2005 and April 14, 2008 as a tourist. Her change of status request from temporary visitor to treaty trader status (E-visa) was approved on October 1, 2005 and the beneficiary enjoyed treaty trader status from October 2005 to September 2009. She received notice from the United States Department of State (DOS) in January 2005 about how to immigrate to the United States based upon the current petition.

On appeal, the beneficiary states that she in compliance with immigration regulations and that she could not file her Form I-485 (Application to Adjust Status to Permanent Residence) until her visa category became current.<sup>2</sup> She states that she is not required to work for the petitioner until she obtains lawful permanent residence.

The AAO agrees. While it seems unlikely that an educated foreign national intends to work permanently as a poultry worker, as of the date of the appeal the beneficiary was not required to work for the petitioner and may not be presumed to be ineligible for the visa by not working for the petitioner to date.<sup>3</sup>

The AAO finds that the director appropriately reopened the approval of the petition by issuing the Notice of Intent to Revoke (NOIR). However, the director's NOIR is deficient in that it contains conclusions not supported by USCIS regulations.<sup>4</sup> Thus, the AAO will remand the petition to the director for the issuance of a new NOIR.

---

<sup>2</sup> The current date for the beneficiary's visa category, based on her employment preference, became current on February 1, 2006. *See* Department of State Visa Bulletin for January 2012 (accessible online at <http://travel.state.gov/visa/> under "Visa Bulletin") (last accessed January 25, 2012). The record shows, as noted above, that the employment-based petition was approved in September 2004.

<sup>3</sup> The beneficiary may be ineligible for adjustment of status as she may have misrepresented her intention to return to South Korea when she obtained the ten-year B-1/B-2 visitor's visa in January 2003 and upon inspection at each subsequent entry to the United States. The application for labor certification was filed on her behalf on March 10, 2003, which is an expression of immigrant intent inconsistent with the terms of the temporary visitor's visa which she obtained two months earlier presumably after an interview with DOS. Further, her continued travel to the United States under the terms of her tourist visa is inconsistent with her intention to reside permanently in the United States at all times after the filing of the application for labor certification on March 10, 2003. Further, by entering the United States under the terms of the B-visa in April, 2008 during the approval period of the E visa extension of status, she may have abandoned the E visa status. The beneficiary's admissibility is not at issue in the current adjudication, however.

<sup>4</sup> 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 (9<sup>th</sup> 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).

While the petitioner, in order to be eligible for the benefits sought, must have the intention to employ the beneficiary in the position as certified by the DOL, the beneficiary is not required to work for the petitioner until she obtains legal permanent residence.<sup>5</sup> The petitioner, however, is required to establish that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives her legal permanent residence.

USCIS regulation at 8 C.F.R. § 204.5(g)(2), in pertinent part, specifically states:

*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 be able to demonstrate the continuing ability to pay the proffered wage beginning 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. *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 as certified by the DOL and submitted with the instant petition.<sup>6</sup> *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted by the DOL for processing on March 10, 2003. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$7 per hour or \$14,560 per year (based on a 40-hour work per week). Therefore, the petitioner is required to demonstrate that it has the ability to pay \$7 per hour or \$14,560 per year from March 10, 2003 and continuing until the beneficiary receives her lawful permanent residence.

Further, a review of USCIS records reveals that the petitioner has previously filed multiple immigrant petitions since 2001.<sup>7</sup> If the instant petition were the only petition the petitioner has filed, the petitioner would have only been required to demonstrate the ability to pay the proffered wage to the single

---

<sup>5</sup> The record reflects that the beneficiary sold her floral business and moved to Georgia, and that she worked for the petitioner for one week. The beneficiary's intention to work for the petitioner continues to be a relevant inquiry and any expression of inconsistent intent should be explored by the director on remand.

<sup>6</sup> The beneficiary is qualified for the job offered as the certified Form ETA 750 does not require applicants for the job to have any education, training, or work experience prior to filing of the labor certification application.

<sup>7</sup> A review of USCIS database records indicates that the petitioner has filed 599 employment-based petitions.

beneficiary of the instant petition. However, that is not the case here. In this case, the petitioner has filed multiple petitions in the past. Unless the petitioner disputes this fact (if, for instance, one or more of hundreds of the petitions have been withdrawn, or if the information provided is inaccurate), the petitioner, consistent with the regulation at 8 C.F.R. § 204.5(g)(2), is required to establish the ability to pay the proffered wages *not only* for the current beneficiary but *for all* of the other immigrant visa beneficiaries until each beneficiary receives his or her legal permanent residence (LPR).

The petitioner has submitted the following evidence to show that it has the continuing ability to pay the proffered wage from March 10, 2003:

- A letter dated December 11, 2003 from [REDACTED], stating that the petitioner currently employs more than 1,700 people and that, based on the balance sheet for the period October 1, 2002 to June 27, 2003, the petitioner has gross and net income of \$112,205,402 and \$2,540,631, respectively; and
- A copy of the petitioner's balance sheet dated June 27, 2003 and a statement of cash flow for the period ending June 27, 2003.

The evidence submitted above is not sufficient to demonstrate that the petitioner has the ability to continuously pay the proffered wage from the priority date until each beneficiary, including the beneficiary in the instant case, received or receives his or her permanent residence. First, neither the balance sheet nor the statement of cash flow is audited. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. In this case, there is no indication that either the balance sheet or the statement of cash flow has been audited in accordance with Generally Accepted Accounting Principles.

In addition, by itself, the letter dated December 11, 2003 from [REDACTED] stating that the company currently employs more than 1,700 workers is not acceptable as evidence of the petitioner's ability to pay. In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That regulation further provides: "In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." (Emphasis added).

Given the absence of other evidence of ability to pay, such as tax returns, audited financial statements, or annual reports, and the fact that USCIS remains concerned about the petitioner's intentions to permanently employ the beneficiary and that the petitioner has 599 immigrant visa petitions, USCIS need not exercise its discretion to accept the letter from [REDACTED]. Furthermore, [REDACTED] is the director of human resources; he is not the company's financial officer. As noted earlier, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. It is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of the beneficiary it is seeking to employ.

On remand, the director should issue a new NOIR requiring the petitioner to demonstrate financial resources in the form of annual reports, federal tax returns, or audited financial statements sufficient to pay the proffered wages of the beneficiary and of all of the other beneficiaries from the priority date and continuing until the beneficiary receives her lawful permanent residence, and until the other beneficiaries obtain permanent residence or until their petitions' approvals were revoked. 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).

In summary, the director's decision to revoke the approval of the petition is withdrawn. The approval of the petition, however, may not be reinstated under the facts of record. The petition is, therefore, remanded to the director for issuance of a new NOIR to the petitioner, specifically advising the petitioner to demonstrate the ability to pay, as discussed above. The director may request any evidence relevant to the outcome of the decision and should afford the petitioner a reasonable opportunity to respond. Upon review and consideration of any response, the director shall enter a new decision.

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