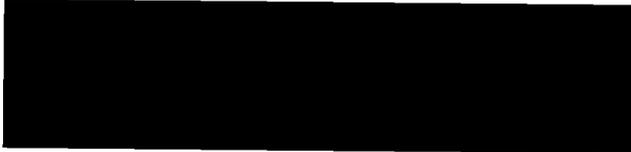


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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

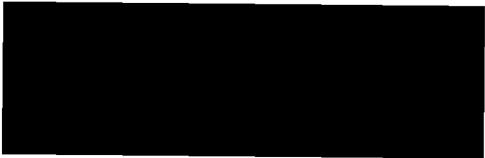


B6.

Date: **FEB 22 2012** Office: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

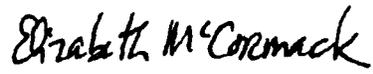
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:


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: On June 10, 2002, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on March 5, 2003. The director of the Texas Service Center, however, revoked the approval of the immigrant petition on May 21, 2009, and the petitioner subsequently appealed the director's decision to revoke the petition's approval. The appeal will be dismissed.

The petitioner is [REDACTED].¹ It seeks to employ the beneficiary permanently in the United States as a baker, DOT job code 526.381-010 (Baker), 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).² As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification. As stated earlier, this petition was approved on March 5, 2003, but that approval was revoked in May 2009. The director of the Texas Service Center ("the director") concluded that the petitioner did not follow the U.S. Department of Labor (DOL) recruitment procedures, since it failed to submit copies of the in-house postings. The director also determined that the petitioner's previous counsel, [REDACTED], paid for and created the job advertisement and thus impermissibly participated in the consideration of U.S. applicants for the job. For these reasons, the director found fraud/material misrepresentation relating to the labor certification process against the petitioner and revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal, current counsel for the petitioner ([REDACTED]) contends that the director's decision to revoke the approval of the petition was not based on good and sufficient cause, as required by section 205 of the Act, 8 U.S.C. § 1155. Counsel further asserts that the petitioner fully complied with the DOL recruitment procedures. Counsel also states that the DOL would not have approved the petitioner's Form ETA 750 had it not followed the DOL recruitment requirements. Additionally, counsel indicates that the director revoked the approval of the petition simply because the petition in the instant proceeding was filed by Mr. Dvorak.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

¹ Dunkin Donuts is a trade name for coffee and bakery shops in the United States of America.

² 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.

³ 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).

Preliminarily, the AAO finds that the director erred in revoking the approval of the petition under the authority of 8 C.F.R. § 205.1. The regulation at 8 C.F.R. § 205.1 only applies to automatic revocation and is not the proper authority to be used to revoke the approval of the petition in this instant proceeding. Under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if (A) the labor certification is invalidated pursuant to 20 C.F.R. § 656; (B) the petitioner or the beneficiary dies; (C) the petitioner withdraws the petition in writing; or (D) if the petitioner is no longer in business. Here, the labor certification has not been invalidated; neither the petitioner nor the beneficiary has died; the petitioner has not withdrawn the petition; nor has the petitioner gone out of business. Therefore, the approval of the petition cannot be automatically revoked. The director's erroneous citation of the applicable regulation is withdrawn. Nonetheless, as the director does have revocation authority under 8 C.F.R. § 205.2, the director's denial will be considered under that provision under the AAO's *de novo* review authority.

Upon *de novo* review, the AAO will withdraw the director's conclusion that the petitioner did not follow the DOL recruitment procedures. First, the Notice of Intent to Revoke (NOIR) issued to the petitioner by the director on February 20, 2009 was deficient in that it did not specifically give the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director generally questioned the beneficiary's qualifications and indicated that the petitioner had not properly advertised for the position. The NOIR neither provided nor referred to specific evidence or information relating to the petitioner's failure to comply with DOL recruitment or to the beneficiary's lack of qualifications in the present case. The director did not state which recruitment procedures were defective. Without specifying or making available evidence specific to the petition in this case, the petitioner can have no meaningful opportunity to rebut or respond to that evidence. *See Ghaly v. INS*, 48 F.3d 1426, 1431 (7th Cir. 1995). Because of insufficient notice to the petitioner of derogatory information, the director's decision will be withdrawn. The petition's approval will not be reinstated however as the petitioner has not established that the beneficiary possessed the requisite work experience in the job offered prior to the priority date, as more fully discussed below.

The AAO acknowledges that at the time the petitioner filed the labor certification application with the DOL for processing in April 2001, employers were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the DOL. *See* 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991. Not until 2005, when the DOL switched from paper-based to electronic-based filing and processing of labor certifications, were employers required to maintain records and other supporting documentation, and even then employers were only required to keep their labor certification records for five years. *See* 69 Fed. Reg. 77386, Dec. 27, 2004 as amended at 71 Fed. Reg. 35523, June 21, 2006; *also see* 20 C.F.R. § 656.10(f) (2010). As such, USCIS may not make an adverse finding against the petitioner, if, as in this case, the

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).

petitioner claims it no longer has the supporting documentation over five years after the labor certification was approved.⁴

Further, the record contains no evidence showing that [REDACTED] either paid for the job advertisement or interviewed or considered candidates for the position. By itself, the letter dated February 14, 2001 addressed to [REDACTED] from the *Boston Herald* does not show that [REDACTED] paid for or impermissibly participated in the consideration of U.S. applicants for the job offered. No DOL regulations prohibit agents and/or legal representative of petitioners from placing advertisements for their clients with local newspapers.

While the regulation at 20 C.F.R. §§ 656.20(b)(3)(i)-(ii) (2001)⁵ specifically prohibited agents or legal representatives of the beneficiaries and the petitioners from participating in interviewing or considering applicants for the job offered, the regulation in place at the time of the recruitment in this case allowed beneficiaries and petitioners to have agents and/or attorneys (legal representatives) represent them throughout the labor certification process. See 20 C.F.R. § 656.20(b)(1) (2001).⁶

⁴ The AAO, however, acknowledges the authority and interest of USCIS to request such documentation pursuant to our invalidation authority at 20 C.F.R. § 656.31(d) and the interest of the petitioner in proving its case by retaining and submitting such documentation to USCIS particularly in response to a fraud investigation.

⁵ This regulation is currently found at 20 C.F.R. § 656.10(b)(2) (2010). The regulation at 20 C.F.R. § 656.20(b)(3)(i) (2001) at the time of recruitment stated:

It is contrary to the best interests of U.S. workers to have the alien and/or agents or attorneys for the alien participate in interviewing or considering U.S. workers for the job offered the alien. As the beneficiary of a labor certification application, the alien cannot represent the best interests of U.S. workers in the job opportunity. The alien's agent and/or attorney cannot represent the alien effectively and at the same time truly be seeking U.S. workers for the job opportunity. Therefore, the alien and/or the alien's agent and/or attorney may not interview or consider U.S. workers for the job offered to the alien, unless the agent and/or attorney is the employer's representative as described in paragraph (b)(3)(ii) of this section.

The regulation at 20 C.F.R. § 656.20(b)(3)(ii) (2004) at the time of recruitment stated:

The employer's representative who interviews or considers U.S. workers for the job offered to the alien shall be the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered the alien, but which do not involve labor certifications.

⁶ This regulation is currently found at 20 C.F.R. § 656.10(b)(1) (2010).

The record does, however, indicate anomalies in the recruitment process in that the petitioner signed the Form ETA 750 prior to the time of the advertisement. A review of the record reveals that the petitioner signed the Form ETA 750 on January 31, 2001. By signing the Form ETA 750, the petitioner essentially stated under penalty of perjury that the recruitment was complete. Under the reduction in recruitment procedures, the petitioner should have completed the recruitment efforts and declared that its efforts to recruit U.S. workers yielded no result by January 31, 2001 (the date the petitioner signed the Form ETA 750).

Nevertheless, based on the evidence submitted, the petitioner placed an advertisement after it signed the Form ETA 750 on February 23, 2001.⁷ The petitioner's premature signature, therefore, raises the likelihood that the DOL's recruitment procedures were not followed and that the petitioner or [REDACTED] (the attorney who represented the petitioner in filing the Form I-140) might have been impermissibly involved in the recruiting process, if the petitioner, for instance, merely signed the Form ETA 750 and let [REDACTED] take over the recruitment efforts (for instance, by placing the advertisement and interviewing U.S. candidates, or making the decision on whether to refer candidates to the petitioner). 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).

Regardless of the ambiguity concerning the recruitment process, the AAO cannot affirm the director's finding that the recruitment procedures were not followed. The record has not been sufficiently developed to support that finding. In addition, the petitioner has not been specifically notified of the derogatory information involving the recruitment process, as outlined above. Therefore, the director's conclusion that that the petitioner failed to follow the DOL recruitment procedures is erroneous and is withdrawn.⁸

The AAO also finds that the evidence of record is not sufficiently developed to support the director's finding of fraud or willful misrepresentation in connection with the labor certification process or that the beneficiary engaged in fraud or material misrepresentation in the presentation of his credentials to the petitioner and through the petitioner to USCIS. Thus, the director's finding of fraud or misrepresentation is withdrawn.

As immigration officers, USCIS Appeals Officers and Center Adjudications Officers possess the full scope of authority accorded to officers by the relevant statutes, regulations, and the Secretary of Homeland Security's delegation of authority. See sections 101(a)(18), 103(a), and 287(b) of the Act; 8 C.F.R. §§ 103.1(b), 287.5(a); DHS Delegation Number 0150.1 (effective March 1, 2003).

⁷ The advertisement was placed in the *Sunday Boston Herald* on March 11, 2001.

⁸ Although the director's conclusion is withdrawn, the issue relating to the recruitment process must be addressed in any future filings.

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I).

The administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation for any issue of fact that is material to eligibility for the requested immigration benefit. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. at 591-592.

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.⁹

Section 204(b) of the Act states, in pertinent part, that:

After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien . . . in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true.

⁹ It is important to note that, while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. See *Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. See sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO and USCIS have the authority to enter a fraud finding, if during the course of adjudication, the record of proceedings discloses fraud or a material misrepresentation.

Section 212(a)(6)(C) of the Act governs misrepresentation and states the following: "Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

- (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

Matter of S & B-C-, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750. *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

In this case, as noted above, the factual record does not disclose that the petitioner and/or [REDACTED] engaged in material misrepresentation with respect to the recruitment process, even though, as noted above, there are anomalies in the record involving the petitioner's premature signature on the Form ETA 750 that may suggest that the DOL recruitment procedures were not properly followed.

With respect to the ability to pay, the AAO finds that the petitioner has demonstrated by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority

date.¹⁰ The petition, however, cannot be approved because the petitioner has not established that the beneficiary had the requisite work experience in the job offered as of 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. 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 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 Form ETA 750 was filed and accepted for processing by the DOL on April 19, 2001. The name of the job title or the position for which the petitioner seeks to hire is "Baker." Under section 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, signed by the beneficiary on February 23, 2001, he represented that he worked 40 hours a week for [REDACTED] as a baker from April 1998 to September 2000. The record, however, does not contain any evidence that the beneficiary was employed at [REDACTED]. Instead, the record contains an employment letter dated February 19, 2002 from [REDACTED] stating that the beneficiary worked at [REDACTED] as a full-time baker from April 1995 to September 1997. In response to the director's NOIR dated February 20, 2009 and to show that the beneficiary had the experience in the job offered as a baker before the priority date, the petitioner or the beneficiary submitted another letter of employment from [REDACTED] stating that the beneficiary worked as a pastry baker from April 1995 to September 1997 earning \$1,200 Mexican Pesos a week. This letter is undated.

In adjudicating the appeal, the AAO also observes that the beneficiary failed to include his work experience abroad on the Biographic Form (Form G-325), which he filed along with the Application to Register Permanent Residence or Adjust Status (Form I-485). The AAO issued a Notice of Derogatory Information and Request for Evidence (NDI/RFE) on April 7, 2010 advising the petitioner to submit independent and objective evidence to resolve the inconsistencies in the record concerning the beneficiary's past work experience.

¹⁰ The AAO notes that the petitioner has employed and paid the beneficiary more than the proffered wage since the priority date. The rate of pay or the proffered wage as shown on the Form ETA 750 is \$12.61 per hour or \$22,950.20 per year (based on a 35-hour work per week). The evidence submitted shows that the petitioner employed and paid the beneficiary over \$22,950.20 per year from 2001 to 2009.

In response to the AAO's NDI/RFE, counsel states that the beneficiary was not required to disclose his past employment beyond five years on the Form G-325. Counsel also states that the information about the beneficiary's past employment in the Form ETA 750 was wrong, and that it is unreasonable to expect the beneficiary to embark on a search of a former owner of the business in Mexico all the way from Boston, Massachusetts.

The AAO disagrees with counsel's contention that the beneficiary was not required to disclose his employment abroad on the Form G-325. The beneficiary is required on the Form G-325 to list his "last employment abroad." The beneficiary failed to do this.

Further, because of the noted inconsistency in the record, the petitioner should submit independent objective evidence to demonstrate that the beneficiary qualifies for the position and had the requisite work experience in the job offered before the priority date. Whether or not the beneficiary had two years of work experience in the job offered before the priority date is material in this case, since the DOL would not have approved the labor certification had it known that the beneficiary was not qualified for the job opportunity at issue.

Additionally, such evidence, if provided, would have shed more light on the beneficiary's qualifications and would have resolved the inconsistencies in the record regarding the beneficiary's employment and work experience in Mexico. USCIS regulations at 8 C.F.R. §§ 103.2(b)(2)(i) and (ii) allow USCIS to accept secondary proof in the event that the primary evidence (such as independent objective evidence) is not available. The regulations further state, "If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances." 8 C.F.R. § 103.2(b)(2)(i). Here, neither the petitioner nor the beneficiary has demonstrated that the primary or the secondary evidence is unavailable.

In this case, neither the petitioner nor the beneficiary has submitted independent objective evidence to resolve the inconsistencies in the record. The record does not contain evidence such as the beneficiary's government-issued identification card to show where he lived and where he was employed from 1995 to 1997. Further, the record contains no evidence showing the efforts taken by the petitioner or the beneficiary to obtain independent objective evidence from [REDACTED]. Nor does the record include evidence to show that such evidence is unavailable.

[REDACTED] letters of employment stating that the beneficiary worked at [REDACTED] alone are not sufficient and do not establish the reliability of the assertions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Further, the AAO finds that neither letter of employment from Femarez Alimentos complies with the regulation at 8 C.F.R. § 204.5(1)(3)(ii)(B), in that neither includes a sufficient description of the experience or training received by the beneficiary while he worked there between April 1995

and September 1997. For these reasons, the AAO agrees with the director that the petitioner has failed to establish that the beneficiary had the requisite work experience in the job offered as of the priority date.

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).

Since no independent objective evidence and/or explanation as to why such evidence is unavailable has been provided, the AAO is dismissing the appeal and finds that the beneficiary does not have the requisite work experience in the job offered as of the priority date.

The petition will be denied for this reason. 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. The approval of the petition remains revoked.