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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: JUL 05 2012

OFFICE: NEBRASKA SERVICE CENTER

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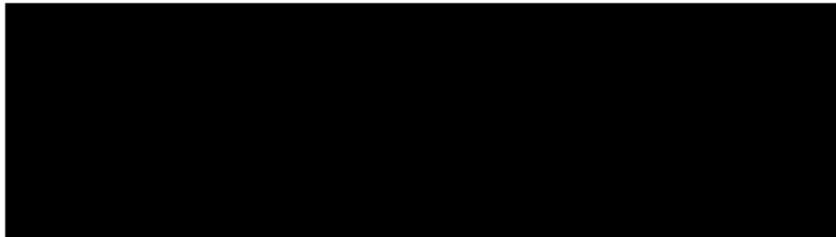


IN RE: Petitioner:  
Beneficiary:



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 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,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the Director, Nebraska Service Center (Director). The approval was subsequently revoked by the Director. That decision is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is an office cleaning and industrial cleaning business. It seeks to employ the beneficiary permanently in the United States in a job it describes as "auto body and mechanic" and to classify him as a skilled worker 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). 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).

Section 203(b)(3)(A)(i) of the Act 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.

The petitioner must demonstrate 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 the qualifications stated on the application. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this case, the Form ETA 750 – which was accepted for processing by the DOL on January 14, 1998 – specified that eight years of grade school education and three years of experience in the job offered was required to qualify for the position. The application was certified by the DOL on May 1, 2001.

The petitioner filed its Form I-140, Immigrant Petition for Alien Worker, accompanied by the certified Form ETA 750 (labor certification), on January 6, 2003. The Director approved the petition on April 15, 2003.

On December 15, 2011, however, the Director issued a Notice of Intent to Revoke (NOIR). In this notice the Director referred to an investigation by the Chicago Field Office of U.S. Citizenship and Immigration Services (USCIS) in which the beneficiary's supervisor stated that the beneficiary was employed by the petitioner as a general machinist and that the company's business was primarily cleaning services. This information conflicted with that provided by the petitioner on the labor certification application and on the immigrant petition. As pointed out by the Director, on the Form ETA Form 750 as well as on the Form I-140 the proffered position is identified as "auto body and mechanic" and the "nature" or "type" of business run by the petitioner is described as "automobile repair services." In view of this conflicting information, the Director stated that "it appears that the approval of the petition should be revoked." The petitioner was given 30 days to respond to the NOIR.<sup>1</sup>

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<sup>1</sup> 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

The petitioner responded with a letter from counsel, dated January 12, 2012, and an affidavit from the petitioner's former general manager, or operations manager, [REDACTED]. The affidavit from Mr. [REDACTED] dated January 11, 2012, stated that he was the petitioner's general manager overseeing business operations from 1998 to 2005, during which time the instant labor certification application and immigrant petition were filed on behalf of the beneficiary for the job of "auto body and mechanic." According to Mr. [REDACTED] the petitioner's line of business was "cleaning services," for which "a stable of vans, cars and transports" was maintained. Mr. [REDACTED] indicated that the beneficiary (whose employment with the petitioner allegedly began in 1990 or 1994) "was filling various roles at RAE" during the time period when the labor certification application and immigrant petition were filed, and "was to transition to the full time Automobile Mechanic/Auto Body & Mechanic position" by the time his adjustment application (Form I-485) was approved. Counsel asserted that this affidavit from Mr. [REDACTED] proved that the job offer was valid and the original approval of the petition was not in error.

On April 3, 2012, the Director issued a decision revoking the approval of the petition. The Director reiterated the points he made in the NOIR that the labor certification and the immigrant petition both identified the proffered position as "auto body and mechanic" and both identified the petitioner's line of business as "automotive repair services." The Director also quoted the petitioner's description of the job duties on the labor certification, which reads as follows:

Straightens and aligns damaged auto chassis and frames to original specifications; restores original auto surface to original contours; prepares surface for painting; paints auto surface to match original colors; makes necessary mechanical repairs.

The Director recounted the Chicago field office's investigation, which featured an interview of the beneficiary's supervisor, [REDACTED], who stated that the petitioner was an "Office Building and Industrial Cleaning Service" and that the beneficiary worked for the petitioner as a general machinist. The Director reviewed the affidavit from Mr. [REDACTED] but determined that it "does not rehabilitate the inconsistencies already present in the record." The Director concluded that the job offered in the petition was different from the job described to the DOL, and revoked the approval of the petition.

The petitioner filed an appeal on April 20, 2012, followed by a brief from counsel and copies of documents already in the record. The appeal is properly filed and timely and makes specific allegations 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).

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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 discrepancies in the record pertaining to the petitioner's line of business and the position offered to the beneficiary.

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. *See Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Counsel asserts on appeal that there was no "good and sufficient cause" to revoke the approval of the instant petition. Counsel acknowledges that the petitioner is "primarily a cleaning service," not an automobile repair service as indicated on the labor certification and the immigrant petition, but calls this inconsistency a "clerical error" and claims that the company may nonetheless offer the beneficiary a job as "auto body and mechanic." Counsel objects that the beneficiary's supervisor is not personally identified by the Director in his NOIR or his revocation decision. Even if that person was [REDACTED] counsel contends, the affidavit of Mr. [REDACTED] submitted in response to the NOIR confirms the petitioner's ultimate intention to employ the beneficiary in the position of "Automobile Mechanic/Auto Body and Mechanic." According to counsel, therefore, the petitioner has overcome the grounds for revocation and the approval of the petition should be reinstated. The AAO does not agree.

A labor certification for a specific job offer is valid only for the particular job opportunity and for the area of intended employment stated on the Form ETA 750. *See* 20 C.F.R. § 656.30(c)(2). In the instant proceeding, the Form ETA 750 specifically states that the nature of the petitioner's business is "automobile repair services" (Part A, box 8) and that the job title is "auto body and mechanic" (Part A, box 9). Moreover, the job duties described in Part A, box 13 (quoted by the Director in his decision) are exclusively related to automobile service and repair. These descriptions of the petitioner's business and the beneficiary's proposed employment are mirrored in the subsequent immigrant petition. Neither the labor certification nor the immigrant petition make any mention of industrial cleaning, which is the petitioner's actual line of business and fundamentally different from automotive repair services. The petitioner has not provided a satisfactory explanation for this major discrepancy, and counsel's attempt to minimize it as a "clerical error" is entirely unpersuasive.

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *Id.*

Counsel is correct insofar as he asserts that what matters in this proceeding is not the job the beneficiary has been performing for the petitioner up to now (except as noted *infra*), but the job he will perform if and when the instant petition is approved and the beneficiary adjusts status to legal permanent resident. According to Mr. [REDACTED] that job will be the "automobile mechanic/auto body and mechanic" position identified in the labor certification and the petition. The evidence of record, however, does not adequately demonstrate that such a position exists, or will exist, for the beneficiary to fill. The petitioner's business is industrial cleaning. The only connection of motor vehicles to this business is the "stable of vans, cars and transports" allegedly utilized in the business, which Mr. [REDACTED] states will

be maintained and repaired by the beneficiary. There is no further description of these vehicles by Mr. [REDACTED] nor any documentary evidence of the number, types, and age of these vehicles, or the frequency of needed maintenance and repairs. Thus, the record does not demonstrate that there would be enough work generated in the proffered position to occupy the beneficiary in a full-time, 40-hour per week job, as described on the labor certification. Indeed, the record indicates that the beneficiary has been working for the petitioner since the 1990s, but always "filling various roles" (as described by Mr. [REDACTED] and never as a full-time auto mechanic or repairman. The petitioner has failed to establish that any such job opportunity has existed up to now, or will in the future.

Based on the evidence of record, the AAO concludes that the petitioner does not intend to employ the beneficiary in a position that accords with the job described in the Form ETA 750. Since the petitioner has not established its compliance with the terms of the labor certification, the instant petition should not have been approved. *See Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966).

Furthermore, the petition is deniable on two other grounds as well.

To determine whether a beneficiary is eligible for an employment-based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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). The petitioner must establish that the beneficiary possessed all of the education, training, and experience specified on the labor certification as of the priority date. *Matter of Wing's Tea House, supra*.

In this case, the labor certification states that that the proffered position – Auto Body and Mechanic – requires a grade school education (8 years) and three years of experience in the job offered. (Part A, Box 14, of Form ETA 750).

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

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.

In Part B, Box 15 of the Form ETA 750 – Work Experience – two jobs are listed for the beneficiary, the first with Dalon Trade & Service Company (Dalon) in Poznan, Poland from 1979 to 1990, and the second with TRI Enterprises, Inc. (TRI) in Glen Ellen, Illinois, from 1990 to the present (January 1998, when the labor certification application was filed). According to the Form ETA 750, both of these jobs had the same title and the same job duties as the proffered position in this petition.

The petitioner has submitted photocopies of a Polish-language form letter signed by the president of Dalon dated July 16, 1990, with an English translation, which states that the beneficiary was employed from September 3, 1979 to July 15, 1990 in various positions including mechanic, body worker, painter foreman, and master workman. This listing of alleged positions at Dalon over an 11-year period, however, does not describe the beneficiary's job duties in those various positions with any detail. In particular, it does not confirm that he was performing the specific duties indicated for that job on the Form ETA 750, which are the same as those of the proffered position in the instant petition. The AAO determines that the letter from Dalon's president does not conform with the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A). Accordingly, it does not establish that the beneficiary's employment by Dalon constituted experience in the job offered.<sup>2</sup>

There is no employment letter at all from TRI. The AAO notes that the address for TRI is the same as that for RAE of America on the labor certification application in January 1998. The petitioner has not explained its relationship, if any, to TRI. Moreover, the alleged employment of the beneficiary by TRI from 1990 to at least January 1998 conflicts with three other documents in the record. One is a letter from ██████████ of Floorserve Janitorial Services, Inc. (Floorserve) in Chicago, Illinois, dated January 15, 1995, stating that Floorserve employed the beneficiary as a floor machine mechanic from November 30, 1991 to January 31, 1994. Work as a floor machine mechanic does not constitute experience in the job offered (Auto Body and Mechanic). The second conflicting document is a letter from the petitioner's ██████████ dated July 14, 2005, stating that the beneficiary had been working for the petitioner since September 1994. Though the job duties described in this letter are the same as those of the proffered position – i.e., the duties of an "Auto Body and Mechanic" – Mr. ██████████ subsequent affidavit of January 11, 2012 described the beneficiary's duties differently – specifically, as "filling various roles" that were not strictly in the realm of auto servicing and repairs. The third conflicting document is the Form G-325A dated December 31, 2002, on which the beneficiary stated that he had been "self-employed" for the last five years (*i.e.*, back to December 1997). According to the Form ETA 750 in 1998, however, the beneficiary was working for TRI at that time, and according to Mr. ██████████ in 2005 the beneficiary had been working for the petitioner since 1994.

Based on the foregoing analysis and the myriad inconsistencies in the record, the AAO concludes that the petitioner has failed to establish that the beneficiary had three years of experience in the job offered as of January 14, 1998, the priority date of the instant petition. Therefore, the beneficiary did not meet the experience requirement on the labor certification to qualify for the proffered position. For this reason as well, the petition should not have been approved.

The petitioner must also establish its continuing ability to pay the proffered wage from the priority date onward. As stated in the regulation at 8 C.F.R. § 204.5(g)(2), in pertinent part:

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<sup>2</sup> The AAO also notes that the beneficiary's alleged employment in Poland was not revealed on a Form G-325A signed by the beneficiary and dated December 31, 2002, despite a specific direction on that form to identify his "last occupation abroad" on the line indicated.

*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. 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.

In this case, the labor certification states that the "rate of pay" of the proffered position is \$18.36 per hour (Part A, box 12 of the Form ETA 750), which amounts to \$38,188.80 per year (based on a 2,080 hour work year).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on that document, 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).

The only evidence in the record of the petitioner's ability to pay the proffered wage is (1) an undated statement on the letterhead of RAE America, signed by its "operation manager" [REDACTED] and submitted with the labor certification application in January 1998, that "[w]e employ more than 100 employees, and we hereby certify that we are able to meet payroll when due," and (2) a statement dated April 8, 2003 and signed by [REDACTED] who identified himself as "Independent CPA for RAE of America," stating that "our firm is willing to verify that [the petitioner] has more than 100 employees working for the firm." Neither of these two statements comports with the regulatory requirements of 8 C.F.R. § 204.5(g)(2). Neither statement is from "a financial officer" of the petitioner, and the second statement does not even refer to the petitioner's ability to pay the proffered wage. Nor does the record include any other documentation of the petitioner's ability to pay the proffered wage, such as annual reports, federal tax returns, or audited financial statements from 1998 onward, as called for in the regulation, or payment records issued by the petitioner to the beneficiary, such as Form W-2, Wage and Tax Statements, or Form 1099-MISCs.

Thus, the petitioner has failed to establish its continuing ability to pay the proffered wage from the priority date (January 14, 1998) up to the present. For this additional reason the petition should not have been approved.

**Conclusion**

The petition is deniable on three grounds:

- The petitioner has not established that it intends to employ the beneficiary in a position that accords with the job described in the Form ETA 750.
- The petitioner has failed to establish that the beneficiary had three years of experience in the job offered as of the priority date, as required on the labor certification to qualify for the proffered position.
- The petitioner has failed to establish its continuing ability to pay the proffered wage from the priority date up to the present.

For all of these reasons, considered both in sum and as separate grounds for denial, the petition should not have been approved.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The Director's decision of April 3, 2012, revoking the approval of the petition, is affirmed. The appeal is dismissed.