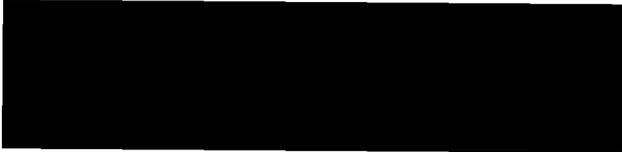


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
U.S. Citizenship and Immigration Services



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Date:

Office: TEXAS SERVICE CENTER

FILE:



MAY 11 2012

IN RE:

Petitioner:

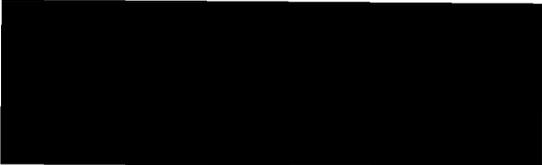
Beneficiary:



Petition:

Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

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.¹

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner claims to be an Argentine grocery, deli, and bakery store. It sought to employ the beneficiary permanently in the United States as a pastry chef. The petition was filed for classification of the beneficiary under section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), which 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.

As required by statute, the petitioner filed a Form I-140 with a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The labor certification was filed on January 14, 1998, the priority date, and was certified by the DOL on July 7, 2000. The petitioner filed Form I-140 with the U.S. Citizenship and Immigration Services (USCIS) on November 14, 2000, which was approved on January 18, 2002.²

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

On August 6, 2008, the director sent a NOIR to the petitioner stating the following:

¹ 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). 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).

² The director stated in the NOIR and the NOR that the I-140 visa petition was approved on January 18, 2007. It was actually approved on January 18, 2002.

The petition and the ETA 750 indicate the petitioner is filing application to employ the beneficiary as a pastry chef. The duties of this position include supervises and coordinate activities of the bakery. Prepare European style desserts, cakes, breads, croissants, pastries, etc. The position also requires the beneficiary to plan production for the bakery according to supply and demand, order supplies and estimate costs. The ETA 750 indicates that the position requires three (3) years [of] experience as a pastry chef.

The evidence submitted does not indicate the petitioner has a bakery on the premises, to include baking and warming ovens, prep tables, etc., in order for the beneficiary to prepare European style desserts and pastries. It is also noted that the description of the European-style desserts is counter to the photographic evidence presented which emphasized Latin American items. Furthermore, the printed advertisement flyer/menu submitted by the petitioner states that it sells products from Argentina, Brazil, Columbia, Mexico y Centro America, Uruguay, Peru. It also goes on to identify itself as a "Grocery," "Deli," "Bakery," and "Pastries," and specifies they are South American specialties (Sudamerican Especialities). There is no indication of sales of European bakery products in the advertisements.

On September 22, 2008, the director revoked the approval of the I-140 petition for lack of response to the NOIR and cited the above discrepancies as noted in the NOIR. He then described the following steps that were taken to verify these discrepancies:

Also, on July 14, 2008 an officer from the Miami District Office called the petitioner at [REDACTED]. The person who answered the telephone at the business was asked "Do you sell pastries?" The response was "No only meat." The officer asked if they sold any type of specialty breads and the response was "no we only have meats and a few sandwiches."³

The director noted the lack of response to the NOIR in the September 22, 2008 notice of revocation as follows:

³ 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 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 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 the discrepancies and seeming misrepresentation between the South and Central American focus of the petitioner's business and the beneficiary's job duties listed on Form ETA 750 as making European-style pastries. The director also noted the lack of evidence as to whether the petitioner had a bakery, including a phone call made to the business wherein an employee stated that the petitioner only sold meat.

On August 6, 2008 the petitioner was sent an Intent to Revoke the approval of this I-140 petition. The Intent to Revoke specified the above discrepancies discovered with the petition. A response was not received within the required thirty three (33) day period ending September 9, 2008.

On appeal, counsel asserts that the petitioner's response to the NOIR was timely filed but was mistakenly returned to the petitioner as a customer service "inquiry." As evidence to support this claim, the petitioner enclosed a copy of the FedEx US Airbill for the filing of the response to the NOIR that was mailed on September 4, 2008 by FedEx Priority Overnight mail. The petitioner submitted an online FedEx Tracking confirmation that lists the same tracking number as listed on the FedEx US Airbill, shows a September 5, 2008 delivery, and specifically references the beneficiary on the AirBill. The petitioner also submitted a copy of the September 5, 2008 letter from the Texas Service Center, which states in part, "Thank you for your recent inquiry to the Texas Service Center . . . via letter for information regarding your case."

At the outset, the AAO finds that this evidence adequately demonstrates that the petitioner's response to the NOIR was timely received by the Texas Service Center on September 5, 2008 and was rejected in error. Therefore, the petition will be remanded to the director for consideration of the petitioner's response to the director's NOIR.

Bona Fides of the Job Offer

On remand, the director should consider the issue of whether the position is a bona fide job offer; whether Section 106(c) of *American Competitiveness in the Twenty-First Century Act of 2000* (AC21) applies to the beneficiary as the petitioner asserts; whether the petitioner has established its ability to pay the proffered wage; and whether the beneficiary has the qualifications for the position offered. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986).⁴

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). However, the petitioner has stated that its bakery activities were transferred to [REDACTED] in May 2000, and it appears that the beneficiary changed locations to work there. The director should address this issue on remand.

⁴ 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).

Counsel asserts that because the beneficiary is now employed by [REDACTED] he is eligible to take advantage of Section 106(c) of AC21.⁵

Qualifications for the Proffered Position

On remand, the director should consider whether the petitioner has established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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'r 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).

⁵ Section 106(c) of AC21, codified as section 204(j) of the Act, 8 U.S.C. § 1154(j), states the following:

Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence- A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Section 204(j) of the Act, 8 U.S.C. § 1154(j), provides that where the beneficiary's application for adjustment of status has been filed and remained unadjudicated for 180 days, the petition must have been "valid" to begin with if it is to "remain valid with respect to a new job." *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010).

Section 205 of the Act provides that approval of any petition may be revoked for "good and sufficient cause" and that the revocation dates back to the date of approval. Thus, there is an inherent conflict between sections 205 and 204(j) of the Act. Because the agency has to give effect to both provisions, and noting the lack of regulatory guidance, USCIS generally allows 204(j) portability to keep the underlying I-140 alive in situations where the prior employer withdraws the approved petition and the beneficiary's I-485 application has been pending for 180 days or more. However, in cases where the underlying I-140 approval was not valid to begin with, such as in cases of fraud or willful misrepresentation, or where the I-140 was approved in error by USCIS because either the petitioner or the beneficiary did not qualify for the preference classification sought, a revocation under section 205 will negate any claim to section 204(j) portability.

In the instant case, the labor certification states that the offered position requires three years of experience as a pastry chef. The labor certification does not allow for experience in any alternate occupation. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a pastry chef and caterer. The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A).⁶

The beneficiary set forth his credentials on Form ETA 750B and signed his name on January 12, 1998, under a declaration that the contents of the form are true and correct under the penalty of perjury.⁷ On Part 15 of Form ETA 750B, the beneficiary listed his past employment history as demonstrated in the table below:

Name of and Address of Employer	Name of Job	Dates Employed	Number of Hours per Week
[REDACTED] Argentina Self-employed	pastry chef	09/1983 to 06/1990	40
[REDACTED] Argentina Self-employed	caterer	06/1990 to 02/1991	40
[REDACTED] Argentina Self-employed	pastry chef	02/1991 to 12/1995	40
[REDACTED] Argentina Self-employed	caterer	12/1995 to 08/1997	20
Unemployed	--	08/1997 to Present (01/1998)	--

The record of proceeding also contains a Form G-325, Biographic Information sheet, submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form, under a section eliciting information about the beneficiary's last occupation abroad, he listed that he was employed as head pastry chef from September 1993 to July 1997. However, no employer

⁶ The record contains two letters regarding the beneficiary's past experiences that are in the Spanish language with translations that did not comply with the terms of 8 C.F.R. § 103.2(b)(3), which states the following:

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The director shall request proper translations on remand.

⁷ The Form ETA 750B specifically instructs the beneficiary to "[l]ist all jobs held during the last (3) years. Also, list any other jobs related to the occupation for which the alien is seeking certification as indicated in item 9."

name or address was stated for this position. Part 15 of Form ETA 750B does not include a position that matches these dates. Under a section eliciting information about the beneficiary's employment for the last five years, he listed being employed with the petitioner as a pastry chef, but he did not list the date the employment began.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The director may seek evidence to resolve these inconsistencies.

Ability to Pay the Proffered Wage

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.

Here, the Form ETA 750 was accepted on January 14, 1998, the priority date. The proffered wage as stated on the Form ETA 750 was \$362.40 per week (\$18,844.80 per year) based on a 40 hour work week.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1992, yet the number of employees it employs was left blank. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on January 12, 1998, the beneficiary did not claim to have worked for the petitioner. However, he did claim to have worked for the petitioner on Form G-325 as a pastry chef, but he did not list the date the employment began.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.⁸ If the petitioner's net income or net current assets is

⁸ See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas

not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967).

In the instant case, it is unclear whether the petitioner employed the beneficiary or paid the full proffered wage each year. The petitioner did not submit any evidence of ability to pay the proffered wage for 1998 and 2007, and it is unclear whether the tax returns submitted for 2000, 2004, 2005, 2006, by [REDACTED] can be attributed to the petitioner. These issues must be resolved on remand.

In consideration of the foregoing, the AAO remands the petition to the director to review the petitioner's response to the director's NOIR. The director may request additional evidence related to the issues set forth above and allow the petitioner time to respond after which the director shall issue a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.