



U.S. Citizenship  
and Immigration  
Services



B6

Date: NOV 01 2012 Office: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary:

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

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

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** On January 5, 2005, the Director, Vermont Service Center, approved the employment-based immigrant visa petition. However, on May 7, 2012, the Director, Texas Service Center (the director), revoked the approval of the petition, invalidated the labor certification, and certified the decision to the Administrative Appeals Office (AAO) for review pursuant to 8 C.F.R. § 103.4(a). Upon review, the AAO will affirm the director's decisions to revoke the approval of the petition and to invalidate the labor certification.

The petitioner is a bakery.<sup>1</sup> It seeks to permanently employ the beneficiary in the United States as a 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).<sup>2</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, finding that the petitioner failed to establish that it conducted good faith recruitment in accordance with the U.S. Department of Labor (DOL) recruitment procedures and that there was fraud or willful material misrepresentation involving the labor certification process. Accordingly, the director invalidated the labor certification. The director also found that the beneficiary did not have the requisite work experience in the job offered before the priority date and that the petitioner failed to show that it had the continuing ability to pay the proffered wage from the priority date until the beneficiary receives his lawful permanent residence.

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

We will discuss the following issues: (a) whether there was fraud or willful misrepresentation involving labor certification; (b) whether the beneficiary had the requisite work experience in the job offered prior to the priority date; and (c) whether the petitioner has the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives lawful permanent residence.

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

In the Notice of Intent to Revoke dated September 28, 2010 (2010 NOIR) the director indicated that Special Agents with the DOL's Office of Labor Racketeering and Fraud Investigation (OLRFI) interviewed the owner of the petitioning company, Mr. Deo Braga, on two separate occasions. One such interview was conducted in Mr. Braga's office on Washington Street in

---

<sup>1</sup> The petitioner is an operator of Dunkin Donuts, a coffee and bakery shop.

<sup>2</sup> 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.

Gloucester, MA, on July 8, 2004; and the other was conducted telephonically on September 20, 2004.

The director stated that during the interviews with the [REDACTED] claimed that his attorney at the time, [REDACTED], did not notify him of the requirement to post internal recruitment notices at the jobsite in attempt to recruit qualified U.S. employees and that [REDACTED] would handle the newspaper advertisements required for labor certification.<sup>3</sup> When the [REDACTED] questioned [REDACTED] about duplicate labor certification filings for some of his employees, [REDACTED] indicated he had no knowledge of duplicate filings, nor had he given [REDACTED] permission to file application without his knowledge.

The petitioner did not respond to the director's 2010 NOIR, but the beneficiary did. In his response, the beneficiary stated that [REDACTED] did post the job posting internally at the work place where he worked. To show that the recruitment was conducted properly, the beneficiary submitted various copies of the job advertisements posted online and published in the *Boston Sunday Herald*. The beneficiary also stated that he had no knowledge of any duplicate filings.

On January 9, 2012 the director sent another NOIR (2012 NOIR); this time the director advised the petitioner to answer these questions: how many specific conversations the petitioner had with [REDACTED] prior to filing the labor certification application; what were [REDACTED] specific instructions with regard to recruitment; what procedures the petitioner followed in relation to the interviewing and consideration of applicants; and what role did [REDACTED] play in the recruitment process and in the interviewing and consideration of applicants. The director also asked the petitioner to outline the specific steps the petitioner took to recruit U.S. workers.

The petitioner did not respond to the 2012 NOIR. Thus, based on the record, the AAO concludes that the petitioner has failed to establish that it conducted good faith recruitment in accordance with the DOL recruitment procedures/requirements.

Further, U.S. Citizenship and Immigration Services (USCIS), pursuant to 20 C.F.R. § 656.31(d) (2004), may invalidate the labor certification based on fraud or willful misrepresentation. On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, Form ETA 9089, replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004, with an effective date of March 28, 2005. See 69 Fed. Reg. 77326 (Dec. 27, 2004). The regulation cited at 20 C.F.R. § 656.31(d) is the pre-PERM

---

<sup>3</sup> [REDACTED] was the attorney of record for the petitioner. On June 7, 2012, the AAO received his withdrawal of representation. In addition, we note that his license to practice law before the United States Department of Homeland Security (DHS) was suspended for three years from March 1, 2012. He was under DOL and U.S. Citizenship and Immigration Services (USCIS) investigation for submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions.

regulation applicable to the instant case. The regulation stated:

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

Upon *de novo* review, the AAO finds that evidence of record does support the director's conclusion that there was fraud or willful misrepresentation involving the labor certification. There has been sufficient development of the facts upon which the director can make a determination of fraud or willful misrepresentation in connection with the documentation submitted to support the beneficiary's qualifications based on the criteria of *Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961). Thus, the director's decision to invalidate the certified Form ETA 750 is affirmed.

**b) Whether or not the beneficiary had the requisite work experience in the job offered prior to the priority date.**

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

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Here, the record shows that the petitioner filed the Form ETA 750 labor certification with DOL on April 6, 2001. The name of the job title or the position for which the petitioner seeks to hire is "Baker." The job duties under item 13 of the Form ETA 750, part A, are as follows:

Mix and measure ingredients to produce all types of baked goods, including muffins, pastries, donuts, etc. Apply finishes.

Under item 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered.

On the Form ETA 750, part B, signed by the beneficiary on January 5, 2001, he represented he worked 35 hours a week as a baker in a bakery in Brazil called [REDACTED] from June 1997 to December 1999. Submitted along with the approved Form ETA 750 and the Form I-140 petition was an undated employment verification letter from [REDACTED] the co-manager of [REDACTED] stating that the beneficiary worked as a baker from June 1997 to December 1999.

In the 2012 NOIR, the director noted that the employment verification letter submitted did not include a sufficient description of the experience or training of the beneficiary, in accordance with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B).<sup>4</sup> The director also noted that the beneficiary failed to include his last occupation abroad on the Form G-325 (Biographic Information), which he signed on September 19, 2002 and filed in conjunction with the Application to Register Permanent Residence or Adjust Status (Form I-485). However, the petitioner did not submit a response to the 2012 NOIR.

Upon *de novo* review, the AAO agrees with the director that the petitioner has failed to establish by a preponderance of the evidence that the beneficiary had the requisite work experience in the job offered prior to the priority date. Moreover, the director asked the petitioner to provide independent objective evidence to resolve the noted inconsistencies above (relating to where the beneficiary's failure to include his last occupation abroad on the Form G-325). 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 petitioner has not submitted copies of the beneficiary's pay stubs, payroll records, tax documents, or financial statements from her employment in Brazil. Nor has the petitioner produced the beneficiary's Brazilian booklet of employment and social security or a copy of his government-issued identification card reflecting where he worked between 1997 and 1999. Without independent objective evidence showing where the beneficiary worked between 1997 and 1999, the AAO cannot conclude that the beneficiary had the requisite experience in the job offered before the priority date and that he qualifies for the job offered.

---

<sup>4</sup> The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) provides:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

Simply stating that the beneficiary worked as a baker is not sufficient for purposes of describing the experience or the training received by the beneficiary and does not establish the reliability of the assertion.

c) **Whether the Petitioner has the Ability to Pay the Proffered Wage from the Priority Date.**

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

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As indicated above, the Form ETA 750 was accepted by the DOL for processing on April 6, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$12.75 per hour or \$23,205 per year (based on a 35-hour work per week).<sup>5</sup> Further, a review of USCIS electronic databases reveals that the petitioner has previously filed at least one other immigrant petition in the past.<sup>6</sup>

---

<sup>5</sup> The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DoL Field Memo No. 48-94 (May 16, 1994).

<sup>6</sup> The details of the other petition were disclosed in the 2012 NOIR; the AAO will not repeat those details here. The AAO also notes that during the 2004 interview with OLRFI, Mr. Braga, the owner of the petitioner, admitted to submitting 21 petitions, including the present case.

Consistent with 8 C.F.R. § 204.5(g)(2), the petitioner is not only required to establish the ability to pay the proffered wage of the current beneficiary but also of the other sponsored beneficiary whose name was listed earlier in the 2012 NOIR from the respective priority date of each petition through such time when the beneficiaries obtain permanent residence, or until the petitions are either withdrawn or revoked.

The petitioner submitted copies of the following evidence to show that it has the continuing ability to pay \$12.75 per hour or \$23,205 per year from April 6, 2001:

- Internal Revenue Service (IRS) Forms W-2 Wage and Tax Statements for the years 2001 through 2004 issued to the beneficiary by [REDACTED] (Employer's Identification Number [REDACTED] and [REDACTED] (Employer's Identification Number [REDACTED])

Upon review, the AAO finds that the evidence submitted above is not sufficient to demonstrate that the petitioner has the continuing ability to pay the proffered wages of the beneficiary and of the other beneficiaries listed above from the priority date until each beneficiary receives or received his or her lawful permanent residence. We note that the petitioner here is a company called Braga Donuts Three Inc with Employer's Identification Number [REDACTED]. We also note that DOL certified the labor certification to a company called [REDACTED]. It is not clear whether the evidence submitted above came from the same company as the petitioner [REDACTED].<sup>8</sup> The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "Nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Therefore, we will not consider any evidence submitted above as evidence of the petitioner's ability to pay.

The record contains no evidence, i.e. the company's tax returns, audited financial statements, or annual reports, to establish that the petitioner has the ability to pay the proffered wages from the priority date until all of the beneficiaries receive or received their lawful permanent residence.

In summary, the director's decision to invalidate the labor certification is withdrawn. Nevertheless, the AAO finds that the director had good and sufficient cause to revoke the approval of the petition. The petitioner has failed to establish by a preponderance of the evidence that the beneficiary had the requisite work experience in the job offered prior to the priority date and that the petitioner has the continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

---

7 [REDACTED]

<sup>8</sup> According to the database maintained by the Secretary of the Commonwealth, Corporations Division (<http://corp.sec.state.ma.us>), there are 10 records matching the entity name [REDACTED] (Last accessed October 10, 2012).

Section 205 of the Act, 8 U.S.C. § 1155, states, “The Secretary of Homeland Security may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204. Such revocation shall be effective as of the date of approval of any such petition.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. at 590.

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

The revocation of the approval of the petition is affirmed for the above stated reasons, with each considered as an independent and alternative basis for the decision. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The director’s decision to revoke the approval of the petition is affirmed.

**FURTHER ORDER:** The decision to invalidate the alien employment certification, Form ETA 750, ETA case number P2001-MA-01313755, is affirmed.