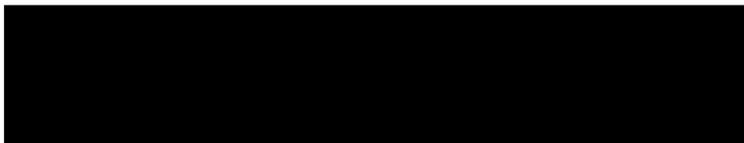


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

Date: **SEP 28 2012**

Office: TEXAS SERVICE CENTER

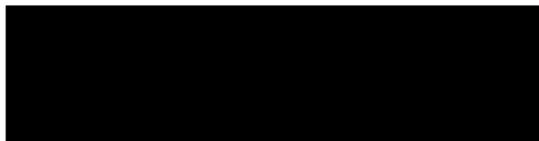
FILE: 

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 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 with the field office or service center that originally decided your case by filing a 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 November 12, 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 November 4, 2003. However, the Director of the Texas Service Center (TSC) revoked the approval of the immigrant petition on March 23, 2009, and the petitioner subsequently appealed the director's decision. The decision of the director is now before the Administrative Appeals Office (AAO). The director's decision will be withdrawn. The AAO will remand the matter to the TSC director for further action, consideration, and the entry of a new decision.

The petitioner is a tailor shop. It seeks to permanently employ the beneficiary in the United States as an alteration tailor, 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).¹ As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). As stated above, the petition was initially approved in November 2003 but its approval was revoked later in March 2009. The director determined that the petitioner did not follow the Department of Labor (DOL) recruitment procedures and that the beneficiary did not have the experience required for the position.

In the Notice of Intent to Revoke (NOIR), the director identified numerous problems including fraud and willful misrepresentation in other I-140 petitions and labor certification applications that the petitioner's former attorney of record, [REDACTED] filed.² Because of these other petitions and since [REDACTED] filed the petition in this case, the director issued a NOIR to the petitioner on February 10, 2009, requesting that the petitioner submit additional evidence to demonstrate that the beneficiary had at least two years of employment experience in the job offered prior to the filing of the labor certification application on April 23, 2001, and that the petitioner complied with all of the DOL recruitment requirements.

In response to the director's NOIR, counsel for the petitioner submitted a sworn statement from the owner of [REDACTED] with registration certificate, a letter from the petitioner stating that the beneficiary is currently employed by the company, and a copy of the Form ETA 750.

¹ 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.

² The petitioner's current counsel of record, [REDACTED] will be referred to throughout this decision as counsel. Its former counsel of record, [REDACTED] will be referred to as previous counsel. The AAO notes that [REDACTED] was suspended from the practice of law before the Immigration Courts, Board of Immigration Appeals (BIA), and Department of Homeland Security (DHS) for a period of three years from March 1, 2012 to February 28, 2015.

Upon review of the additional evidence, the director issued a Notice of Revocation (NOR) revoking the approval of the petition. The director determined that the petitioner did not follow the DOL recruitment requirements and did not establish that the beneficiary had the experience required for the position.

On appeal to the AAO, counsel asserts that the director improperly revoked the petition's approval. The revocation, according to counsel, is based upon an alleged failure to follow recruitment requirements and a failure to demonstrate that the beneficiary had the requirements for the position and is not supported by any evidence in the record.

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

One of the issues on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, states:

The Secretary 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. Such revocation shall be effective as of the date of approval of any such petition.

The regulation at 8 C.F.R. § 205.2 states:

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

The regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf

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). 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).

before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

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

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

The director advised the petitioner in the NOIR that the instant case might involve fraud since the petition was filed by [REDACTED] who is under USCIS investigation for submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions. In the NOIR, the director generally questioned the beneficiary's qualifications and whether the petitioner had complied with recruitment requirements. Because of these findings in other cases and since [REDACTED] filed the petition in this case, the director issued the NOIR, advising the petitioner to submit additional evidence to demonstrate that the beneficiary had at least two years of work experience in the job offered before the labor certification application was filed and that the petitioner complied with all of the DOL recruiting requirements.

The AAO finds that the director appropriately reopened the approval of the petition by issuing the NOIR. However, the director's NOIR was deficient in that it did not give the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director 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 also did not specifically state that the petitioner needed to submit copies of the in-house postings or other evidence to show that the petitioner complied with the DOL recruitment procedures.*⁴ 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. Nevertheless, the AAO agrees with the director that the approval of the petition was erroneous, and will return the petition to the director for the issuance of a new NOIR.

⁴ The DOL regulations in place at the time of recruitment in this case included a requirement that the employer post notice of the job opening to its employees for ten consecutive days at the job site where the alien will work. 20 C.F.R. § 656.20(g)(1)(ii) (2004).

The next issue on appeal is whether the director properly concluded that the petitioner did not comply with the recruitment procedures of the DOL.

The director's decision revoking the approval of the petition generally stated that the petitioner had not shown that it complied with DOL requirements regarding advertising and recruitment for the position. The director did not outline the defective recruitment procedures in the NOIR, and the record does not contain a description of the DOL recruitment requirements. Since the director did not advise the petitioner about specific recruitment procedures, and did not request the petitioner to submit copies of advertisements, in-house postings, or any other recruitment materials before the decision was rendered, the director cannot rely on the absence of such information to revoke the approval of the petition. Thus, the AAO will withdraw the director's finding that the petitioner failed to follow recruitment procedures.

On appeal, the petitioner submitted a declaration of its owner stating that newspaper advertisements and in-house advertisements for the position were posted. The petitioner also submitted a letter from [REDACTED] stating that she thought that newspaper and word of mouth recruiting for the position had been done although she could not be sure due to the passage of time. The petitioner did not submit copies of any advertisements for the position.

The record does not reflect internal inconsistencies in the recruitment process. As there was no requirement to keep recruitment records beyond five years, the director may not make an adverse finding against the petitioner if it claims it does not have the documentation.⁵ Because of the lack of internal inconsistencies, the record does not indicate that recruitment procedures were not followed. Therefore, the director's conclusion that the petitioner did not comply with DOL requirements is withdrawn.

The petition's approval may not be reinstated, however, as the record does not reflect that the beneficiary qualifies for the position offered nor that the petitioner has the ability to pay the proffered wage.

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.

Here, the Form ETA 750 was filed and accepted for processing by the DOL on April 23, 2001. The name of the job title or the position for which the petitioner sought to hire is “alteration

⁵ The AAO 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. Further, the petitioner must resolve inconsistencies in the record by independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

tailor.” Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, “Alters & repairs clothing to fit customers; shorten/lengthen sleeves, pants, hems.”

Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two (2) years of work experience in the job offered.

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).

As set forth above, the proffered position requires the beneficiary 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 9, 2001, she represented that she worked 40 hours a week at [REDACTED] as an alteration tailor from January 1994 to December 1998.

To show that the beneficiary had the requisite work experience in the job offered before April 23, 2001, the petitioner submitted the following evidence:

- A January 30, 2001 letter from [REDACTED] stating that the beneficiary worked as an alteration tailor for [REDACTED] from January 2, 1994 to December 31, 1998;
- A March 5, 2009 letter from the same author stating that the beneficiary worked as a seamstress from January 2, 1994 to December 31, 1996;
- A corporate modification document for [REDACTED] dated July 2, 1992, which also specifies [REDACTED] as one owner of the business.

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.

The AAO notes that the March 5, 2009 letter is inconsistent with the January 30, 2001 letter and the Form ETA 750B as the January 30, 2001 letter contains an end date for the employment two years later than the date on the March 5, 2009 letter. In the event that the record contains a document inconsistent with other evidence of record, it is incumbent on the petitioner to resolve such inconsistencies in the record by independent objective evidence. In this case, the documentation proving the beneficiary’s qualifications for the position is internally inconsistent, casting doubt on

the remainder of the evidence of the beneficiary's qualifications. No evidence of record resolves this inconsistency. *Matter of Ho*, 19 I&N Dec. at 591-592.

In addition to the inconsistencies in the letter, we note that the location of [REDACTED] is in Nova Era, a town within the Brazilian province of Minas Gerais. On the Form G-325 submitted in conjunction with the petitioner's Form I-485, she notes her last address outside the United States as in the city of Cuiaba, a town in the Brazilian province of Mato Grosso. She indicated that she lived in Cuiaba from February 1995 to March 1999, a period of time that encompasses the January 1994 to December 1996 (or 1998) time period that the letter stated she worked for [REDACTED]. According to a map search online, those municipalities are located some 1,700 km apart, a distance that would take approximately 20 hours to cover. It is unclear how the beneficiary could work in a place so far from her residence. Again, the petitioner must submit evidence to resolve discrepancies in the record. *Matter of Ho*, 19 I&N Dec. at 591-92.

On remand, in the NOIR the director should advise the petitioner about the derogatory evidence, and give it the opportunity to respond to and explain the discrepancy between the two letters of experience submitted and the issue regarding distance explained above.

Nor does the record reflect that the petitioner has the ability to pay.⁶ 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, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, as noted above, the record shows that the Form ETA 750 was received for processing on April 23, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$11.00 per hour (\$22,880 per year).

⁶ 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).

According to USCIS records, the petitioner has filed at least two other I-140 petitions on behalf of other beneficiaries. 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 beneficiaries whose names are listed above from the respective priority date of each petition through such time when the beneficiary obtains permanent residence.

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 beneficiaries whose names are listed above from the respective priority date of each petition through such time when the beneficiary obtains permanent residence.

The record contains no relevant evidence (i.e. federal tax returns, annual statements, or audited financial statements) to show that the petitioner has the capability to pay the proffered wage of all the beneficiaries, however.

The petitioner submitted Forms W-2 demonstrating that it paid the beneficiary in 2001 and 2002. The wage amount paid in each year was less than the proffered wage. The petitioner must demonstrate its ability to pay the difference between the actual wage paid in those years and the proffered wage. The petitioner submitted its 2000 Form 1120, however, that document predates the priority date so cannot be used to demonstrate the petitioner's ability to pay the proffered wage or the difference between the actual wage paid and the proffered wage in 2001 and 2002.

Therefore, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that the petitioner is making a realistic job offer and that the petitioner has the continuing ability to pay the proffered wage from the priority date, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wage, 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).

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 sponsored beneficiaries. On remand, the director must give the petitioner the opportunity to demonstrate that it has financial resources sufficient to pay the proffered wages of all of the beneficiaries; and if not, whether the totality of the circumstances affecting the petitioning business establishes the petitioner's ability to pay as of the priority date. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The director's decision is withdrawn; however, the AAO may not reinstate the approval of the petition at this time for the reasons discussed above. The petition is remanded to the director for the issuance of a NOIR to the petitioner. Upon consideration of the response, if any, and the evidence of record, the director should issue a new, detailed decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for the issuance of a NOIR to the petitioner, and a new decision consistent with above.