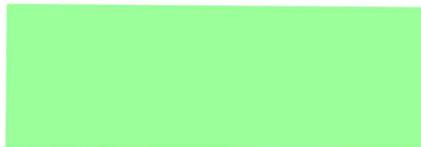


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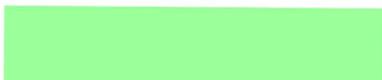
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: **AUG 23 2013** OFFICE: TEXAS SERVICE CENTER

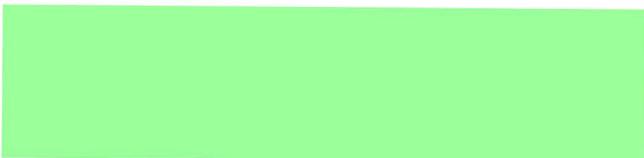


IN RE: Petitioner:
Beneficiary:



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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The approval of this employment-based immigrant visa petition was revoked by the Director, Texas Service Center (the director). On June 11, 2012 the Administrative Appeals Office (AAO) issued a decision rejecting a subsequent appeal filed by the petitioner and remanded the case to the director to consider the filing as a motion to reopen or reconsider. On May 30, 2013, the director, after sending the petitioner a Notice of Intent to Revoke (NOIR) and receiving a response, revoked the approval of the petition, and certified the decision to the AAO for review pursuant to 8 C.F.R. § 103.4(a). Upon review, the AAO will affirm the director's decision to revoke the approval of the petition.

The petitioner is a cleaning company. It seeks to permanently employ the beneficiary in the United States as a cleaning supervisor 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). The petition was initially approved on March 19, 2003, but the approval of the petition was eventually revoked on August 3, 2009.² The director determined that the petitioner failed to demonstrate that it conducted good faith recruitment in accordance with the U.S. Department of Labor (DOL) recruitment procedures. On March 18, 2013, the director reopened the matter and issued a second Notice of Intent to Revoke. On May 30, 2013, the director again revoked the approval of the petition, finding that the beneficiary was not qualified to perform the duties of the position as of the priority date, that the petitioner failed to establish its ability to pay the proffered wage, that the identity of the beneficiary was in question, and that the petitioner had committed fraud by making changes to the certified labor certification application. The director also invalidated the labor certification.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The threshold issue on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition. As noted above, the Secretary of DHS has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. *See* section 205 of the Act; 8 U.S.C. § 1155. This means that notice must be provided to the petitioner before a previously approved petition can be revoked. More specifically, the regulation at 8 C.F.R. § 205.2 reads:

- (a) *General.* Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice to the**

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 USCIS reviewed the approved petition because the petitioner was previously represented by [redacted] who was suspended from practicing law before the BIA, immigration courts, and DHS for three years from March 1, 2012.

petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS]. (emphasis added).

Further, 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 [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 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.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); and *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.

Here, in the NOIR dated March 18, 2013, the director wrote:

A review of the petition and all of the supporting evidence indicates that Form I-140 was approved in error. The realization that an immigrant visa petition was approved in error constitutes good and sufficient cause for revoking its approval.

The director specifically asked the petitioner to submit additional evidence to demonstrate that the beneficiary had the two years of experience required by the terms of the labor certification including noting that the letters previously submitted stated that the beneficiary worked in a position other than cleaning supervisor, the proffered position, and noting that discrepancies existed between the dates and names of employers as provided on the ETA Form 750B and letters from previous employers. The director also specifically requested evidence of the petitioner's ability to pay the proffered wage from the priority date onwards including evidence of wages paid and the proffered wage for other workers sponsored by the petitioner.

The AAO finds that the director had good and sufficient cause to revoke the approval of the petition per section 205 of the Act, 8 U.S.C. § 1155, which 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. 582, 590 (BIA 1988).

The approval of the petition cannot be reinstated because the petitioner has not established 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 it has the ability to pay the proffered wage from the priority date onwards.

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate that, on the priority date, the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition. The priority date 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).

The priority date here is March 26, 2001. The name of the job title or the position for which the petitioner sought to hire is "cleaning supervisor." Under the job description, section 13 of the Form ETA 750, the petitioner wrote, "Under direction of owner, supervise cleaning personnel, schedule workers, examine finished work, make certain supplies available, etc." 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 as a cleaning supervisor.

To determine whether a beneficiary is eligible for a preference immigrant visa, the director 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 by the petitioner, 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 February 27, 2001, she represented that she worked 35 hours a week at [REDACTED] as a housekeeper from October 1995 to November 1997 and at [REDACTED] in Mexico as a cleaning supervisor from March 1993 to October 1995. The record contains a letter of employment dated February 20, 2001 from [REDACTED] stating that the beneficiary worked there as a house maid from October 1995 to November 1997.³ The petitioner also submitted a letter dated February 18, 1995 from [REDACTED] of the Design Laboratory of [REDACTED] stating that the beneficiary worked in

³ The beneficiary's marriage certificate in the record lists her occupation at the date of her marriage on June 28, 1997 as "at home." The petitioner should submit evidence to resolve this discrepancy in any further filings.

“different cleaning activities” from March 1993 to January 1995.⁴ These letters do not meet the requirements in the regulations as they do not list a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). In addition, they seem to indicate that the position in which the beneficiary worked was as a housekeeper or cleaner and not as a supervisor as required by the terms of the labor certification. As a result, they are insufficient to demonstrate that the beneficiary had the experience required as of the priority date.

The ETA Form 750B stated that the beneficiary’s employer from March 1993 to October 1995 was [REDACTED] states the name of the institution that the beneficiary worked during that time was [REDACTED]. The names of the claimed employers differ and it is thus unclear that the beneficiary has the experience claimed. It is additionally noted that the end dates of the employment differ with the beneficiary stating that she worked at the University through October 1995 while [REDACTED] letter states that she worked for his institution through January 1995.⁵ In addition, the Form I-140 states that the beneficiary entered the United States on May 22, 1995, so it is unclear how she would have been able to work in Mexico through October 1995 if she were present in the United States in May 1995. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

In response to the director’s February 17, 2009 Notice of Intent to Revoke (2009 NOIR), the petitioner submitted a letter from the beneficiary stating that she attempted to acquire additional evidence of her work experience from both [REDACTED] and “the school [she] worked at before leaving Mexico.” Although the beneficiary states that neither institution was able to provide additional evidence, 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’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

The petitioner also submitted a letter from its Senior Operations Manager stating that it has employed the beneficiary since September 9, 2003 as a cleaning supervisor. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing’s Tea House*, 16 I&N Dec. 158 (Acting Reg’l Comm’r 1977). As the priority date is March 26, 2001, any experience gained with the petitioner would be after the priority date and

⁴ On the Form ETA 750, the beneficiary describes her duties for [REDACTED] as follows: “I scheduled cleaning personnel, inspected work, coordinated schedules.” [REDACTED] on the other hand, states that “she worked . . . at the realization of different cleaning activities of this building.”

⁵ Even assuming that [REDACTED] letter accurately states the date of the beneficiary’s employment, the period between March 1993 and January 1995 is less than two years of employment.

cannot be considered as evidence of the beneficiary's qualifications for the position. In addition, the petitioner submitted its pay check history showing that the beneficiary was employed by the petitioner as early as December 2000. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

No other evidence has been submitted to show that the beneficiary had at least two years of work experience in the job offered prior to the priority date. We note that the position offered in this case is for a skilled worker, requiring at least two years of specialized training or experience gained *before* the priority date. The petitioner has failed to establish that the beneficiary had at least two years of specialized training or experience in the job offered before the priority date. Therefore, we find that the beneficiary is not qualified for the position offered.

With respect to the petitioner's ability to pay, the regulation at 8 C.F.R. § 204.5(g)(2) states:

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 appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

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, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

Here, as indicated above, the Form ETA 750 was accepted by DOL for processing on March 26, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$12.00 per hour or \$21,840.00 per year (based on the indicated 35-hour work per week).⁶

⁶ 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).

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'l Comm'r 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'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

The record contains Internal Revenue Service (IRS) Forms W-2 evidencing that the petitioner paid wages to [REDACTED]. As noted by the director in his decision, discrepancies exist between the information provided on the Form I-140 and the beneficiary's tax returns in the record. Specifically, the director noted that the birth date provided on the documents were different: the Form I-140 states that the beneficiary's birth date is May 9, 1975 while the income tax returns states a birth date of May 10, 1974. The petitioner failed to address this issue in response to the Notice of Certification. In addition, the social security number (SSN) that appears on the 2003 IRS Form W-2 is [REDACTED] while the beneficiary's tax returns contain a [REDACTED] for 2001 through 2003 until she began using [REDACTED] in 2004.⁷ Given these inconsistencies, the beneficiary's identity is unclear and it is unclear that the petitioner ever paid the beneficiary any salary or wages. The beneficiary should address these inconsistencies in any further filings. *See Matter of Ho*, 19 I&N Dec. at 590.

Even if the IRS Forms W-2 could be considered, they demonstrate the following wages paid:

- The 2003 IRS Form W-2 states that the petitioner paid the beneficiary \$2,405.00.⁸
- The 2004 IRS Form W-2 states that the petitioner paid the beneficiary \$8,817.48.

⁷ It is noted that a SSN with the first three digits of [REDACTED] is issued as a temporary taxpayer identification number. As a result, it is consistent for an individual to use a temporary taxpayer identification number prior to the use of a permanent SSN. A number beginning with [REDACTED] however, is a permanent number issued to one individual. No evidence was submitted to explain why the beneficiary might have been issued two permanent SSNs or why a temporary taxpayer identification number would have been issued between two permanent SSNs.

⁸ The SSN on this Form W-2 is [REDACTED]. There is no explanation in the record to resolve this inconsistency.

- The 2005 IRS Form W-2 states that the petitioner paid the beneficiary \$10,953.95.
- The 2006 IRS Form W-2 states that the petitioner paid the beneficiary \$11,828.03.⁹
- The 2008 IRS Form W-2 states that the petitioner paid the beneficiary \$15,554.88.
- The 2011 IRS Form W-2 states that the petitioner paid the beneficiary \$19,723.90.

As none of these amounts exceeds the proffered wage, the petitioner must establish its ability to pay the difference between the actual wage paid and the proffered wage which in 2003 is \$19,435; in 2004 is \$13,022.52; in 2005 is \$10,866.05; in 2006 is \$10,011.97; in 2008 is \$6,285.12; and in 2011 is \$2,116.10.

The petitioner also submitted its paycheck history, which demonstrates wages paid to the beneficiary of \$7,410.75 in 2001, \$12,149.39 in 2007, \$15,254.20 in 2009, \$16,923.20 in 2010, and \$17,605.86 in 2012.¹⁰ The petitioner did not submit a paycheck history for 2002. None of these amounts exceed the proffered wage, so the petitioner must demonstrate its ability to pay the difference between the actual wage paid and the proffered wage, which in 2001 was \$14,429.25, in 2007 was \$9,690.61, in 2009 was \$6,585.80, in 2010 was \$4,916.80, and in 2012 was \$4,234.14.

Therefore, the petitioner has not established the ability to pay the proffered wage in any year from the priority date in 2001 onwards.

The petitioner submitted a letter dated March 18, 2002 from [REDACTED] stating that the organization employs approximately 700 people and the company was capable of paying the proffered wage. With the appeal filed, the petitioner submitted a profile of [REDACTED] as appears on its website stating that in 2009, he served as the Senior Operations Manager. As stated in the director's NOR, [REDACTED] does not serve as a financial officer of the petitioner. As a result, his affidavit is insufficient to establish the petitioner's ability to pay the proffered wage.¹¹

As noted by the director, USCIS records indicate that the petitioner has filed 12 additional Form I-140 petitions since the priority date. The petitioner would need to demonstrate its ability to pay

⁹ No IRS Form W-2 was submitted for 2007, 2009, 2010, or thereafter.

¹⁰ Additional years were submitted, but as the wages paid in those years were reported on IRS Forms W-2, they will not be repeated here.

¹¹ Apart from providing a statement from a financial officer of a company with over 100 employees, a petitioner may submit evidence of its net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage. *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 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

Therefore, the petitioner has not established the ability to pay the proffered wage in any year. The record does not contain any other evidence of the petitioner's ability to pay (i.e. federal tax returns, annual reports, and/or audited financial statements) for 2001 onwards. In view of the foregoing, the AAO agrees with the director that the petitioner has not established by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date.

In addition, corrective fluid appears on the Form ETA 750B in the block describing the name of job and a description of the job duties of the beneficiary's claimed position at [REDACTED]

As stated by the director in his decision, it is unclear from the record when the corrective fluid was applied to the labor certification so that we are unable to ascertain whether the DOL reviewed the labor certification as amended or in a different form. In any further filings, the petitioner should submit correspondence with DOL concerning the corrections made or other evidence to establish when the corrections were made and that DOL had the opportunity to review the labor certification with the indicated changes. *See Matter of Ho*, 19 I&N Dec. at 591-92.

Here, the petitioner has failed to establish by a preponderance of the evidence that the petitioner has the continuing ability to pay the proffered wage from the priority date, and that the beneficiary had the requisite work experience in the job offered as a cleaning supervisor. 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 previously approved 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 is affirmed. The petition's approval remains revoked.