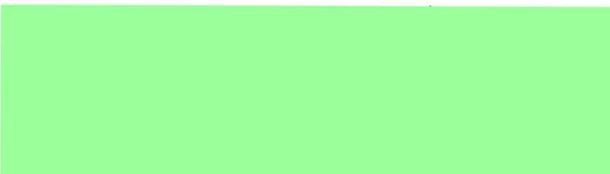


(b)(6)

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: OFFICE: TEXAS SERVICE CENTER

FILE:

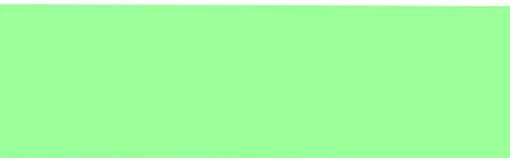
FEB 19 2013

IN RE: Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was approved on April 18, 2001 and revoked on August 24, 2009 by the Director, Texas Service Center. On May 11, 2010, the director granted the petitioner's motion to reopen and reconsider and affirmed his previous decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an "oriental grocery/restaurant." It seeks to employ the beneficiary permanently in the United States as a cook.¹ As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).² The director determined that the petitioner had not responded to the notice of intent to revoke (NOIR) requesting that the petitioner submit "an original completed Form ETA 750 for the position of cook as described on the I-140 page 2." The director revoked the approval of the petition accordingly.

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 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

In his revocation dated August 24, 2009, the director stated that the petitioner did not respond to the director's May 18, 2009 NOIR. In his decision ruling on to the petitioner's motion, the director restated that the petitioner did not submit a timely response to the director's NOIR. The AAO notes

¹ The petitioner listed the proffered position as a "utility kitchen helper" on the Form ETA 750 and as a "cook" on the Form I-140. The duties for the proffered position of "utility kitchen helper" are described in the Form ETA 750 as "maintains store in neat and clean condition, sweeping, mopping, washing kitchen utensils, unpacking and shelving stock, bagging and carrying purchase[s] to car." On February 4, 2013, the AAO accessed the *The Dictionary of Occupational Titles (DOT)* online at www.occupationalinfo.org. The *DOT* describes the duties of a "cook" as "prepares, seasons, and cooks soups, meats, vegetables, desserts, and other foodstuffs for consumption in eating establishments: Reads menu to estimate food requirements and orders food from supplier or procures food from storage."

² This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

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).

that there is evidence in the record of proceeding that the petitioner submitted a timely response to the director's NOIR. The AAO withdraws the director's statements indicating that the petitioner did not submit a timely response to the NOIR and will consider the evidence on appeal.

As set forth in the director's NOIR, at issue in this case is whether or not the petitioner has an approved labor certification for the position of cook, the position listed on the Form I-140.

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). It seems that the petitioner intends to employ the beneficiary as a cook instead of as a "utility kitchen helper," outside the terms of the Form ETA 750. See *Sunoco Energy Development Company*, 17 I&N Dec. 283 (Reg'l Comm'r 1979) (change of area of intended employment).

On appeal, the petitioner submitted a revised Form I-140 listing the proffered position as that of a "utility kitchen helper." On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

Therefore, the petitioner is not in compliance with the terms of the labor certification and has not established that the proposed employment will be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966).

The regulations at 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i) require that any Form I-140 petition filed under the preference category of section 203(b)(3) of the Act be accompanied by a labor certification. As the record contains no valid labor certification for the position noted in the Form I-140, the petition must be denied.

On appeal, counsel states that previous counsel, [REDACTED] was convicted of immigration fraud in December 2002. Counsel states that [REDACTED] "failed to exercise all the basic due diligence in preparing the instant [Form] I-140 petition with the correct job title and duties to truthfully follow the petitioner's clear and unambiguous request for the labor certification substitution." The AAO notes that the record contains a notarized employment letter dated November 30, 2006 and signed by the petitioner on behalf of the beneficiary. The letter states that the beneficiary worked for the petitioner as a "cook." The record also contains a Form G-325A, Biographic Information signed by the beneficiary on December 4, 2006 listing his employment as a "cook" for the petitioner from 2001 to December 4, 2006, the date that the Form G-325A was signed. Neither the petitioner nor the beneficiary may claim that it/he signed the forms in blank and thus be absolved of responsibility. See *Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005)

(unpublished) (an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents). The law generally does not recognize deliberate avoidance as a defense to misrepresentation. See *Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005); *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993). To allow the petitioner and the beneficiary to absolve themselves of responsibility by simply claiming no knowledge or participation in a matter where the petitioner and the beneficiary provided all the supporting documents and signed a document either in blank or with the wrong information would have serious negative consequences for USCIS and the administration of the nation's immigration laws. While potentially ineligible aliens might benefit from approval of an invalid petition or application in cases where USCIS fails to identify fraud or material misrepresentations, once USCIS does identify the fraud or material misrepresentations, these same aliens would seek to avoid the negative consequences of the fraud, including denial of the petition or application, a finding of inadmissibility under section 212(a)(6)(C) of the Act, or even criminal prosecution. 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.*

Although the petitioner claims that its counsel was incompetent, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). The petitioner may not simply state that its counsel was negligent in addition to filing fraudulent petitions. A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not address these requirements. The petitioner does not explain the facts surrounding the preparation of the petition or the engagement of the representative. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2).

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.⁴ If the petitioner's net income or net current assets is

⁴ 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.

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'l Comm'r 1967).

In the instant case, the petitioner did not employ the beneficiary or submit tax returns or any financial documents. Further, the petitioner failed to establish that factors similar to *Sonogawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets.

Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.