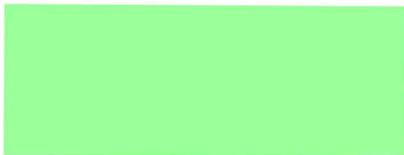




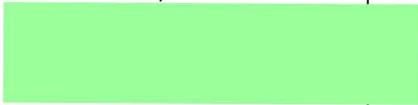
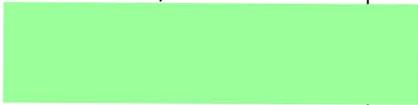
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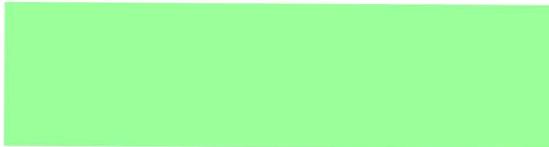
Date: Office: TEXAS SERVICE CENTER FILE: 

JAN 24 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: On October 6, 2003, the Director, United States Citizenship and Immigration Services (USCIS) Vermont Service Center, approved the employment-based immigrant visa petition. However, on May 23, 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 decision to revoke the approval of the petition.

The petitioner is a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook 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 in 2003, but as indicated above, the approval of the petition was later revoked and the labor certification invalidated in 2012. The director found that the petitioner failed to demonstrate that (a) the beneficiary had the requisite work experience in the job offered as of the priority date and (b) the petitioner has the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. The director found fraud/willful misrepresentation involving the beneficiary's qualifications and accordingly, invalidated the labor certification.

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 each of the director's findings as follows.

a. The beneficiary's Qualifications for the Job Offered.

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

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.

Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Here, the priority date (which is the date the Form ETA 750 was filed and accepted for processing by DOL) is April 23, 2001. The minimum requirement to perform the duties of the offered position is two years of work experience in the job offered. The name of the job title or the position for which the petitioner seeks to hire the beneficiary is "Cook." The job description listed on the Form ETA 750 part A item 13 is "prepare meats, fish, vegetables, souces [sic] etc."

On the Form ETA 750 part B signed by the beneficiary on January 9, 2001 he claimed to have worked as a cook at [REDACTED] in Brazil from March 1997 to February 2000. To show that the beneficiary did work as a cook and have the requisite work experience in the job offered prior to the priority date, the petitioner originally submitted the following evidence:

- A letter of employment verification dated February 1, 2001 from [REDACTED] manager, stating that the beneficiary worked as a cook at [REDACTED] from March 5, 1997 to February 15, 2000.

In response to the director's Notice of Intent to Revoke dated January 19, 2010 (2010 NOIR), the petitioner submitted the following evidence:

- An affidavit dated February 18, 2010 from the beneficiary stating that he first learned how to cook through working as a cook at a small club – [REDACTED] – for almost two years, that in 1997 he left the club because there was a new pizza place in town that needed cooks, that he was hired because he had already had some experience in cooking, and that the owner, [REDACTED] was too young at the time to officially register her business;
- A copy of the completion certificate in the kitchen course, structure, organization, and function issued to beneficiary on October 6, 1995;
- A copy of the completion certificate in the waiter course, technique of bar and restaurant services issued to beneficiary on October 6, 1995;
- A statement dated February 11, 2010 from [REDACTED] stating that she and her brothers, [REDACTED] founded [REDACTED] that she hired the beneficiary, among others, on March 5, 1997, to work initially at [REDACTED] and later at [REDACTED] because the beneficiary had the experience in making wood oven pizza and was a certified cook;
- A copy of the business registration (CNPJ) of [REDACTED]
- A copy of the CNPJ of [REDACTED]

² CNPJ or Cadastro Nacional da Pessoa Juridica is a unique number given to every business registered with the Brazilian authority; it is similar to Federal Employer Identification Number in the United States. The CNPJ database can be accessed online at the following website: http://www.receita.fazenda.gov.br/PessoaJuridica/CNPJ/cnpjreva/Cnpjreva_Solicitacao.asp.

- A copy of the CNPJ of [REDACTED] ME;
- Various supporting documents showing that [REDACTED]
- A statement dated February 8, 2010 from [REDACTED] who claimed that she knew the beneficiary as the cook at [REDACTED] and that she was a regular customer;
- A statement dated February 5, 2010 from [REDACTED] stating that the beneficiary was an excellent cook at [REDACTED]; and
- A statement dated February 10, 2010 from Ricardo [REDACTED] who stated that he and the beneficiary were co-workers; that he was a prep cook and deliveryman from 1997 to 2001, and that the beneficiary was the cook.

In response to the director's Notice of Intent to Revoke dated January 18, 2012 (2012 NOIR), the petitioner further submitted the following evidence:

- An affidavit dated February 12, 2012 from [REDACTED] stating that he hired the beneficiary on behalf of the petitioner in 2000 after testing the beneficiary's cooking abilities; and
- A declaration dated February 7, 2012 from [REDACTED] stating that she was the owner/partner/manager of [REDACTED] that she is now the owner/partner/manager of [REDACTED] that the beneficiary worked as a cook at [REDACTED] from March 5, 1997 to February 15, 2000, and that the beneficiary's duties, among other things, include: receiving and organizing food and beverages; preparing the pizza dough; preparing and cooking the tomato sauce; and preparing, cooking, baking, and packing pasta and lasagna.

In response to the director's Notice of Certification (NOC) dated May 23, 2012, the petitioner submitted the following evidence:

- An affidavit dated June 21, 2012 from the beneficiary affirming that he worked full time at both [REDACTED] and [REDACTED]
- A sworn statement dated June 20, 2012 certifying that the signature that appeared on three separate documents submitted to show the beneficiary's job qualifications was of [REDACTED]

The 2012 employment verification letter from [REDACTED] meets the minimum requirements in the regulations in that it includes the name, title, and address of the author and a specific description of the training received or duties performed by the beneficiary. See 8 C.F.R. §§ 204.5(g)(1) and (l)(3)(ii)(A).³

³ The regulations at 8 C.F.R. §§ 8 C.F.R. §§ 204.5(g)(1) and 204.5(l)(3)(ii)(A) provide:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the

The director concluded that the beneficiary could not have been employed by [REDACTED] beginning in March 1997 and that the petitioner must have submitted false documentation because [REDACTED] was not registered until September 1999.⁴ The AAO finds that the petitioner has explained and resolved this issue with independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The AAO is also persuaded that the petitioner has submitted sufficient evidence to establish that it is more likely than not that the beneficiary worked as a cook and had the requisite work experience in the job offered before the priority date.

For these reasons, the director's conclusion that the beneficiary did not have the requisite work experience in the job offered as of the priority date is withdrawn. Similarly, the director's finding of fraud/willful misrepresentation involving the beneficiary's qualifications is withdrawn.

Nevertheless, the approval of the petition cannot be reinstated because the petitioner failed to establish by a preponderance of the evidence the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence, or until he ported to another similar employment, pursuant to section 204(j) of the Act.⁵

name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

⁴ The director found the above information by searching the CNPJ database on the internet (http://www.receita.fazenda.gov.br/PessoaJuridica/CNPJ/cnpjreva/Cnpjreva_Solicitacao.asp) (last accessed December 4, 2012).

⁵ Section 204(j) of the Act, 8 U.S.C. § 1154(j), provides that an employment-based immigrant visa petition shall remain valid with respect to a new job if the beneficiary's application for adjustment of status has been filed and remained unadjudicated for 180 days. Counsel in his brief claimed that the beneficiary ported to [REDACTED] pursuant to section 204(j) of the Act in July 2005. The record contains a letter dated June 4, 2008 from [REDACTED] General Manager, stating that the beneficiary has been a full-time and permanent cook at [REDACTED] since approximately July 4, 2005. The record also includes an affidavit dated February 8, 2012 from [REDACTED] who states that the beneficiary has been working as a cook at [REDACTED] since 2005.

A review of the record reflects that the Form I-140 petition was filed on June 24, 2002 and approved on October 6, 2003, and that the beneficiary filed the Form I-485 on December 9, 2002. Based on the evidence submitted and the facts stated above, we find that the petition was valid when the beneficiary ported to another employment in July 2005. The beneficiary ported to another similar employment after the petition had been approved and more than 180 days after he filed the Application to Register Permanent Residence or Adjust Status (Form I-485) but before the director revoked the approval of the petition on May 23, 2012.

b. The Petitioner's Ability to Pay.

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, or until he ported, pursuant to section 204(j) of the Act, as explained above. *See footnote 4.* 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).

Here, as noted earlier, the priority date is April 23, 2001. The rate of pay or the proffered wage listed on the Form ETA 750 is \$12.57 per hour or \$22,877.40 per year. The record contains copies of the beneficiary's paystubs showing that the beneficiary received the following amounts from the priority date to the date he ported (in 2005):

- \$4,517.39 in 2001 (\$18,360.01 less than the proffered wage of \$22,877.40);
- \$12,415.70 in 2002 (\$10,461.70 less than the proffered wage of \$22,877.40);
- \$30,447.35 in 2003 (exceeds the proffered wage of \$22,877.40); and
- \$33,596.31 in 2004 (exceeds the proffered wage of \$22,877.40).

Therefore, the petitioner has established the ability to pay in 2003 and 2004 but not in 2001, 2002, and 2005. In order to meet the burden of proving by a preponderance of the evidence that the petitioner has the continuing ability to pay from the priority date, the petitioner must show that it has the ability to pay the difference between the proffered wage and the actual wages paid, which is:

- \$18,360.01 in 2001;
- \$10,461.70 in 2002; and
- \$22,877.40 in 2005.

The record also contains copies of the petitioner's federal income tax returns (Internal Revenue Service Forms 1120S U.S. Income Tax Return for an S Corporation) for 2000 to 2005, which reflect the following net income and net current assets in 2001, 2002, and 2005:

Tax Year	Net Income ⁶	Net Current Assets	Remainder of the Proffered Wage
2001	\$157,050	\$35,946	\$18,360.01
2002	\$270,968	\$72,989	\$10,461.70
2005	\$224,506	\$12,882	\$22,877.40

Therefore, the petitioner has established the ability to pay in 2001, 2002, and 2005.

However, we acknowledge and share the director's concern that the petitioner has filed 14 other petitions since 2000.⁷ Consistent with 8 C.F.R. § 204.5(g)(2), the petitioner is required, not only to establish the ability to pay the proffered wage of the instant beneficiary, but also of the other alien beneficiaries that the petitioner sponsored. In the 2012 NOIR, the director specifically advised the petitioner to submit, among other things, copies of the Forms W-2 or 1099-MISC issued by the petitioner to the other alien beneficiaries. In response to the 2012 NOIR and the NOC, counsel for the petitioner made the following statement in his briefs:

Unfortunately, Petitioner no longer has complete information regarding the other 14 beneficiaries for whom he filed over the past twelve years. This unavailability was procured by the Service's unreasonable 10 year delay in seeking such evidence. Yet the fact that [redacted] [the beneficiary] was paid between 2001

⁶ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2001-2002) and line 17e (2004-2005) of Schedule K. See Instructions for Form 1120S, 2005 at <http://www.irs.gov/pub/irs-prior/i1120s--2005.pdf> (last accessed May 24, 2012) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had adjustments shown on its Schedule K for 2001, 2002 and 2005, the petitioner's net income is found on Schedule K of its tax returns for those years.

⁷ The details of those petitions are disclosed in the director's 2012 NOIR and NOR and therefore, they will not be repeated here.

and 2005 clearly demonstrates Petitioner's ability to pay [REDACTED] at the time he was employed.

Counsel also asserted that in 2001, the petitioner reported net income more than 10 times the remainder of the beneficiary's proffered wage. Similarly, in 2002, according to counsel, the petitioner showed \$328,089 in current assets and income. In summary, counsel stated, "Clearly, these sums, combined with the fact that the petitioner did in fact pay the prevailing wage every year thereafter, more than demonstrate the ability to pay."

The fact that the petitioner has filed 14 other petitions since 2000 is important in determining whether the petitioner has the ability to pay. The director specifically asked the petitioner to produce/submit additional evidence, such as audited financial statements, annual reports for the relevant years, and Forms W-2 and 1099-MISC issued to the other beneficiaries, to demonstrate the petitioner's ability to pay. No such evidence has been submitted. Due to the lack of evidence, the AAO cannot conclude that the petitioner has the continuing ability to pay the proffered wage from the priority date, especially in 2001, 2002, and 2005.

In addition, it appears that the petitioner has been dissolved as of April 9, 2007. According to the website of the Secretary of the Commonwealth, Corporations Division (<http://corp.sec.state.ma.us/corp/corpsearch/corpsearchinput.asp>), the petitioner on its own will filed a petition to dissolve the business on December 1, 2006. The Secretary of the Commonwealth approved the request on April 9, 2007 (last accessed January 16, 2013). If the petitioner is no longer in business, then no *bona fide* job offer exists, and the petition would be subject to automatic revocation due to the termination of the petitioner's business. See 8 C.F.R. § 205.1(a)(iii)(D). Thus, for these reasons the AAO affirms the director's conclusion that the petitioner has not established that it has the continuing ability to pay the proffered wage from the priority date until the beneficiary receives lawful permanent residence or until he ported to another similar employment in July 2005.

In summary, the director's finding that there was fraud or willful misrepresentation involving the beneficiary's job qualifications will be withdrawn. Similarly, the director's decision to invalidate the labor certification will be 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 petitioner has the continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary either obtains lawful permanent residence or ported to another similar employment.

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 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. 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 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 to revoke the previously approved petition is affirmed.

FURTHER ORDER: The decision to invalidate the alien employment certification, Form ETA 750, ETA case number P2001-MA-01314748, is withdrawn.