



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: JUN 26 2013 OFFICE: NEBRASKA SERVICE CENTER

[Redacted]

IN RE: Petitioner:
Beneficiary:

[Redacted]

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:

[Redacted]

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 Director, Nebraska Service Center (director), revoked the approval of the employment-based immigrant visa petition and on motion; the director reopened his decision and reaffirmed the revocation on June 14, 2012. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department 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.” 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 petitioner describes itself as a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is July 16, 2004. *See* 8 C.F.R. § 204.5(d).

The director’s decision revoking the approval of the petition concludes that the beneficiary did not possess the minimum two years of experience required to perform the duties of the offered position by the priority date. Specifically, the director’s decision concludes that the evidence of the beneficiary’s work experience is inconsistent and created doubts as to the beneficiary’s qualifying work experience. Therefore the director found that the beneficiary did not qualify for the visa classification requested.

The record shows that the appeal is properly filed 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.

On appeal, the petitioner states that the director failed to consider timely filed evidence and a response to the director’s Notice of Intent to Revoke (NOIR). The director, on motion, considered the evidence that he previously had not considered. Thus, this argument is moot and will not further be addressed on appeal.

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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.²

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 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).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate about the beneficiary’s qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: 6 years.

High School: None.

College: Not Required.

TRAINING: None Required.

EXPERIENCE: Two (2) years in the job offered.

OTHER SPECIAL REQUIREMENTS: None.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

The Form ETA 750 provides that the position requires 2 years of experience as a cook/ Malaysian style. The labor certification also states that the beneficiary qualifies for the offered position based on three and a half years of experience as a cook with [REDACTED] in Malaysia from October 2000 until present. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury on May 1, 2004.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

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 record at hand provides a statement from the former manager of the restaurant and from the beneficiary's brother, concerning his work experience. A letter dated October 7, 2004 by [REDACTED], states that the beneficiary worked as a kitchen helper from October 2000 to October 2001 and thereafter as a Malaysian specialty cook until September 15, 2004. An affidavit from [REDACTED], the beneficiary's brother, dated September 9, 2011, states that he (the brother) worked at the restaurant as a chef for 11 years and for the last two years was also the owner. The beneficiary's brother further states that the beneficiary worked as a kitchen worker at [REDACTED] for one year from October 2000 to September 2001 and that thereafter, the beneficiary, worked as a full time chef from September 2001 to September 2004. An affidavit from [REDACTED] the beneficiary's sister and a former co-worker, corroborated the dates and the employment history of the beneficiary testified to by [REDACTED] from 2001 - 2004. The beneficiary's brother also stated that the beneficiary again worked as a fulltime chef from May 2009 until the restaurant closed in August 2011.

On April 7, 2011 and June 6, 2011, the beneficiary was interviewed by the United States Department of State (DOS) in connection with his application for an immigrant visa. At the interviews, the beneficiary claimed to have worked for [REDACTED] from 2003 to 2007. He also stated that after 2009 he worked part-time at a noodle shop, which is inconsistent with his brother's testimony that he again worked as a fulltime chef at [REDACTED] from 2009 – 2011. The beneficiary could not provide any explanation for the discrepancy between his statements and those of [REDACTED] and [REDACTED]. Further, the beneficiary's statements at the interview were also inconsistent with the work experience that he declared, signed and attested to under penalty of perjury on the Form ETA 750, and the DOS Form DS-230, Application for Immigrant Visa and Alien Registration, dated May 1, 2004 and April 7, 2011, respectively.³ Further, the beneficiary could not provide any names or contact numbers of co-workers⁴ with whom he had worked in order to verify his claims. On October 18, 2011, the DOS notified USCIS that the beneficiary could not provide supporting evidence of his

³ On these forms the beneficiary stated that he worked for [REDACTED] from 2000 – 2004.

⁴ We note that one of the beneficiary's co-workers was also his brother.

work experience and that he misrepresented a material fact regarding his employment history. The director subsequently issued a Notice of Revocation (NOR)

Upon reconsideration of the record on motion and the petitioner's response to the director's request for information in the NOIR, the director found that there was good and sufficient cause to revoke and again revoked the approval of the petition.

On appeal counsel states that the consular officials also faulted the beneficiary for inconsistencies regarding his current employment at the food court, which is irrelevant to the beneficiary's qualifying work experience. Further, on appeal, counsel states, that the beneficiary failed to provide the correct dates of employment to the DOS because of the pressure of the interview. The AAO disagrees that the beneficiary's testimony about his non-qualifying work experience is not relevant. The interviewing officer considered the lack of details of the beneficiary's statements at the interviews and concluded that the inconsistencies and the lack of detail created doubt as to the beneficiary's overall creditability. The beneficiary's credibility is relevant to his immigrant visa application.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition...It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The petitioner fails to provide independent objective evidence of the beneficiary's employment at [REDACTED]. The director's NOIR and NOR indicated that the beneficiary could not provide the names of contacts, of any co-workers, and could not describe his routine, his hours of employment, and his average salary. The petitioner failed to overcome these inconsistencies on appeal by stating that the beneficiary got confused about the dates. There is no financial record; no tax document, work identification card or other document to corroborate the beneficiary's claimed employment at [REDACTED].

The beneficiary's and the three other affidavits do not provide independent, objective evidence of his prior work experience. *See Matter of Ho*. Based on lack of independent objective evidence we find it more likely than not that the beneficiary does not possess two years of work experience as required under the terms of the certified Form ETA 750.

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.⁵ If the petitioner's net income or net current assets are 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. Comm'r 1967).

In the instant case, the record does not reflect that the petitioner employed the beneficiary, and does not establish that its net income and net current assets were equal or greater to the proffered wage for 2008, 2009, 2010, and 2011. Specifically, the record contained no evidence of its federal income tax returns for 2008, 2009, 2010, and 2011. Moreover, according to USCIS records, the petitioner filed a second form I-140 petition on behalf of another beneficiary. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The evidence in the record does not document the priority date, proffered wage, whether the other petition has been withdrawn, revoked, or denied, or whether the other beneficiary has obtained lawful permanent residence. 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 from 2008-2011.

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 and the proffered wage to the beneficiary of its other petition, since 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. The petition's approval remains revoked.

⁵ *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).