

(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

[Redacted]

DATE: **MAY 03 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner: [Redacted]
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 employment-based preference visa petition was initially approved by the Director, Texas Service Center. The director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The matter is now before the Administrative Appeals Office (AAO) on appeal. 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 convenience store. It seeks to permanently employ the beneficiary in the United States as a store manager. 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 August 27, 2004. *See* 8 C.F.R. § 204.5(d).

The director’s decision revoking the approval of the petition found that the evidence in the record was so contradictory that the record as a whole could not be relied upon. 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.* Specifically, the director found that the petitioner presented no evidence to rebut the inconsistencies noted in the NOIR, including the bona fides of the job offer, the beneficiary’s previous employment, the successor-in-interest relationship between the petitioner and the successor employer, and the beneficiary’s physical presence in the United States prior to December 21, 2000.

The proffered job requires that the beneficiary possess a minimum of two years of experience in the proffered job as a store manager, or alternatively two years as a manager (retail or restaurant field). The beneficiary must possess all of the required experience for the proffered job at the time the

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.

application for labor certification was filed. The inconsistencies in the record noted by the director are detailed below.

The beneficiary claims to have arrived in the United States on October 16, 2000 from Pakistan. Two months later, the beneficiary claims to have been hired as a manager at [REDACTED]. According to the beneficiary's job description, he was responsible for overseeing fast food store operations, monitoring inventory, ordering food supplies, hiring, training, and supervising employees, and ensuring quality standards. However, the beneficiary was the subject of a prior application for labor certification, filed by [REDACTED] which sought to hire him as a maintenance technician. The experience needed for the [REDACTED] labor certification was "maintain electrical and utility equipments of the business." On that application for labor certification, the beneficiary claimed that he had worked as an Engineering Supervisor for [REDACTED] in Karachi, Pakistan from November 1999 to October 2000. A letter was provided by [REDACTED] to support the prior application for labor certification, which stated his duties were the "final commissing [sic] and testing of Electrical installations on Site." The duties and experience gained do not align with those needed to manage a [REDACTED] franchise. Thus, there is nothing in the record to explain how an alien who entered without inspection, with no apparent experience in the fast food business, is hired to be a manager within weeks of arrival.

The director informed the petitioner that the dates [REDACTED] claimed to employ the beneficiary (November 1999 to October 31, 2000) were inconsistent with the date the beneficiary claimed on the Form I-140 to have arrived in the United States. In his response to the NOIR, counsel asserts that the beneficiary called [REDACTED] to give his resignation on October 31, 2000 from the United States and that both the date of entry to the United States and the date of resignation are correct. No evidence to support these assertions was submitted in the response to the NOIR or on appeal. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The director also found inconsistencies with the beneficiary's claimed physical presence in the United States prior to December 21, 2000. In the NOIR, the director noted that the petitioner provided a copy of a prescription written to the beneficiary for Ciba Night & Day contact lenses. The prescription was dated November 22, 2000, and expired September 22, 2001. However, the director informed the petitioner in the NOIR that the contacts described in the prescription were not released for sale until 2007. The petitioner provided no evidence in its response to the NOIR or on appeal to address these issues. Rather, on appeal, the petitioner asserts that the director erred by making presence in the United States a criterion for an immigrant visa. The petitioner misreads the director's decision. The director found the evidence in the record was inconsistent, and the petitioner did not provide objective and conclusive explanations showing where the truth lies. See *Matter of Ho, supra*.

The petitioner also provided a copy of a Social Security card purportedly issued to the beneficiary so he could work in December 2000. However, according to USCIS records, no work authorization

was filed by [REDACTED] on behalf of the beneficiary in 2000, or at any other time. This evidence does not resolve the inconsistencies noted by the director, but raises further doubts.

The petitioner also asserts that the director abused his discretion by evaluating evidence in the record which does not immediately pertain to the instant petition. The petitioner provides no legal authority which supports his position that the director cannot look at past records in an A file when determining eligibility for immigration benefits. Indeed, if the petitioner were correct, the director would be hamstrung in his ability to detect and deter fraud.

The director informed the petitioner that according to the State of Georgia, the petitioner's business had been dissolved. The petitioner responded, explaining that it had sublet the business to another entity. The petitioner claimed that the petition was still valid under the provisions American Competitiveness in the Twenty-First Century Act of 2000 (AC21). The director, in his decision noted that AC21 does not apply to situations where the employee stays in the proffered job, but ownership changes hands. The director correctly informed the petitioner that if ownership had changed hands it must meet the requirements for a successor-in-interest, as stated in *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A valid successor relationship may be established for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. On appeal, the petitioner failed to supply evidence that there is a valid successor-in-interest in this case.

Beyond the decision of the director,² 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.³ If the petitioner's net income or net current assets is

² 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).

³ *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

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 has not established that it employed and paid the beneficiary at any time. The record contains the petitioner's federal income tax returns for 2004 and 2005. Those returns show that the petitioner's net income was insufficient to pay the beneficiary the full proffered wage of \$36,700 each year,⁴ and its net current assets⁵ were not equal or greater to the proffered wage. 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 AAO affirms the director's decision that the petitioner failed to establish eligibility for the benefits sought. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act. The AAO also finds that the petitioner has not demonstrated its continued ability to pay the proffered wage.

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.

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).

⁴ The petitioner's net income shown on its 2004 and 2005 Forms 1120 was -\$3,401, and -\$5,883 respectively.

⁵ The petitioner's net current assets as reflected on its 2004 and 2005 Forms 1120 were \$32,205, and -\$12,420 respectively.