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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

[REDACTED]

Date: 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:

SELF-REPRESENTED

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

[Redacted]

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cc:

[Redacted]

**DISCUSSION:** The preference visa petition was initially approved by the Director, Vermont Service Center, on May 21, 2002, but on July 20, 2009, the approval was revoked by the Director, Texas Service Center (the director). The beneficiary through his counsel filed an appeal, but the appeal was summarily rejected by the director.<sup>1</sup> Pursuant to 8 C.F.R. § 103.3(a)(5)(ii), the Administrative Appeals Office (AAO) reopened the proceeding *sua sponte*, withdrew the decision by the director to reject the appeal, and provided the petitioner 30 days in which to submit additional arguments and/or evidence. The AAO noted that once the case is appealed to the AAO, then the AAO, not the director, shall have the jurisdiction to adjudicate the appeal. See 8 C.F.R. § 103.3(a)(2)(iv). Upon review, the appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently 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).<sup>2</sup> As required by statute, a labor certification approved by the U.S. Department of Labor accompanied the petition. The director revoked the approval of the petition, finding that the petitioner failed to demonstrate by a preponderance of the evidence that it complied with or followed the Department of Labor (DOL) recruitment requirements.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Upon *de novo* review, the AAO concludes that the petition is not approvable, because the petitioner has failed to demonstrate by a preponderance of the evidence that the beneficiary met the minimum requirements for the job offered (two years of work experience in the job offered as of the priority date), and that the company petitioning for the beneficiary has the ability to pay the proffered wage from the priority date and continuing until the beneficiary ported to another similar employment, in accordance with section 204(j) of the Immigration and Nationality Act (the Act).<sup>3</sup> Beyond the decision of the director, and as an alternative decision, the appeal will be dismissed as moot.

As noted in our *sua sponte* notice dated March 11, 2013, the position offered in this case is for a skilled worker, requiring at least two years of specialized training or experience. Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date, the beneficiary had all of the

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<sup>1</sup> The director stated that the beneficiary is not the affected party, and therefore he is not entitled to file the appeal, pursuant to 8 C.F.R. § 103.3(a)(1)(iii)(B).

<sup>2</sup> 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.

<sup>3</sup> In her appellate brief, counsel for the beneficiary claimed that the beneficiary ported pursuant to section 204(j) of the Act. The record contains a letter from [REDACTED] indicating that the beneficiary has been employed as a cook and food handler since March 2005.

qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition. We do not find that the beneficiary had at least two years of specialized training or experience in the job offered before the priority date.

Here, the Form ETA 750 was filed and accepted for processing by DOL on April 23, 2001. The name of the job title or the position for which your organization sought to hire is “cook.” Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, “Prepare all types of dishes,” and indicated on section 14 that an applicant must have, at a minimum, two years of experience in the job offered.

The beneficiary signed the Form ETA 750B on February 27, 2001 and represented that he worked 40 hours a week as a cook for a restaurant called [REDACTED] in Curitiba, PR (Parana), Brazil, from January 1994 to December 1997. Under the job description, the beneficiary stated, “I made all different kinds of foods for lunch and dinner.”

To support the beneficiary’s claim that he worked as a cook in Brazil, the petitioner submitted a letter of employment verification dated April 11, 2001 from [REDACTED] indicating that “the beneficiary worked in my company in the period from 01/20/1994 to 12/31/1997, exercising the function of a cook, stove, oven, and salads in general.”

The AAO finds that the letter of employment verification dated April 11, 2001 does not comply with the regulation at 8 C.F.R. §§ 204.5(g)(1) and 204.5(l)(3)(ii)(A), in that it does not include the name and title of the author and a sufficient description of the experience or training received by the beneficiary.<sup>4</sup> When asked in the March 11, 2013 AAO notice to provide another letter of employment verification that complies with the regulations noted above, or pay stubs, payroll records tax documents, or the beneficiary’s Brazilian booklet of employment and social security, the petitioner did not provide any response, nor did it submit any of the requested documentation.

Further, as indicated in our March 11, 2013 notice, we doubt that the beneficiary worked as a cook in Brazil from January 1994 to December 1997, as the company where the beneficiary used to work in Brazil was not registered in the Cadastro Nacional da Pessoa Juridica (CNPJ)<sup>5</sup> until November 5, 1997.

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<sup>4</sup> The regulation at 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 name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.”

<sup>5</sup> CNPJ is a unique number given to every business registered with the Brazilian authority. In Brazil, a company can hire employees, open bank accounts, buy and sell goods only if it has a CNPJ number. The Department of State has determined that the CNPJ provides reliable verification with respect to the adjudication of employment-based petitions in comparing an individual’s stated hire and working dates with a Brazilian-based company to that Brazilian company’s registered creation date. The CNPJ database can be accessed online at

Moreover, we note that the beneficiary on his Form G-325 (Biographic Information) which he signed under penalty of perjury and submitted in connection with the application to adjust status to lawful permanent resident status (Form I-485) stated he lived in the city of Curitiba, Parana, Brazil, from 1998 to 1999. It is not clear from the evidence available in the record where the beneficiary lived between 1994 and 1997.<sup>6</sup> Further, the beneficiary did not list his last occupational aboard on the Form G-325. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). No independent objective evidence has been submitted to resolve the inconsistencies in the record as noted above. Therefore, we find that the petitioner has not demonstrated by a preponderance of the evidence that the beneficiary possessed the requisite work experience in the job offered as of the priority date.

Concerning 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, which 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 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. 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

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The letter of employment verification dated April 11, 2001 for the beneficiary from [REDACTED] included the following CNPJ number: [REDACTED]. The director searched the CNPJ database and found that [REDACTED] did not exist until November 5, 1997.

<sup>6</sup> The location of the business where the beneficiary claimed to have worked from 1994 to 1997 was, as noted above, in Curitiba, Parana, Brazil.

considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As indicated above, the Form ETA 750 was accepted by the DOL for processing on April 23, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$12.57 per hour or \$22,877.40 per year (based on a 35-hour work per week).<sup>7</sup> Further, a review of USCIS electronic databases reveals that the petitioner has filed multiple immigrant visa petitions (Form I-140) for alien beneficiaries other than the beneficiary in the instant proceeding since 2001.<sup>8</sup>

If the instant petition were the only petition filed by the petitioner, the petitioner would have only been required to demonstrate the ability to pay the proffered wage to the single beneficiary of the instant petition. However, that is not the case here. In this case, the petitioner has filed multiple petitions in the past. Unless this fact is disputed (if, for instance, one or more of the petitions above have been withdrawn, or if the information provided above is inaccurate), consistent with the regulation at 8 C.F.R. § 204.5(g)(2), the petitioner is therefore required to establish the ability to pay the proffered wages *not only* for the current beneficiary but *for all* of the other immigrant visa beneficiaries until (either one or more of these circumstances apply):

- a) Each beneficiary receives or received his or her legal permanent residence (LPR);
- b) Unless and until we deny/revoke the petition; or
- c) Unless and until your organization withdraws the petition.

The petitioner has already submitted copies of the following evidence to show that it has the continuing ability to pay \$12.57 per hour or \$22,877.40 per year from April 23, 2001:

- The petitioner's reviewed financial statements for the period ended January 31, 2000 and January 2, 2001;<sup>9</sup>

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<sup>7</sup> 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).

<sup>8</sup> We have revealed the names of the other beneficiaries and the details of the other petitions that the petitioner has filed since 2001, and therefore, we will not reveal them again here.

<sup>9</sup> The accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The reviewed financial statements that the petitioner submitted are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1, and accountants only express limited assurances in

- The petitioner's Internal Revenue Service (IRS) Forms 940 Employer's Annual Federal Unemployment Tax Return for calendar year 2001 showing total payments of employees' wages in the amount of \$4,525,035.80; and
- The petitioner's IRS Forms 941 Employer's Quarterly Federal Tax Return for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> quarters of 2001, showing total wages and tips in the amounts of \$1,169,560 (1<sup>st</sup> Qtr); \$1,031,574.83 (2<sup>nd</sup> Qtr); \$1,062,134.54 (3<sup>rd</sup> Qtr); and \$1,261,766.31 (4<sup>th</sup> Qtr).

We noted earlier in our notice to reopen the appeal *sua sponte* dated March 11, 2013, that the evidence submitted above is not sufficient to demonstrate the petitioner's ability to pay. We requested that the petitioner submit annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. The AAO gave the petitioner 30 days to respond, but no such evidence has been submitted after 30 days have passed. Therefore, we find that the petitioner has failed to demonstrate by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date.

Finally, the AAO observed that the company filing the petition in this case has been dissolved as of September 10, 2010.<sup>10</sup> If the petitioning business has been dissolved and is no longer an active business, then no *bona fide* job offer exists and the petition and its appeal have become moot. Therefore, the appeal will alternatively be dismissed as moot.<sup>11</sup>

The appeal will be dismissed 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.

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reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

<sup>10</sup> A copy of the decision will be mailed to the counsel for the beneficiary and the registered agent of the petitioner at the address provided by the Massachusetts Department of State, Corporation Divisions.

<sup>11</sup> Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.