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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 **MAR 24 2015**

OFFICE: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE:

Petitioner:

Beneficiary:

[Redacted]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(iii)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Vermont Service Center (VSC) Director. The approval of the petition was subsequently revoked by the VSC Director. A motion to reopen and reconsider the revocation decision was dismissed by the Texas Service Center (TSC) Director. The petitioner filed an appeal, which was dismissed by the Chief, Administrative Appeals Office (AAO). The petition is now before the AAO on a motion to reopen and reconsider. The motion will be granted, and the dismissal of the appeal will be affirmed.

The petitioner describes itself as an “oriental grocery/restaurant.” Its Form I-140, Immigrant Petition for Alien Worker, was filed on November 24, 1999, accompanied by a Form ETA 750, Application for Alien Employment Certification, which was filed with the U.S. Department of Labor (DOL) on September 13, 1990, and certified by the DOL (labor certification) on April 1, 1991. The petition was approved by the VSC Director on April 18, 2001. On May 18, 2009, however, the VSC Director issued a notice of intent to revoke (NOIR) the approval on the ground that the proffered position described in the petition (cook) did not match the job described in the labor certification (kitchen utility helper). The petitioner was given 33 days to respond to the NOIR with rebuttal evidence. On August 24, 2009 the VSC Director revoked the approval of the petition on the ground that the petitioner failed to respond to the NOIR. The petitioner filed a motion to reopen and reconsider on September 10, 2009, claiming that the revocation decision was erroneous because a timely response was filed to the NOIR on June 18, 2009, which was not considered by the VSC Director.

On May 11, 2010 the TSC Director dismissed the petitioner’s motion. While acknowledging that a timely response to the NOIR had been submitted, the TSC Director found that the motion did not meet regulatory requirements because no new facts had been introduced.

On June 10, 2010 the petitioner filed a timely Notice of Appeal on Form I-290B (receipt number [REDACTED]). The appeal was supplemented on June 18, 2010 by a brief from counsel which claimed that its response to the NOIR was not properly considered by the TSC Director.

On February 19, 2013 we issued a decision dismissing the appeal. At the outset we noted that a timely response to the 2009 NOIR was in the record. Therefore, we withdrew the TSC Director’s finding to the contrary and adjudicated the appeal on the merits. In accord with the VSC Director’s discussion in the NOIR, we found that the petitioner was not in compliance with the terms of the labor certification because the job described in the petition (cook) was not the same as the job described in the labor certification (kitchen utility helper). We noted that the petitioner had submitted a revised Form I-140 petition on appeal, replacing the job title of cook with kitchen utility helper,¹ but found that the revision constituted a material change which could not be submitted on appeal to bring the petition into alignment with the labor certification. The petitioner pointed out that its prior counsel, [REDACTED] was convicted of immigration fraud in December 2002, and asserted that he was responsible for incorrectly describing the job offered in the petition as a

¹ The revised Form I-140 was, in fact, initially submitted with the response to the NOIR.

cook instead of a kitchen utility helper. We found the petitioner's claim unpersuasive, and cited two documents in the record – including a notarized letter signed by the petitioner in 2006 stating that the beneficiary was employed as a cook and a Form G-325A, Biographic Information, signed by the beneficiary in 2006 which stated that he had been employed by the petitioner as a cook since 2001 – as indicating that the petitioner intended to employ the beneficiary as a cook (consistent with the petition) rather than as a kitchen utility helper (consistent with the labor certification). We concluded, therefore, that the petition was not supported by a valid labor certification. In conjunction with this determination we also found that the petitioner had not articulated a proper claim based upon the ineffective assistance of counsel. In addition, and beyond the decisions of the VSC and TSC Directors, we found that the petitioner did not submit any tax returns, financial documents, or other evidence to establish its continuing ability to pay the proffered wage of the job offered from the priority date of the petition up to the present. For all of the above reasons we determined that the petition must be denied. Accordingly, the appeal was dismissed.

The petitioner filed a timely motion to reopen and reconsider on March 20, 2013, supplemented by a brief from counsel and additional documentation. We find that the motion meets the requirements of a motion to reopen and a motion to reconsider under 8 C.F.R. § 103.5(a)(2) and (3). However, for the reasons discussed hereinafter we will affirm our dismissal of the appeal. The petition will remain revoked.

Labor Certification Issue

Repeating the claim first made in response to the NOIR, the petitioner asserts that its only intent when it filed the I-140 petition in 1999 was to substitute the instant beneficiary for the original beneficiary identified in the Form ETA 750, who was no longer available for the job offered. The petitioner contends that it had no intention to change the job offer as described in the labor certification obtained from the DOL in 1990-91, but that its prior counsel, [REDACTED] failed to exercise basic due diligence in preparing the I-140 petition to ensure that the job title and duties corresponded to those in the labor certification. As discussed in our previous decision, however, the petitioner cannot absolve itself of all responsibility for the contents of an I-140 petition by simply blaming its attorney for malpractice, especially when the petitioner has not articulated a claim based upon the ineffective assistance in conformance with *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988, *aff'd*, 857 F.2d 10 (1st Cir. 1988)).

Furthermore, the petitioner's former president signed the Form I-140 on November 8, 1999 under a declaration that read: "I certify under penalty of perjury under the laws of the United States that this petition, and all the evidence submitted with it, is true and correct." Directly above this certification the petition clearly stated that the title of the proposed employment was "Cook" and that the job duties consisted of preparing Korean cuisine including appetizers, entrees, desserts, wonton, dumplings, and dishes for special occasions. The job described in the Form I-140 had nothing in common with the job described in the Form ETA 750 that was signed by the petitioner's president (the same individual) on August 22, 1990. As described in the labor certification, the job title was "kitchen utility helper" and the job duties were "maintain[ing] store in neat and clean condition,

sweeping, mopping, washing kitchen utensils, unpacking and shelving stock, bagging and carrying purchase[s] to car.” Considering the actual contents of the Form I-140 and the certification of the petitioner’s president on that form, the petitioner cannot credibly deny that it knew, or should have known, that the Form I-140 was filed for a cook in 1999. The petitioner’s claim that it intended to file the Form I-140 for a kitchen utility worker rather than a cook is unpersuasive.

Further undermining the petitioner’s claim that it intended to employ the beneficiary as a kitchen utility helper, and not as a cook, in 1999 is the conflicting evidence in the record concerning the beneficiary’s actual employment in subsequent years. As discussed in our previous decision, the petitioner’s current president, ██████████ acknowledged in a sworn statement on November 30, 2006 that the beneficiary was employed as a cook, making no mention of any other job titles or duties. In another sworn statement more than four years earlier, on June 25, 2002, ██████████ stated that a job offer as cook was being extended to the beneficiary. The job duties were described in identical language to that subsequently used in the 2006 sworn statement: “Prepare season and cook a variety of dishes including soups, sauces, salads, meats, vegetables, desserts and other foodstuff[s]. Divide into portions, garnish and serve.” No other job titles or duties were mentioned. Six years later, on July 31, 2008, ██████████ signed yet another sworn statement, indicating that the beneficiary was currently working as both a cook and a kitchen utility helper, and had been performing the duties of the latter position from the beginning of his “long-term” employment. Adding to the confusion of the beneficiary’s employment history, the Forms G-325A in the record, signed by the beneficiary, are inconsistent. Whereas the previously cited G-325A from 2006 indicated that the beneficiary had worked as a cook for the petitioner since 2001, with no mention of any work as a kitchen utility helper, a subsequent G-325A in 2012 indicated that the beneficiary had worked for the petitioner as a “helper/store assistant” from January 2004 up to the present, and simultaneously as a butcher for another company from January 2005 up to the present. No mention was made in the 2012 Form G-325A of any job as a cook.

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant’s evidence also reflects on the reliability of the applicant’s remaining evidence. *See id.*

As an alternative line of argument the petitioner asserts that the beneficiary could port to the job of cook in accordance with section 204(j) of the act because it is in the same or a similar occupational classification as a kitchen utility helper. We do not agree. As referenced in the sworn statements of the petitioner’s president, dated June 25, 2002 and November 30, 2006, the job duties of the cook were to “prepare, season and cook a variety of dishes including soups, sauces, salads, meats, vegetables, desserts, and other foodstuff[s]. Divide into portion[s], garnish and serve.” These job duties do not overlap in any manner with the duties of the kitchen utility helper described in the labor certification. Except for the fact that they may be performed under the same roof, the jobs of cook and kitchen utility helper have practically nothing in common.

In summation, we affirm our previous finding that the petition is not supported by a valid labor certification because the job described in the Form ETA 750 that was certified by the DOL in 1991 differs fundamentally from the job described in the Form I-140 filed in 1999. The revised Form I-140 submitted by the petitioner in June 2009, which changed the proffered position from cook to kitchen utility worker, cannot be accepted because it represents a material change to the petition. As stated in our previous decision, 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).

Ability to Pay the Proffered Wage

With regard to the other ground for denial in our initial decision – the petitioner’s failure to establish its ability to pay the proffered wage – the petitioner points out that it was not asked to submit additional documentation on this issue at any time after the initial approval of the petition in 2001. In support of its current motion the petitioner has submitted copies of the federal income tax returns filed by its predecessor entity – [REDACTED] – for the years 1993, 1996, and 1997 (originally submitted with the I-140 petition in November 1999), as well as more recent federal income tax returns for the years 2003-2008. The record also includes copies of the petitioner’s federal income tax return for 2009 and the Forms W-2, Wage and Tax Statements, issued by the petitioner to the beneficiary for the years 2008, 2009, and 2010, which were submitted in conjunction with other proceedings. Based on the information contained in the above documentation, we find that the petitioner more likely than not has had the continuing ability to pay the proffered wage of the job offered from the priority date up to the present.

Accordingly, we will withdraw our previous finding that the petitioner failed to establish its continuing ability to pay the proffered wage.

Identity of the Petitioner

As previously discussed, the petition was filed in November 1999 by [REDACTED]. The documentation of record – including the labor certification and tax returns from the 1990s – identified [REDACTED] as the sole owner. Under a Sales Agreement dated February 18, 2000, co-signed by [REDACTED] sold its [REDACTED] business to [REDACTED] for \$600,000. On April 19, 2000, [REDACTED] was incorporated. Its initial directors, under the Articles of Incorporation, were [REDACTED] and [REDACTED]. On July 1, 2001, pursuant to a document entitled “Consent in Lieu of the Combined Annual Meeting of the Directors and Shareholders of [REDACTED]” three shareholders were identified as [REDACTED] (300 shares), [REDACTED] (400 shares) and [REDACTED] (300 shares). DTI’s tax returns for the years 2003-2008 were signed by [REDACTED] as president, and identified [REDACTED] as a 20% shareholder. None of the other shareholders are identified in the tax returns of record.

In a sworn statement dated July 31, 2008, [REDACTED] asserted that [REDACTED] “is the successor of [REDACTED]” pointing out that “[a]lthough the management was changed, it maintained the same business in the same location.” The record confirms [REDACTED] statement insofar as the current business – [REDACTED] – is essentially the same as [REDACTED] is located at the same address, and appears to be owned by [REDACTED] since the income tax returns for 2003-2008 (as well as “Special Tax Stamps” issued by the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms for the tax years 2001-2003) identify the taxpayer as [REDACTED]. Nonetheless, the documentation of record is unclear as to how [REDACTED] became the owner of [REDACTED] formerly known as [REDACTED]. As described above, [REDACTED] sold [REDACTED] to [REDACTED] individually, two months before [REDACTED] was incorporated. [REDACTED] is a co-owner of [REDACTED] (with 30% of the shares in 2001, 20% in the years 2003-2008). But there is no documentary evidence of [REDACTED] conveyance to [REDACTED] of the business he purchased in 2000. In fact, [REDACTED] filed a credit application with the [REDACTED] on July 24, 2002, in which he identified himself as the owner of [REDACTED] and likewise asserted in a sworn statement on May 2, 2003 that “I am the owner and president of [REDACTED].” Furthermore, in another Form I-140 filed by the petitioner on behalf of the instant beneficiary ([REDACTED]), which was denied by the TSC Director on January 28, 2015, the petitioner claimed to have a new owner, [REDACTED], as of 2012. In any future proceedings the petitioner should resolve this ownership issue and document the conveyance of the business formerly known as [REDACTED] now known as [REDACTED], from [REDACTED] (and any other owners) to [REDACTED].

Conclusion

The petition cannot be approved because it is not supported by a valid labor certification. Accordingly, we will affirm our dismissal of the appeal on this ground.

In visa petition proceedings it is the petitioner’s burden to establish eligibility for the immigration benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). That burden has not been met in this proceeding.

ORDER: The motion to reopen and reconsider is granted. Our previous finding that the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date up to the present is withdrawn. We affirm our previous finding that the petition is not supported by a valid labor certification. The dismissal of the appeal is affirmed. The revocation of the petition’s initial approval remains in effect.