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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]

B6

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 12 2011

IN RE: [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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (VSC) revoked the approval of the petition. The petitioner filed a motion to reopen and reconsider the revocation. The Director, Texas Service Center (director), dismissed the motion and certified the decision to the Administrative Appeals Office (AAO) for review. The decision of the director will be affirmed.

The petitioner claims to be a cinema. It seeks to permanently employ the beneficiary in the United States as a projectionist. 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).

The petitioner filed the instant petition on January 3, 2001. It 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 is January 14, 1998, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

The job offer portion of the labor certification states that the offered position requires two years of experience as a projectionist or in a related position. Part B of the labor certification, signed by the beneficiary under penalty of perjury, states that the beneficiary was employed as a projectionist by "[redacted]" in India (no address provided) from March 1988 until June 1994. The labor certification does not state any other projectionist-related employment. The petition contains a letter of [redacted] claiming to be the manager of "[redacted]" dated December 12, 1997. The letter is on what appears to be "[redacted]" letterhead. The letter states that the beneficiary was employed by the theatre on a full-time basis as a Projector Operator from March 1, 1988 until June 10, 1994.

The petition was initially approved by VSC on August 3, 2001. However, on March 13, 2007, the VSC issued Notice of Intent to Revoke (NOIR) the approval of the petition, stating that an investigation had revealed that the beneficiary did not have the claimed experience as a projectionist at [redacted] in India. The NOIR also notes that the petitioner had filed petitions on behalf of two other beneficiaries, and states that the record did not establish that the petitioner had the ability to pay the proffered wage to the beneficiary of the instant petition and to the two additional beneficiaries of the two other petitions. The NOIR includes a copy of an investigative report dated September 14, 2006 and prepared by the Consular Investigative Assistant, American Consulate General, Mumbai, India. The report states that the investigator talked to [redacted] the manager of [redacted]. [redacted] told the investigator that he had been the manager of the cinema since it was established in 1977. [redacted] stated that the cinema had employed the same projector, [redacted], since 1977. [redacted] told the investigator that he had 14 employees and knew them all by name, and that the beneficiary had never worked for the cinema.

Counsel submitted five responses to the NOIR, with letters dated March 26, 2007, April 2, 2007, April 26, 2007, May 23, 2007 and August 10, 2007. In a letter dated April 2, 2007, counsel states that the beneficiary had admitted to him that he had not worked at [redacted] The letter states:

> (b) [The beneficiary] advised that he has ***not*** previously been employed by the [c]inema listed on his employment attestation statement. [The beneficiary] indicates that he regrets the submission of this employment attestation statement and that he was pressured to normalize his status after entering the United States due to his family situation and his desire to remain in the country. It is therefore requested that the prior employment attestation submitted be withdrawn as being untrue and inaccurate.
>
> (c) [The beneficiary] advised that he did previously work as a projectionist for a movie theater that is not operating presently, in India, known as "Light House" [and] and that he worked there from 1988 to 1991 on a full time plus basis, six days a week. [The beneficiary] indicated that this business closed.

(Emphasis in original). Counsel's letter dated April 26, 2007 contains three "Indian Non Judicial Affidavits" attesting to the beneficiary's employment experience at the [redacted] from March 1988 to April 1991. Counsel's letter states:

> As indicated in our correspondence of April 2nd, [the beneficiary] advised our office after reviewing the [NOIR] that he had *not* previously been employed by the [t]heater listed on the employment attestation letter. [redacted]icated that he had previously worked in India as a projectionist but that the cinema at which he had been employed was not operating and that he was unable to obtain verification of his employment. Our office had then requested [redacted] "track down" persons having knowledge of his employment and provide statements as to his past employment.

(Emphasis in original). The three affidavits submitted with the letter testified that the beneficiary was employed by [redacted]

Counsel's May 23, 2007 letter contained three additional documents to supplement the petitioner's NOIR response. The evidence submitted with this letter contradicts counsel's prior statements in the April 2, 2007 and April 26, 2007 letters about the beneficiary's prior experience. The first document is a letter signed by [redacted] The letter, dated May 15, 2007, states that the beneficiary worked for as a "project operator" at [redacted] from March 1, 1993 to April 11, 1994. The letter appears to be on [redacted] letterhead. The second letter is an affidavit, also executed by [redacted] dated May 15, 2007. The affidavit states that [redacted] a "project operator" at [redacted] House," and that the beneficiary was an assistant "project operator" there from March 1, 1993 until April 11, 1994. The third document is a signed statement from the beneficiary dated May 23, 2007. In the statement, the beneficiary describes the circumstances behind the creation of employment

[1] This is apparently the same person named in the investigative report as the projectionist at [redacted] since 1977.

experience letter submitted with the petition. The beneficiary states that he was required to provide an experience letter when he applied for a projectionist position in the U.S. (presumably the current position with the petitioner):

> I contact[ed] my friend [in India] to contact [redacted] get my experience letter and have them send it to me.
>
> After two days I contacted my friend in India, where he told me that the [redacted] has been closed down, hence I would not get any documents. So I inform my friend that I had worked at [redacted] and asked if he would contact [redacted] and get my experience letter and send it to me.

Accordingly, the evidence submitted by counsel with the May 23, 2007 letter attempts to establish that the beneficiary was employed by [redacted] from March 1988 to April 1991, and later by [redacted] As is noted above, this contradicts counsel's earlier statements that the beneficiary had informed him that he had never worked for [redacted] It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Id.* at 591.

On February 19, 2008, after consideration of the evidence submitted in response to the NOIR, the VSC issued a Notice of Revocation (NOR), revoking the approval of the petition. The NOR states that the new evidence of the beneficiary's employment was not credible and that the petitioner had also failed to establish its ability to pay the proffered wage.

The petitioner filed a motion to reopen and reconsider the revocation on March 1, 2008.[2] The motion asserts that the director erred in not providing a hearing or other opportunity for the

[2] A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy. 8 C.F.R. § 103.5(a)(3). In addition, a motion to reconsider must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* A motion that does not meet these requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110.

petitioner to personally appear and contest the grounds of revocation; in finding that the petitioner did not have the ability to pay the proffered wage; and in finding that the beneficiary did not have the required experience for the offered position by placing "undue reliance" on the overseas investigation report. The brief in support of the motion states:

> The undersigned counsel concedes that some of the documentation and evidence presented in this proceeding by the [beneficiary] is, in fact, inconsistent, conflicting and incorrect and that the [beneficiary], in attempting to document his employment in India, made some serious errors in judgment in providing same, as has been referenced in the previous correspondences of the undersigned. The [beneficiary] has attempted to redress his previous mistakes, has admitted to same, and has attempted to provide the USCIS with a true and correct history of his employment in India as a projectionist. After several in depth discussions with the applicant, counsel fully believes that the applicant did in fact work as a projectionist with the employer designated on the ETA 750 Part B documentation but was employed not as an employee but as a contractor – at the same employer and for the same period of time specified in the labor certification documentation. The applicant allowed his passion to remain in the United States with his wife and children interfere with his judgment and cloud his reason. He is very regretful of his past mistake. He has attempted to rectify his mistake by providing employment documentation to the contrary.

On March 17, 2008, counsel supplemented the motion with 16 affidavits attesting to the beneficiary's prior employment with [redacted] The affidavits are fundamentally identical, each stating:

> I had been gone in [redacted] N.G.) during 1993-1994 on holiday. At the time [the beneficiary] was serving as Project Operator in [redacted] and he frequently met me in 9-00 A.M. morning. I knew him very well. He was serving as a Project Operator 1993-1994. So I went in [redacted] (N.G.) for advance booking during 9-30am to 10-30am morning. I met him frequently so he became my personal friend. So I know him very well since 1993. He is sincere and very good person. He is very good and lovable by nature. So [the beneficiary] is very good person. He also distributes the movies. So I know him very well since 1993.

On March 26, 2008, counsel again supplemented the motion with 13 affidavits attesting to the beneficiary's prior employment with [redacted] The affidavits are also fundamentally identical, each stating:

> [The beneficiary] was going service as a Projector in the year 1988 to 1991 in [redacted] I saw him every time he was brought ticket to play picture. During that period he is Good Person.

On November 27, 2009, the director dismissed the motion and certified the decision to the AAO.[3] The certification concludes that the VSC properly revoked the petition, and that there is no requirement of an in-person hearing prior to revoking the approval of a petition. Second, the director found that the affidavits submitted by counsel failed to resolve the inconsistencies in the record pertaining to the beneficiary's employment experience. Third, the certification states that even if the director accepted the evidence of the beneficiary's employment history submitted in response to the NOIR, the director would "be obligated by case law" to inquire into whether the beneficiary made a material misrepresentation of a material fact, and also possibly invalidate the petitioner's labor certification pursuant to 20 C.F.R. § 656.30(d). Fourth, the certification states that the additional

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[3] Certifications by regional service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1). The regulation at 8 C.F.R. § 103.4(a)(4) states: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

The regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) states:

> (iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;
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> . . .
>
> (B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act;

Pursuant to the delegation cited above, the AAO exercises the appellate jurisdiction formerly exercised by the Associate Commissioner for Examinations.

In the instant case, the decision does not fall within the exception clause in subparagraph (B) in the regulation quoted above, which pertains only to a denial based upon a lack of a certification by the Secretary of Labor. The decision therefore is within the appellate jurisdiction of the AAO. Therefore, the certification of the denial decision is authorized by the regulation at 8 C.F.R. § 103.4(a)(5).

evidence submitted on motion did not establish the petitioner's ability to pay the proffered wage. Fifth, the certification concludes that the NOR incorrectly states that the petitioner could not appeal the decision, and withdraws that finding. The certification concludes:

> ORDER:
> Upon further review, it is ordered that he motion to reopen and reconsider be dismissed. The [VSC's] adverse decision . . . shall remain. The petitioner has not successfully proven eligibility for the benefit sought. **As noted above, [the VSC] failed to afford the petitioner the right to file an appeal [of the NOR]. Therefore, the dismissal of Form I-290B is certified to the [AAO].**

(Emphasis added). On December 24, 2009, counsel submitted a response to the certification. Counsel summarizes the factual issues as follows:

> This confusion as to the issue of the beneficiary's prior employment arose (1) due to the initial assertion by the beneficiary of the factual basis of such employment; (2) then, by the beneficiary's retraction of that assertion of employment (for the reasons provided by the beneficiary submitted of record in this proceeding); and (3) and finally, by the re-retraction by the beneficiary, and by the affirmative assertion of his having in fact been employed by the Chirag Cinema in India during the period set forth initially in the labor certification documentation.

The response claims that the submitted affidavits are "material, relevant and substantial" with respect to rectifying the beneficiary's misrepresentations pertaining to his employment experience and that the beneficiary possesses the experience required by the labor certification. The response asserts that the investigative report fails to document the methodology used to conduct the work investigation. The response states that the NOR failed to state that the petitioner could appeal the revocation, which is grounds to vacate the revocation. Counsel also claims that the previously submitted financial documentation establishes the petitioner's ability to pay the proffered wage. Finally, the response also discloses that the ownership of the petitioner had changed and that counsel is "investigating the nature of the change of management or ownership or both to determine whether a successor in interest relationship exists."

Given the claimed change in ownership, the AAO reviewed the State of Maryland Department of Assessments and Taxation website. *See* http://sdatcert3.resiusa.org/UCC-Charter/CharterSearch_f.aspx. According to the Maryland Department of Assessments and Taxation online records, the petitioner has voluntarily dissolved its corporate status. If the petitioner is no longer an active business, the petition and its appeal are moot as no legitimate job offer exists.

Accordingly, based on the dissolution of the petitioner and counsel's disclosure about the change in the ownership of the beneficiary's employer, on February 26, 2010, the AAO issued a Request for Evidence (RFE) to the petitioner and its counsel of record. The RFE requested evidence that the petitioner was in active status or that there exists a new owner that is a successor-in-interest to the

petitioner. The RFE provided the petitioner 45 days to respond to the RFE. To date, the AAO has not received a response. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Although the certification is dismissed as moot, the AAO will address the issue certified to it by the director.

The AAO concurs with the director that the VSC properly revoked the petition; that there is no requirement for a hearing prior to revoking the approval of a petition; that the affidavits submitted by counsel failed to resolve the inconsistencies in the record pertaining to the beneficiary's employment experience; and that the additional evidence submitted on motion did not establish the petitioner's ability to pay the proffered wage. However, the specific issue certified to the AAO relates to the statement on the NOR that "There are no provisions in the United States Citizenship and Immigration Services regulations which provide for an appeal of this decision."

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 AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The director's NOIR sufficiently detailed the evidence of the record, pointing out the inconsistencies pertaining to the beneficiary's claimed employment history that would warrant a denial if unexplained and unrebutted, and thus was properly issued for good and sufficient cause.

As is explained in the director's certification, this is an incorrect statement of the law. 8 C.F.R. § 205.2(d) states that a petitioner may appeal a decision to revoke the approval within 15 days after the service of notice of the revocation. However, neither the Act nor the pertinent regulations grant the AAO authority to extend the time limit for filing an appeal. While unfortunate, the incorrect statement on the NOR does not provide grounds for reversing or remanding the NOR. The regulation at 8 C.F.R. § 205.2(d) is sufficient notice that the petitioner could have appealed the NOR decision. Further, as is set forth in detail in the procedural history above, the director granted the petitioner's motion to reconsider, considered the additional evidence and arguments submitted by the petitioner, and issued a new decision. The petitioner also was granted the opportunity to supplement the record on certification to the AAO, the office to which an appeal would have been made. Therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to restate the new arguments and resubmit the new evidence already in the record. Any procedural error was corrected by the certification of the motion decision to the AAO.

In summary, the incorrect statement on the NOR that the decision could not be appealed does not provide grounds for a reversal or reconsideration of the NOR, nor did it deprive the petitioner of a full administrative review of the decision. The approval of the petition will remain revoked.

ORDER: The director's decision in the notice of certification is affirmed. The petitioner's motion to reopen and reconsider the revocation of the petition is dismissed.