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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] E

B6

Date: JUL 0 2 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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 with the field office or service center that originally decided your case by filing a 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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was approved by the Director, Vermont Service Center, on April 16, 2003, but the approval was later revoked by the Director, Texas Service Center, on February 26, 2009. The petitioner has appealed the decision to revoke the approval of the petition to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a restaurant. It seeks to permanently employ the beneficiary 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).[1] As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). The director of the Texas Service Center ("the director") revoked the approval of the petition, finding that the petitioner had failed to demonstrate that the beneficiary qualified for the position offered.

On appeal to the AAO, counsel for the petitioner maintains that the beneficiary qualifies for the position offered and submits additional evidence.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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]

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, states:

> The Secretary of Homeland Security may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204. Such revocation shall be effective as of the date of approval of any such petition.

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).

However, the regulation at 8 C.F.R. § 205.2 states:

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[1] 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.

[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 the regulation at 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).

> (a) *General.* Any Service [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice** to the petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this Service [USCIS]. (emphasis added).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

> (i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceedings

Matter of Arias, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

> A notice of intention to revoke the approval of 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. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, we find that the director provided the petitioner with notice of the derogatory information specific to the current proceeding with respect to the beneficiary's qualifications.

1. **The Beneficiary's Qualifications**

In the Notice of Intent to Revoke (NOIR) dated August 27, 2008, the director stated that the beneficiary could not have worked as a cook at [redacted], located at [redacted] Brazil from May 1995, since the company was not registered with the Brazilian government until August 11, 1995.[3] This, according to the

[3] The letter of employment verification dated February 8, 2001 for the beneficiary from [redacted] included a CNPJ number [redacted] The director searched the CNPJ database and found that [redacted] – ME did not exist until August 11, 1995. The CNPJ database can be accessed online at [redacted] CNPJ or Cadastro Nacional da Pessoa Juridica is a unique number given to every business registered with the Brazilian authority. In Brazil, a company can hire employees, open bank accounts, buy

director, meant that the petitioner had submitted false documentation to verify the required work experience of the beneficiary.

Responding to the director's NOIR, the petitioner submitted the following evidence:

- A statement dated September 15, 2008 from [redacted] Supervisor, stating that [redacted] ME has been in business since 1994;
- A statement dated September 10, 2008 from [redacted] has been operating a restaurant/dorm since 1994;
- A statement dated September 15, 2008 from [redacted] Accountant, stating that [redacted] has been operating a restaurant/dorm since 1994;
- A letter from the petitioner's former counsel[4] addressed to USCIS Adjudications Officer stating that not all businesses in Brazil are registered with the government, and not all businesses have a CNPJ number; and
- A copy of a 2003 study from the Brazilian Agency of Geography and Statistics [redacted] indicating that there were approximately 10 million informal businesses in Brazil.

In the Notice of Revocation (NOR), the director stated that the petitioner failed to provide hard,[5] documentary evidence to demonstrate that [redacted] was in business before August 1995. The director gave the sworn statements submitted above little weight, as none was accompanied by corroborating evidence.

On appeal, counsel contends that [redacted] was engaged in a regular and active course of business during the relevant period. Counsel submits the following evidence in support of his contention:

- An official statement issued by the City Hall of Conselheiro Pena, CNPJ number [redacted] State of Minas Gerais, certifying that [redacted] operated his bar in 1989;
- A copy of a document entitled "Record of Employee" stating that the beneficiary was admitted as a cook on September 1, 1995 and

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and sell goods only if it has a CNPJ. The director indicated that the Department of State had 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.

[4] The AAO notes that [redacted] has been suspended from the practice of law before the Immigration Courts, Board of Immigration Appeals (BIA), and Department of Homeland Security (DHS) for a period of three years from March 1, 2012 to February 28, 2015.

[5] The petitioner bears the burden of proving eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361. The AAO withdraws the director's requirement that the petitioner provide "hard documentary evidence."

- A copy of a document entitled "Contract of Work" showing the following information:
  - ✓ Employer: [redacted]
  - ✓ [redacted]
  - ✓ Address: [redacted]
  - ✓ Position: Cook.
  - ✓ Start date: September 1, 1995.
  - ✓ End date: November 30, 1997.

Upon review of all of the evidence in the record, the AAO agrees with the director that the petitioner has failed to demonstrate that the beneficiary qualified for the position offered as of the priority date.

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 – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

Here, the Form ETA 750, as noted earlier, was filed and accepted for processing by the DOL on April 11, 2001. The name of the job title or the position for which the petitioner seeks to hire is "Cook." Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two (2) years of work experience in the job offered.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d, 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).

As set forth above, the proffered position requires the beneficiary to have a minimum of two years of work experience in the job offered. On the Form ETA 750, part B, signed by the beneficiary on February 20, 2001, he represented he worked 35 hours a week at [redacted] as a cook from May 1995 to November 1997.

The letter of employment dated February 8, 2001 from Mr. Ernandes Almeida Luz does not comply with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A),[6] in that it does not include a

[6] The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) provides:

description of the beneficiary's work experience or the training received. Simply stating that the beneficiary worked as a cook is not sufficient for purposes of describing the experience or the training received by the beneficiary and does not establish the reliability of the assertion.

Moreover, the evidence submitted by counsel does not establish the beneficiary's qualifications. The beneficiary on the ETA Form 750B, and the declaration of [redacted] dated February 8, 2001, both stated that the beneficiary worked as a cook from May, 1995. This evidence is inconsistent with the Contract of Work indicating that the bearer of the document worked as a cook beginning in September, 1995, and with the Record of Employee, indicating that the beneficiary began work as a cook in September 1995. The AAO also notes that the beneficiary failed to include his employment abroad on the Form G-325 (Biographic Information), which he filed along with the Application to Register for Permanent Residence or Adjust Status (Form I-485). 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).

The official statement issued by the City Hall of Conselheiro Pena states that [redacted] operated a beverage tavern in 1989; the statement does not indicate that [redacted] operated a restaurant in May 1995, or suggest any need for a cook. The document titled Record of Employee lists the beneficiary's name, but does not identify his employer or state the place of his employment from September 1, 1995. Additionally, the document entitled Contract of Work does not reflect the beneficiary's name or identifying number, such as the [redacted] as set forth on the Record of Employee.[7] The petitioner submitted only page 12 of the document. We cannot determine, without looking at all pages of the document, that the document entitled Contract of Work belongs to the beneficiary, and that the beneficiary gained two years of qualifying employment with Ernandes Almeida Luz. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Further, the AAO agrees with the director that the statements of [redacted] Accountant are not persuasive. None of the witnesses describe the business establishment in detail or state how he knows the business was in operation in 1994. Neither [redacted]

> 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.

[7] [redacted] is an employee's record of work, which contains annotations regarding the employee's work history.

[8] The name of the business, [redacted] is not translated but suggests a service business in bookkeeping or accounting.

[redacted] indicates that he is the accountant for [redacted] or has or had a business relationship with the restaurant/dorm. [redacted] does not offer an explanation for how [redacted] operated a restaurant/dorm since 1994 and was not registered with the federal revenue service until 1995.[9] The AAO finds the statements lack sufficient detail to establish that [redacted] was in operation in May 1995 and do not provide independent objective evidence to resolve the inconsistencies of record with respect to the beneficiary's employment for [redacted] *Matter of Ho*, 19 I&N Dec. at 591-92.

Where the beneficiary of an approved visa petition is not eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for good and sufficient cause. Notwithstanding the USCIS burden to show good and sufficient cause in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

Because of the inconsistencies and deficiencies noted above with respect to the beneficiary's qualifying employment, the AAO agrees with the director that the evidence submitted is not sufficient to establish the beneficiary's qualifications as of the priority date. Further, the AAO finds that the director's decision to revoke the approval of the petition was based on good and sufficient cause, as required by section 205 of the Act, 8 U.S.C. § 1155.

2. The Petitioner's Ability to Pay

Beyond the decision of the director, the AAO finds that the instant petition is not approvable as the petitioner has not established that it has the continuing ability to pay the proffered wage from the priority date. 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).

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

[9] The AAO notes that the CNPJ number of [redacted] was acquired on November 21, 2007.

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, United States Citizenship and Immigration Services (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 considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As indicated above, the Form ETA 750 was accepted by the DOL for processing on April 11, 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).[10] 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. The table below shows the details of the other labor certifications that the petitioner has filed since 2001:

No.	*Receipt Number*	*Beneficiary's Last Name*	*Filing Date*	*Decision*	*Date of the Beneficiary's Adjustment to LPR*
1.	[redacted]	[redacted]	06/29/01	Approved	10/06/03
2.	[redacted]	[redacted]	08/03/01	Approved	10/10/08
3.	[redacted]	[redacted]	03/07/02	Approved	03/10/04
4.	[redacted]	[redacted]	04/08/02	Approved	Pending
5.	[redacted]	[redacted]	09/12/02	Approved	06/21/07
6.	[redacted]	[redacted]	10/21/03	Approved	08/13/07

[10] 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).

If the instant petition were the only petition your organization filed, 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), the petitioner, consistent with the regulation at 8 C.F.R. § 204.5(g)(2), is 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 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 per hour or $21,840 per year from April 17, 2001:

- The beneficiary's Forms W-2 for the years 2001;[11] and
- A copy of the petitioner's federal tax return (Form 1120S) for the year 2000.[12]

Upon review, the AAO finds that the evidence submitted above is not sufficient to demonstrate that the petitioner has the continuing ability to pay the proffered wages of all of the beneficiaries from the priority date. For this additional reason, the AAO will dismiss the appeal.

The petition will remain revoked for these reasons, with each considered as an independent and alternative basis for the decision. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The director's decision to revoke the approval of the petition is affirmed.

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[11] The AAO notes that the beneficiary received $21,678.72 or $1,1986.80 less than the proffered wage in 2001.

[12] We note that the petitioner's 2000 tax return is not relevant since it is for the year prior to the priority date of the visa petition; and, therefore, it has little probative value when determining the petitioner's continuing ability to pay the proffered wage from the priority date of April 11, 2001. Therefore, the AAO will not consider the petitioner's 2000 tax return when determining the petitioner's ability to pay the proffered wage except when considering the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration.