identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

Date: JUL 31 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 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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On January 29, 2002, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner.[1] The employment-based immigrant visa petition was initially approved by the VSC director on February 28, 2002. The director of the Texas Service Center ("the director"), however, revoked the approval of the immigrant petition on February 18, 2009, and the petitioner subsequently appealed the director's decision to revoke the petition's approval. 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 [she] deems to be good and sufficient cause, revoke the approval of any petition approved by her 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).

---

[1] On May 9, 2012, the AAO sent a Notice of Intent to Dismiss and Derogatory Information to the petitioner noting that [redacted]. was no longer an active organization according to the Massachusetts Secretary of the Commonwealth and, as such, no bona fide job offer would exist rendering the petition and appeal moot. In response, counsel submitted documents establishing that the three partners who originally formed [redacted]. had ceased doing business under [redacted] and that each partner had taken over a restaurant formerly operated by [redacted]. Counsel maintains that any one of the three partners would qualify as a successor-in-interest to the petitioner as each assumed the assets and liabilities of one restaurant formerly operated by [redacted] Inc. Specifically, however, counsel asserts that [redacted] would be the applicable successor-in-interest as that entity currently operates the restaurant named as the work location in the Form ETA 750 under the same name.

A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A petitioner may establish a valid successor relationship 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.

The documents submitted establish that [redacted] assumed the relevant rights and duties of the original petitioner, that it continues to operate the same business, and that the job offer is the same as originally offered on the labor certification. [redacted] has failed to demonstrate that it is otherwise eligible for the immigrant visa as explained in this decision.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, DOT job code 313.361-014 (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).[2] As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification. As stated earlier, this petition was approved on February 28, 2002 by the VSC, but that approval was revoked in February 2009. The director determined that the beneficiary did not have the requisite work experience in the job offered before the priority date. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.2.

On appeal, current counsel for the petitioner – [redacted] – contends that the director improperly revoked the approval of the petition. Specifically, counsel asserts that the director did not have good and sufficient cause as required by section 205 of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1155 to revoke the approval of the petition. For instance, counsel states that the director rejected the evidence submitted in response to the Notice of Intent to Revoke (NOIR) without giving a specific, reasonable explanation for the rejection.

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.[4]

The issue raised on appeal is whether the petitioner provided adequate evidence that the beneficiary had the experience required by the terms of the labor certification.

As noted above, the Secretary of Homeland Security has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. *See* section 205 of the Act; 8 U.S.C. § 1155. This means that notice must be provided to the petitioner before a previously approved petition can be revoked. The regulation at 8 C.F.R. § 205.2 reads:

---

[2] 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.

[3] Current counsel of record, [redacted], will be referred to as counsel throughout this decision. Previous counsel, [redacted] will be referred to as previous or former counsel or by name. [redacted] has been suspended from the practice of law before the United States Department of Justice and the United States Department of Homeland Security.

[4] 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 [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 [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 proceeding.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *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.

In this case, the AAO finds that the director adequately advised the petitioner of the basis for revocation of approval of the petition. In the NOIR, the director stated that the CNPJ number[5] provided for the beneficiary's former employer in Brazil, [redacted] was actually assigned to a different company, [redacted] and that this second company did not exist before November 1999, which was almost three years after the time that the beneficiary claimed to have begun working at that establishment. Based on this information, the director stated that it would have been impossible for the beneficiary to have worked for [redacted] for the full claimed time period. The director concluded that the beneficiary was not qualified for the position.

[5] Businesses that are officially registered with the Brazilian government are given a unique CNPJ number. CNPJ (Cadastro Nacional da Pessoa Juridica) is similar to the federal tax ID or employer ID number in the United States. The U.S. 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.

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.

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).

Here, the Form ETA 750 was filed and accepted for processing by the DOL on April 27, 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 years of work experience in the job offered. On the Form ETA 750B, signed under penalty of perjury on January 23, 2002, the beneficiary stated that he worked for [redacted] from February 25, 1997 to August 15, 2000.[6]

Whether or not the beneficiary had the prerequisite work experience for the proffered position as of April 27, 2001 (the priority date) is material in this case, and USCIS should not have approved the petition, or sustained the appeal, before determining that the beneficiary qualifies for the job offered in the labor certification.

With the original petition, the petitioner submitted a letter from [redacted] stating that the beneficiary worked at [redacted] from February 25, 1997 to August 15, 2000. The CNPJ number provided on the letterhead for the establishment is [redacted]

The director's NOIR stated that the name of the establishment with the CNPJ number of [redacted]. The CNPJ records also stated that this business did not begin operations until November 5, 1999.[7]

---

[6] This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

[7] [redacted] says in his statement dated October 29, 2008 that the name [redacted] changed to [redacted] on September 9, 2003 and again changed its name to [redacted] on June 27, 2007.

Responding to the NOIR, the petitioner submitted an October 29, 2008 declaration of [redacted], owner of [redacted] stating that the beneficiary worked for his restaurant, CNPJ no. [redacted] as a cook from November 8, 1999 to August 15, 2000. [redacted] also stated that the beneficiary worked from February 25, 1997 to November 7, 1999 for the prior restaurant at that location, [redacted] owned by his father. The petitioner also submitted a statement from the beneficiary affirming his employment with [redacted] a death certificate for [redacted] Senior indicating a date of death of October 8, 1998, and print outs of two webpages from the Brazilian CNPJ for [redacted] (owned by [redacted]).[8]

The director stated in the NOR that the evidence submitted in response to the NOIR did not establish that [redacted] preceded [redacted] or any other business run by [redacted]. The director specifically noted that the businesses all have different CNPJ numbers and no evidence presented linked the companies to establish that the beneficiary has the required experience.

On appeal, counsel stated that the CNPJ database reflects current information including amendments made to CNPJ numbers and the associated companies. Specifically, counsel stated that [redacted] took over his father's business, [redacted] using the associated CNPJ number, [redacted], after his father's death in 1998. In 1999, [redacted] registered his own company at the same address as [redacted], and was issued a different CNPJ number, [redacted]. In 2003, [redacted] changed the business name to [redacted] and opened a different business at a different address in 2007: [redacted]. These changes were reflected in the CNPJ database so that the CNPJ number currently reflects that [redacted] is associated with the CNPJ number [redacted]. Counsel maintains that as the location remained within the same family's control, despite name and CNPJ number changes, that the beneficiary's experience with the companies has been established.

In support of these statements, the petitioner submitted a March 20, 2009 affidavit of [redacted] stating that he worked for his father at [redacted] starting in 1995. After his father died in 1998, [redacted] states that he began running the business, changing the name of the restaurant in 1999 to [redacted] and registering the business under a separate CNPJ. [redacted] further stated that he changed the business name in 2003 to [redacted]. He then sold the business in 2005, with the new owner registering the business under a new CNPJ number. [redacted] then stated that he started a new, completely unrelated business in 2007 called [redacted] using his existing CNPJ number. The petitioner also submitted printouts from the CNPJ database showing that [redacted] operated at the same address. The petitioner also submitted a history of changes made to CNPJ number [redacted] which reflects alterations made on October 8, 2003 and November 7, 2007.

---

[8] These two printouts are submitted without translation.

The information submitted does not establish that the beneficiary worked for [redacted] from February 25, 1997 to August 15, 2000 as he stated under penalty of perjury on the Form ETA 750B. The beneficiary never stated on the Form ETA 750B that he worked for [redacted] and the original letter submitted from [redacted] does not mention [redacted] or any work done by the beneficiary for that company. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states: "It is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The evidence submitted by the petitioner establishes that [redacted] did not exist until November 1999, which was 33 months after the beneficiary claims to have begun working for that establishment. As a result, it was impossible for the beneficiary to have worked for that establishment from February 25, 1997, his indicated start date, to November 1999, the date of incorporation for the establishment.

In addition, the evidence submitted states that [redacted] existed until 2004. This information is in conflict with [redacted] statement that [redacted] ceased operations in November 1999. The petitioner submitted a Limited Responsibility Partnership Agreement establishing that [redacted] was owned by two partners, [redacted] and [redacted][9] This agreement also established that [redacted] was to be the managing partner. Although the petitioner submitted evidence demonstrating the demise of [redacted] it submitted no evidence to establish why [redacted] would have been the one running [redacted] as opposed to the managing partner, [redacted] In any event, the Board's dicta in *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. The petitioner submitted no contemporaneous documentation such as pay stubs, social security statements, or other documentation created during the time the beneficiary claimed to have worked for [redacted] to corroborate his experience. The evidence submitted is insufficient to establish that the beneficiary worked for [redacted]

No evidence was submitted to establish any business relationship between [redacted] and [redacted]. The evidence demonstrates that the businesses had owners with a family relationship and that they operated with the same business address, however, that evidence is insufficient to demonstrate that the companies were related or that [redacted] is the successor-in-interest to [redacted] Without such evidence, [redacted] cannot establish work experience by the beneficiary for [redacted]

Furthermore, the petitioner submitted no evidence to support the claims that the name of the business associated with CNPJ number [redacted] was changed at any point. The

[9] [redacted] states in his March 20, 2009 declaration that [redacted] is his brother.

evidence submitted on appeal states that "alterations" were made to the registration,[10] but the evidence does not indicate what type of alteration was made so that we are unable to corroborate [redacted] statements about changing the name of the business associated with the CNPJ number. 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)).

Without sufficient evidence corroborating [redacted] claims that [redacted]s, and [redacted] are the same businesses with different names and that [redacted] is a different company allowed to register under the pre-existing CNPJ number, the beneficiary has not been shown to possess two years of experience as a cook as of the priority date. As a result, the director had just cause to revoke the petition's approval.

On appeal, counsel states that the beneficiary is no longer with the petitioning employer, but that as his approved Form I-140 and Form I-485 adjustment of status application have been pending for more than 180 days, he was entitled to port to a different employer doing the same or a similar job, and that his application to adjust status should survive the revocation of approval of the underlying Form I-140 petition.

AC21 allows an application for adjustment of status to be approved despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid" suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, USCIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by

[10] The printout submitted from JUCEMG – Commercial Board of the State of Minas Gerais states that the company for which the printout applied bore a number of [redacted]. This registry number appears on two Entrepreneur Applications submitted for the company with tax identification number [redacted] As the original document bears the seal of [redacted] it establishes the link between the registry number and tax identification number.

the fact that the job offer was no longer a valid offer. *See Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010).

Where the approval of the Form I-140 petition is revoked for good and sufficient cause, the beneficiary cannot invoke the portability provision of section 204(j), because there would not be a valid, approved petition underlying the request to adjust status to permanent residence by virtue of having ported to the same or similar job. *See Herrera v. USCIS*, 571 F.3d 881 (9th Cir. July 6, 2009) (the Ninth Circuit held that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start).

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

The record before the director closed on January 29, 2002 with the receipt by the director of the petitioner's original submissions. As of that date, the petitioner's 2001 federal income tax return was not yet due. The petitioner submitted its 2000 Form 1120S, which demonstrated sufficient net income and net current assets to cover the proffered wage, however, this tax return covers a time period prior to the priority date. In any further filings, the petitioner should submit regulatory proscribed evidence to demonstrate its ability to pay the proffered wage from the priority date to the date that the beneficiary may have ported to a new employer.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for revocation of approval of the petition. 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. The approval of the petition remains revoked.