(b)(6)

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: AUG 0 2 2013 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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) 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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

CC: [redacted]

DISCUSSION: On May 12, 2003, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on April 2, 2004. The director of the Texas Service Center ("the director"), however, revoked the approval of the immigrant petition on May 26, 2009, and the AAO rejected the subsequent appeal on November 15, 2012 based on late filing of the appeal. On December 11, 2012, the previous counsel[1] for the petitioner filed a motion to reopen and a motion to reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5.[2] The motion to reconsider will be denied; the motion to reopen will be granted; the director's decision to revoke the approval of the petition will be withdrawn; and the case will be remanded to the director for further action consistent with this decision.

The regulation at 8 C.F.R. § 103.2(a)(3) states, "[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 [U.S. Citizenship and Immigration Services (USCIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision." In his affidavit submitted with the motion to reconsider, previous counsel asserts that the AAO erred in rejecting the appeal, however he fails to cite any pertinent decisions to establish that the AAO's decision was based on an incorrect application of law or policy; therefore, the motion does not qualify for consideration under 8 C.F.R. § 103.5(a)(3).

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[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." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous

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[1] The Form I-290B, Notice of Appeal or Motion, received on December 11, 2012 was filed by the petitioner's previous counsel In this decision, Mr. will be referred to as "previous counsel" or by name; the petitioner's current counsel, will be referred to as "counsel" or by name; the petitioner's original counsel, who represented the petitioner in the filing of the labor certification and the petition, will be referred to by name.

[2] The Form I-290B was signed by , however, the motion was filed without a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative. On May 13, 2013, the AAO sent a fax notice to Mr. requesting him to submit a Form G-28, properly signed by the petitioner. In response, submitted a Form G-28, signed by the petitioner on January 31, 2012, designating Ms. as its current counsel.

proceeding.[3] The record shows that the motion is properly filed and timely. The motion is accompanied by new evidence, and therefore, qualifies for consideration under 8 C.F.R. § 103.5(a)(2). The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.[4]

The petitioner must appeal a decision to revoke the approval of a petition within 15 days of service. 8 C.F.R. § 205.2(d). If the unfavorable decision was mailed, the appeal must be filed within 18 days. 8 C.F.R. § 103.8(b). An untimely appeal must be rejected as improperly filed. Neither the Act nor the regulations grant the AAO authority to extend this time limit. The filing date is the actual date of receipt at the location designated for filing. 8 C.F.R. § 103.2(a)(7)(i). The appeal must be signed and submitted with the correct fee. *Id.*

The director issued the notice of revocation of the approval of the petition on May 26, 2009. The director properly gave notice to the petitioner that it had 18 days to file the appeal. The appeal was due on June 13, 2009, a Saturday. Therefore, the due date became the next business day, June 15, 2009, a Monday.

On motion, previous counsel submits an affidavit, dated December 10, 2012, with the Form I-290B in which he asserts that the AAO erred in rejecting the appeal because the receipt date is incorrect. The AAO finds that the appeal, more likely than not, was received timely by USCIS.

The AAO conducts appellate review on a *de novo* basis. The AAO's de novo authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The petitioner describes itself as a donuts and coffee store. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. On May 26, 2009, the director revoked the approval of the petition after determining that the petitioner had failed to comply with the DOL's recruitment requirements. Subsequent to the AAO's decision to reject the appeal as late, the director reopened the case and treated the rejected appeal as a motion. The director issued a new decision on January 2, 2013, determining that [redacted] was not the owner of the petitioner and as such that he did not have the authority to file the petition. The director also found that the beneficiary did not possess the requisite experience and education as set forth on the labor certification. The director affirmed the earlier decision to revoke the approval of the petition.

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[3] The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).

[4] The AAO notes that the record contains a second unadjudicated Form I-290B filed on February 4, 2013. The AAO does not have jurisdiction over the February 4, 2013 motion as it was filed in response to the director's January 2, 2013 decision.

Section 205 of the Immigration and Nationality Act (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).

The AAO notes that the director revoked the approval of the petition under 8 C.F.R. § 205.1. Although not raised by the petitioner, as a procedural matter, the AAO finds that 8 C.F.R. § 205.1 only applies to automatic revocation and is not the proper authority to be used to revoke the approval of the petition in this instant proceeding. Under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if (A) the labor certification is invalidated pursuant to 20 C.F.R. § 656; (B) the petitioner or the beneficiary dies; (C) the petitioner withdraws the petition in writing; or (D) if the petitioner is no longer in business. Here, the labor certification has not been invalidated; neither the petitioner nor the beneficiary has died; the petitioner has not withdrawn the petition; nor has the petitioner gone out of business. Therefore, the approval of the petition cannot be automatically revoked. The director's erroneous citation of the applicable regulation is withdrawn. Nonetheless, as the director does have revocation authority under 8 C.F.R. § 205.2, the director's denial will be considered under that provision under the AAO's *de novo* review authority.

The threshold issue in these proceedings is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition. As noted above, the Secretary of DHS 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. More specifically, the regulation at 8 C.F.R. § 205.2 reads:

> (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 [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.

First, the AAO finds that while the director appropriately reopened the approval of the petition by issuing the January 29, 2009 Notice of Intent to Revoke (NOIR), the director's NOIR was deficient in that it did not specifically give the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director questioned the beneficiary's qualifications and whether the petitioner complied with the DOL requirements in its recruitment efforts. The NOIR neither provided nor referred to specific evidence or information relating to the petitioner's failure to comply with DOL recruitment or to the beneficiary's lack of qualifications in the present case. The director did not state which recruitment procedures were defective nor outline why the beneficiary was not qualified. Without specifying or making available evidence specific to the petition in this case, the petitioner can have no meaningful opportunity to rebut or respond to that evidence. *See Ghaly v. INS*, 48 F.3d 1426, 1431 (7th Cir. 1995). Because the director did not outline good and sufficient cause for revocation of the approval of the petition in its January 29, 2009 NOIR, the director's revocation decision will be withdrawn.

In addition, after reopening the case in January 2013, for the first time, the director raised the issue of whether had authority to file the Form I-140 petition as the representative of the petitioner. In the January 2, 2013 decision on motion, the director concluded, without providing the petitioner with an opportunity to submit evidence, that Mr. was not a company representative authorized to file the Form I-140 petition. Because of insufficient notices to the petitioner of derogatory information, the director's decision will be withdrawn.

Nonetheless, the petitioner must demonstrate that the beneficiary is qualified for the offered position. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

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 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983). Where the job requirements in a labor certification are not otherwise unambiguously

prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added).

In this case, the Form ETA 750, items 14 and 15, set forth the minimum education, training, and experience that a beneficiary must have for the position of baker. Specifically, in the instant case, the petitioner indicated that the proffered position requires a minimum of four years of high school education plus two years of experience in the job offered. The duties listed by the petitioner at Item 13 of the Form ETA 750 are:

> He will be responsible for baking, frying, glazing, decorating, donuts and bagels. He will mix and prepare the dough and all necessary condiments. He will fill the Belshaw machine and make all preparations.

The petitioner indicated on the labor certification that the beneficiary qualifies for the offered position based on his experience as a bread baker at [redacted] in Brazil from June 1996 until August 1998.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The petitioner submitted two letters from [redacted] dated April 19, 2001 and February 9, 2009, indicating that the beneficiary worked as a bread baker from June 2, 1996 to August 15, 1998. However, neither of these letters indicates the title of the author, nor do they describe the beneficiary's experience. Furthermore, the record does not contain evidence demonstrating that the beneficiary possesses four years of high school education as required by the labor certification. Therefore, the petitioner has not demonstrated that the beneficiary was qualified for the offered position on the priority date.

The petitioner must also establish its 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).

With respect to the petitioner's ability to pay, the regulation at 8 C.F.R. § 204.5(g)(2), in pertinent part, provides:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be

> accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The Form I-140 petition was initially approved on April 2, 2004. At the time, the petitioner's 2003 tax return was not yet due. The record does not indicate whether the petitioner had the ability to pay in 2001 and 2002.

In the instant case, the ETA 750 labor certification was accepted for processing on April 28, 2001. The rate of pay or the proffered wage specified on the ETA 750 is $13.05 per hour or $33,930 per year based on a 40 hour work week. The record contains an Internal Revenue Service (IRS) Form W-2 evidencing that the petitioner paid the beneficiary $27,912.87 in 2001. However, there is no evidence in the record establishing whether the petitioner had the ability to pay the difference between the proffered wage and the actual wage paid in 2001. Furthermore, there is no evidence in the record to establish that the petitioner employed the beneficiary in 2002; nor does the record contain any tax returns, annual reports, or audited financial statements for the petitioner demonstrating its ability to pay in 2001 or 2002. The USCIS has good and sufficient cause to revoke the approval of the petition as of the date of its initial erroneous approval.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for review and consideration of the additional issues that impact the petitioner's eligibility for the visa that were not initially identified by the director. The director may issue a new notice of intent to revoke approval of the petition and may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director may review the entire record and enter a new decision. Once the director issues a NOIR for good and sufficient cause, the burden of proof is borne by the petitioner.

ORDER: The motion to reconsider is denied; the motion to reopen is granted. The director's decision to revoke the previously approved petition is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if contrary to the petitioner, should be certified to the AAO for review.