(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: FEB 0 1 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:

[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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On November 12, 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. The employment-based immigrant visa petition was initially approved by the VSC director on June 24, 2004. The director of the Texas Service Center (the director), however, revoked the approval of the immigrant petition on July 22, 2009, and the petitioner subsequently appealed the director's decision to revoke the petition's approval to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a tailor shop. It seeks to employ the beneficiary permanently in the United States as a laundry supervisor pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. §1153(b)(3)(A)(i).[1] 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 June 24, 2004 by the VSC, but that approval was revoked in July 2009. The director determined that the beneficiary did not have the requisite work experience in the job offered as of the priority date and that the petitioner failed to establish that it engaged in authentic recruitment efforts for U.S. workers. For these reasons, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal, counsel for the petitioner contends that neither the petitioner nor the beneficiary ever submitted false or misleading documentation with respect to the labor certification process.[2] Counsel also asserts that the beneficiary has the requisite work experience in the job offered and qualifies to be classified as a skilled worker.

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.[3]

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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] Current counsel of record, [redacted] will be referred to as counsel throughout this decision. Previous counsel, [redacted], will be referred to by name. At the time the Notice of Intent to Revoke (NOIR) was issued to the petitioner in 2009, [redacted] was under USCIS investigation for submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions. He 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 as of March 1, 2012.

[3] 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

Although not raised by counsel, 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 here. 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) 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.

As a threshold matter, it is important to address whether the director adequately advised the petitioner of the basis for revocation of approval of the petition and whether 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.

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).

This means that the director must provide notice before revoking the approval of any petition. Specifically, 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

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documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

> 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.

Here, the director indicated in the Notice of Intent to Revoke (NOIR) dated May 14, 2009 that the CNPJ number listed on the October 2, 2002 employment verification letter from [redacted] was not a valid number,[4] and concluded that the petitioner must have submitted false documentation. While the CNPJ number in and of itself is not determinative of the beneficiary's qualifications for the job offered in this case, the NOIR contains specific derogatory information relating to the current proceeding with respect to the beneficiary's qualifications, and therefore, the AAO finds that the director appropriately reopened the approval of the petition and issued the NOIR.

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate that the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by DOL and submitted with the petition as of the priority date. Here, the priority date is September 25, 2001, which was the date when the Form ETA 750 was filed and accepted for processing by DOL. The name of the job title or the position for which the petitioner seeks to hire is "laundry supervisor." The job description listed on the Form ETA 750 part A item 13 states, "Under direction of owner, assist with the supervision of laundry personnel, scheduling, assignments and finished work." 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 or in the related occupation of laundry attendant.

We note that the beneficiary listed on the Form ETA 750B the following relevant work experience under item 15 of the Form ETA 750, part B:

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[4] The October 2, 2002 letter of employment verification from [redacted] contains the following CNPJ number: [redacted] The director accessed the CNPJ database online at http://www.receita.fazenda.gov.br/ and found the CNPJ number not valid. 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 and sell goods only if it has a CNPJ. The 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.

Name and address of employer:

Name of Job: Laundry Attendant.
Date started: May 1995.
Date left: February 1998.

However, that work experience above is not supported by any evidence. Submitted along with the approved Form ETA 750 and the Form I-140 petition was a letter of employment verification dated October 2, 2002 from who stated that the beneficiary worked at ' as an attendant from February 3, 1992 to April 25, 1995.

In response to the NOIR, the petitioner submitted the following evidence to show that the beneficiary possessed the minimum requirements for the position offered:

- A statement dated June 4, 2009 from stating that the beneficiary worked at as a laundry worker, washing and ironing the laundry of the inn and customers from February 2, 1988 to January 25, 1991; and
- An affidavit dated June 12, 2009 from the beneficiary stating that she would provide proof that she had the requisite work experience in laundry service.

In *Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), the Board's dicta 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. Therefore, the letters of employment verification from and both cannot be considered as evidence of the beneficiary's qualifications for the job offered, as neither employment was listed on the Form ETA 750B.

We also note that the employment verification letter from does not meet the minimum requirements in the regulations, in that it does not include the title of the author and a specific description of the training received or duties performed by the beneficiary. *See* 8 C.F.R. §§ 204.5(g)(1) and (l)(3)(ii)(A). Considering all of the above, we agree with the director's finding that the beneficiary did not have the requisite work experience in the job offered as of the priority date.

Moreover, we find inconsistencies in the record concerning where the beneficiary lived and worked from 1988 to 1995. On the Form G-325 (Biographic Information), which the beneficiary filed along with the Application to Register Permanent Residence or Adjust Status (Form I-485), the beneficiary claimed to have lived in Belo Horizonte, Minas Gerais, Brazil, until October 2000. The location of and where the beneficiary claimed to have worked from 1988 to 1995, however, is in Conceicao do Mato Dentro, Minas Gerais. The distance between Belo Horizonte, Minas Gerais, and, Conceicao do Mato Dentro Minas Gerais, is approximately 111.99 kilometers (or approximately 69.59 miles). *See* http://www.distancecalculator.globefeed.com (last accessed January 2, 2013). It is, therefore, unlikely that the beneficiary could have worked in Conceicao do Mato Dentro, Minas

Gerais, between 1988 and 1992 while living in Belo Horizonte, Minas Gerais.[5] 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. at 591-92.

In summary, the AAO finds that the petitioner has failed to establish that the beneficiary possessed the minimum experience requirements for the proffered position, and that the director had good and sufficient cause to revoke the approval of the petition, consistent with section 205 of the Act, 8 U.S.C § 1155 based on the petitioner's failure to demonstrate the beneficiary's qualifications for the offered job. For these reasons, the director's decision to revoke the approval of the petition is upheld.

Beyond the decision of the director, we also find that the petitioner has failed to establish the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 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), 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.

As noted above, the ETA 750 labor certification was accepted for processing on September 25, 2001. The rate of pay or the proffered wage specified on the ETA 750 is $11 per hour or $20,020 per year based on a 35 hour work week.[6] The beneficiary claimed on her Form G-325

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[5] We also note that the distance between Itacolomi, Minas Gerais, where was located, and Belo Horizonte, Minas Gerais, is about 111.14 kilometers (about 69.06 miles). This information is from Distance Calculator, which can be accessed online at the following website: http://www.distancecalculator.globefeed.com (last accessed January 2, 2013).

[6] 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

that she had been working for the petitioner since 2000.[7] The petitioner in letters dated October 21, 2005 and June 1, 2009 states that "the beneficiary continuously works for the petitioner."

The record contains an Internal Revenue Service (IRS) Form W-2 Tax and Wage Statement evidencing that the beneficiary received the following amount in 2001 from the petitioner:

- $18,018.90 in 2001 from the petitioner ($2,001.10 less than the proffered wage of $20,020 per year).

The AAO notes that this Form W-2 reflects a social security number for the beneficiary as which does not appear to be hers. The record contains a copy of her actual social security card reflecting There is no evidence in the record explaining the inconsistency between the two numbers. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Because the record does not reliably establish the identity of the recipient of the wages, the AAO will not consider these wages on the 2001 Form W-2.

The record also includes a copy of the petitioner's federal tax return filed on a Form 1120S U.S. Income Tax Return for an S Corporation for 2001, showing the petitioner's net income and net current assets as follows:

- Net Income:[8] $9,831; and
- Net Current Assets:[9] $7,658.

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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).

[7] We note that the beneficiary failed to list her employment with the petition on the Form ETA 750B signed by her on January 6, 2001.

[8] For an S Corporation, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S if the S corporation's income is exclusively from a trade or business. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2004-2005) of Schedule K. *See* Instructions for Form 1120S, 2005, at http://www.irs.gov/pub/irs-prior/i1120s--2005.pdf (last accessed May 18, 2011) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In the instant case, the net income is found on line 21.

[9] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most

Thus, the petitioner has not established the ability to pay the proffered wage in 2001 nor from 2002 onwards until the beneficiary obtains lawful permanent residence.

The AAO notes that the petitioner appears to have been dissolved as of June 6, 2006.[10] If the petitioner is no longer in business, then no *bona fide* job offer exists and the approval of the petition would be subject to automatic revocation due to the termination of the petitioner's business. *See* 8 C.F.R. § 205.1(a)(iii)(D). Further, according to the Secretary of the Commonwealth's website, – the company that allegedly bought the petitioner in 2008 – has been operative since 1997.

Further, we note that claimed in his letter dated June 1, 2009 that he bought the petitioner in 2008. The record contains no proof that assertions that he acquired the petitioner in 2008 are credible. 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)).

The new company that bought the petitioner in 2008 may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the job opportunity offered by the new organization must be the same as originally offered on the labor certification. Second, both the acquired and the acquiring company must establish eligibility in all respects by a preponderance of the evidence. The original petitioner is required to submit evidence of the ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) beginning on the priority date until the date the transfer of ownership to the successor company is completed. The claimed successor – the new organization – must demonstrate its continuing ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) from the transaction date forward. Third, the new organization must fully describe and document the transfer and assumption of the ownership of all, or the relevant part of, the original petitioning company.

Evidence of transfer of ownership must show that the new organization not only purchased assets from the original petitioner, but also the essential rights and obligations of the original petitioner necessary to carry on the business in the same manner as the original petitioner. The new organization must continue to operate the same type of business as the predecessor and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

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cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[10] The information above is based on the information from the Secretary of the Commonwealth, Corporations Division, which can be accessed online at the following website address: http://corp.sec.state.ma.us/corp/corpsearch/corpsearchinput.asp (last accessed January 3, 2013).

Here, the record does not contain any evidence showing the transfer or purchase of the petitioner to or by the new company owned by Nor does it include any evidence showing the petitioner's and the new organization's ability to pay the proffered wage. Thus, the AAO will not recognize a successor-in-interest to the petitioner.

Nevertheless, we find that the director has good and sufficient cause to reopen the matter and to revoke the approval of the petition. The petitioner has failed to establish that the beneficiary possessed the requisite work experience in the job offered before the priority date. 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. Beyond the decision of the director, we find that the petitioner and/or the successor entity have not established the ability to pay the proffered wage from the priority date. 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).

The petition will remain revoked for the above stated reasons, with each considered as an independent and alternate basis for revocation. 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 appeal is dismissed. The director's decision to revoke the approval of the petition is affirmed.