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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: JAN 3 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:

SELF-REPRESENTED

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 May 25, 2004, the Director, Vermont Service Center, approved the employment-based immigrant visa petition. However, on June 6, 2012, the Director, Texas Service Center (the director), revoked the approval of the petition, invalidated the labor certification, and certified the decision to the Administrative Appeals Office (AAO) for review pursuant to 8 C.F.R. § 103.4(a). Upon review, the AAO will affirm the director's decisions to revoke the approval of the petition and to invalidate the labor certification.

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 revoked the approval of the petition, finding that the petitioner failed to establish that it conducted good faith recruitment in accordance with the U.S. Department of Labor (DOL) recruitment procedures and that there was fraud or willful material misrepresentation involving the labor certification process. The director also found that the petitioner modified the approved Form ETA 750 without the authorization from DOL. Accordingly, the director invalidated the labor certification. The director also found that the beneficiary did not have the requisite work experience in the job offered before the priority date and that the petitioner failed to show that it had the continuing ability to pay the proffered wage from the priority date until the beneficiary receives his lawful permanent residence.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Despite several attempts by the director and the AAO to notify the petitioner of derogatory information relating to the petition, all mail sent to the petitioner was returned as "undeliverable." The AAO notes that according to the Corporate Database maintained by the Secretary of the Commonwealth, Corporations Division, it appears as if the petitioner's business was dissolved as of September 10, 2010.[2] On November 1, 2012 we specifically sent a Notice of Intent to Dismiss and Derogatory Information and advised the petitioner that we would not be able to adjudicate the appeal without a response and would affirm the director's decision without further discussion if the petitioner failed to respond. The petitioner did not respond or submit additional evidence.

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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 database can be accessed online at the following website address: (http://corp.sec.state.ma.us/corp/corpsearch/corpsearchinput.asp) (last accessed January 23, 2013).

Nonetheless, we will review whether the director's decisions to revoke the approval of the petition and to invalidate the labor certification are based on good and sufficient cause, consistent with section 205 of the Act, 8 U.S.C. § 1155.

Section 205 of 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:

> (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, the director in the Notice of Intent to Revoke (NOIR) dated January 24, 2012 specifically identified to the petitioner the problems or defects in the record pertaining to the labor certification and the beneficiary's qualifications. First, regarding the labor certification the director stated that several areas of part 14 of the Form ETA 750 were removed.[3] Further, concerning the beneficiary's qualifications, the director stated that the letter of employment verification does not include a sufficient description of the duties or training of the beneficiary, as required by the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B). Moreover, the director noted that the business where the beneficiary claimed to have worked as a cook in Brazil was not a restaurant.[4]

In addition, the director found that the location of the business where the beneficiary claimed to have worked in Brazil from 1996 to 1999 was inconsistent with the State where the beneficiary claimed to have lived in Brazil from 1994 to 2000.[5] The director also indicated that the record does not establish that the beneficiary met the educational requirements for the job offered.[6] Finally, the director noted that the record does not show that the petitioner has the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. The director requested that the petitioner submit additional evidence to demonstrate that the beneficiary possessed the minimum experience and education requirements as of the priority date; independent objective evidence to resolve the inconsistencies in the record; and additional evidence to show the ability to pay the proffered wage from the priority date onwards.

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[3] We note that "No" and "Culinary" under college degree required and major field of study, respectively, were covered by whiteout liquid. We also note that "Hospitality" under related occupation also appeared covered by whiteout liquid.

[4] Specifically, the director stated, in pertinent part, "The CNPJ number on the employment letter from [redacted] belongs to a business named [redacted] and is involved in the sale of retail products, and not as a restaurant." The 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. The CNPJ database can be accessed online at http://www.receita.fazenda.gov.br/).

[5] The director noted that the beneficiary lived in Rio de Janeiro, but the location of the business where the beneficiary claimed to have worked as a cook in Brazil from 1996 to 1999 – based on the CNPJ record – was in Minas Gerais.

[6] The Form ETA 750 requires applicants to have at least eight years of grade school and four years of high school. The record does not contain any evidence showing that the beneficiary completed eight years of grade school and four years of high school.

No additional evidence has been submitted. The inconsistencies in the record remain unexplained and unrebutted. Thus, the AAO concludes that the director's action 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.

We further note that the director, in accordance with 20 C.F.R. § 656.31(d) (2004), may invalidate the labor certification based on fraud or willful misrepresentation. The regulation cited at 20 C.F.R. § 656.31(d) is the pre-PERM regulation applicable to the instant case. The regulation stated:

> If a Court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefor shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

Upon *de novo* review, the AAO finds that evidence of record supports the director's conclusion that there was fraud or willful misrepresentation involving the labor certification. There has been sufficient development of the facts upon which the director can make a determination of fraud or willful misrepresentation in connection with the documentation submitted to support the beneficiary's qualifications based on the criteria of *Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961). Thus, the director's decision to invalidate the certified Form ETA 750 is affirmed.

Beyond the decision of the director, we find that that the approval of the petition may also be revoked in accordance with 8 C.F.R. § 205.1. Under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if one of the following circumstances occurs:

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.

In reviewing the case, evidence has come to light that the petitioning corporation in this matter has been dissolved as of September 10, 2010. Where the petitioning company is no longer an active business, the petition is subject to automatic revocation, pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

The revocation of the approval of the petition is affirmed for the above stated 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.

FURTHER ORDER: The decision to invalidate the alien employment certification, Form ETA 750, ETA case number is affirmed.