U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

DATE: JUN 2 8 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 6, 2006, United States Citizenship and Immigration Services (USCIS), Texas Service Center (the director), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The director initially approved the petition on March 13, 2007 but revoked the approval of the petition on November 15, 2010. The petitioner subsequently appealed the director's decision to revoke the petition's approval to the Administrative Appeals Office (AAO). Upon review, the director's decision to revoke the approval of the petition will be affirmed.

The petitioner is an engineering company. It seeks to employ the beneficiary permanently in the United States as an assistant delivery 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 accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director denied the petition, finding that the petitioner had failed to establish that the beneficiary had the requisite qualifications for the position as of the priority date.

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]

Although not raised by counsel of record on appeal, it is important as a threshold matter 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).

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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).

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 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.

Both *Matter of Arias* and *Matter of Estime*, as noted above, held that a notice of intent to revoke 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.

Here, the director noted in the Notice of Intent to Revoke (NOIR) dated September 22, 2010 that the petitioner had submitted another Form I-140 petition one year earlier in 2005, in which it sought to permanently hire the beneficiary as a delivery supervisor, instead of assistant delivery supervisor. Accompanying that petition was an ETA Form 9089 Application for Permanent Employment Certification, where the petitioner stated under Part K that the beneficiary worked as a supervisor for an automotive business called [redacted] from January 11, 1992 to March 18, 1996. The director noted that the period of employment provided on the ETA Form 9089 is different from the period listed on the Form ETA 750, part B.[3]

[3] The dates of the beneficiary's employment in Brazil as listed on the Form ETA 750B were

In addition, the director stated that the record contains other inconsistencies involving the beneficiary's past work experience. A review of the record, according to the director, revealed that U.S. Citizenship and Immigration Services (USCIS) called and spoke to the beneficiary by telephone on May 21, 2010, where the beneficiary was asked about his employment prior to his arrival in the United States in 1999. In response to that question, the director noted that the beneficiary could not name his employers but claimed that he had previously worked as a delivery driver, a bus driver, and a trailer truck driver.

The record also shows that USCIS contacted and spoke on the telephone with the president of the petitioner, on May 18, 2010, during which stated that the beneficiary did have some driving experience from his country, but that he did not have much experience [in the job offered] at the time he was hired, that he was brought in at an entry low level position, and that he had worked his way up to the supervisor position. Further, USCIS records reflect that the beneficiary informed U.S. Customs and Border Protection (USCBP) officers upon entering the United States on or about February 11, 1999 that he was a drywall installer and that he was going to stay in the United States for only 10 months.

The director also noted in the NOIR that the petitioner had not met its burden of establishing the ability to pay and specifically requested additional evidence to demonstrate its ability to pay the proffered wage from the priority date until the beneficiary receives lawful permanent residence.[4] For the reasons stated above, the AAO finds that the director has adequately provided the petitioner with specific derogatory information to revoke the approval of the petition that if unexplained would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof.

The substantive issue in this matter is whether or not the petitioner has met the burden of proving by a preponderance of the evidence that the beneficiary has the requisite work experience in the job 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 that the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition as of the priority date. *See*. The priority date is the date the Form ETA 750 is accepted for processing by any office within the employment system of DOL. *See* 8 C.F.R. § 204.5(d). Here, the priority date is February 11, 2004.

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

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from November 1992 to March 1996.

[4] In the decision to revoke the approval of the petition, the director concluded that the petitioner had established the ability to pay the proffered wage from the priority date.

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).

The name of the job title or the position for which the petitioner seeks to hire is "Assistant Delivery Supervisor." Under the job description, section 13 of the Form ETA 750, the petitioner wrote:

> Assist in supervision of workers preparing and packaging parts for delivery. Confer with owner on compliance. Assign parts for special processing. Review time sheets and schedules.

Under section 14 of the Form ETA 750, part A, the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered or two years of experience in the related occupation of manager/supervisor. On the Form ETA 750, part B, signed by the beneficiary on November 20, 2003, he represented that he worked as a manager for a mechanical shop in Brazil from November 1992 to March 1996. However, as noted above, this period of employment is different from the dates provided on the ETA Form 9089 in the record. The AAO also notes that the claim that the beneficiary worked for a mechanical shop in Brazil on the Form ETA 750B is different from information provided on the ETA Form 9089.[5]

As evidence of the beneficiary's qualifications for the job offered, the petitioner submitted a letter of employment verification dated February 23, 2001 from , co-manager, stating that the beneficiary worked at from November 11, 1992 to March 18, 1996. The AAO notes that the letter above was written in Portuguese and was translated into English twice. The first translation, dated March 22, 2001, says that the beneficiary worked as "a manager in an auto parts." The second translation, dated November 11, 2005, says that the beneficiary worked as "a supervisor at the sales department."

As indicated above, the director also observed other material inconsistencies in the record. During a telephone questioning on May 21, 2010, the beneficiary stated that he did not remember the name of his past employers, but claimed that he worked as a delivery driver, a bus driver, and a trailer truck driver. The AAO notes that at no point did the beneficiary say he had previously worked as a manager or supervisor.

Further, , the president of the petitioning company in this case, stated during a telephone questioning on May 18, 2010 that the beneficiary did not have much experience in the job offered and that he had to earn his way up to become a supervisor. As discussed above, the record further reflects that the beneficiary informed USCBP officers upon entering the United

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[5] The petitioner stated under part K of the ETA Form 9089 that the beneficiary worked for an automotive business.

States on or about February 11, 1999 that he was a drywall installer and that he was going to stay in the United States for only 10 months.

In response to the director's NOIR and to resolve the inconsistencies in the record as noted above, the petitioner submitted a statement dated October 20, 2010 from the beneficiary stating that he worked for a company that did repair cars, trucks, trailer trucks, and busses and sold auto parts in Brazil, and that his job duties as a supervisor or manager included setting up delivery schedules, monitoring employees, and sometimes delivering the auto parts himself to customers. The beneficiary also indicated that he could not remember the name of his employer in Brazil because he was nervous when USCIS called. Regarding the inconsistencies in the period of his employment between Form ETA 750 and ETA Form 9089, the beneficiary stated that the dates listed on the ETA Form 9089 were not exact dates, and that they are close to those listed on the Form ETA 750.

The AAO disagrees. The dates listed on the Form ETA 750 are from November 1992 to March 1996; whereas the dates listed on the ETA Form 9089 are from January 11, 1992 to March 18, 1996. Further, contrary to the beneficiary's statement above, the dates listed on the ETA Form 9089 were exact dates.

On appeal, submitted a letter dated October 19, 2010 indicating that the beneficiary was initially hired because of his "extensive previous experience as a driver" in Brazil. However, this letter further calls into question whether the beneficiary possessed the minimum experience for the proffered position. stated on the telephone that the beneficiary had some driving experience from his country, but not much experience in the job offered. He states in his letter that the beneficiary's extensive driving experience from Brazil was a big factor for his initial hiring. Regardless of his prior work experience, it does not look like that the beneficiary had the requisite work experience in the job offered or in the alternate occupation as a manager/supervisor prior to the priority date.

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 record in this case contains no independent objective evidence, such as copies of the beneficiary's booklet of employment, paystubs, and tax records, to establish that the beneficiary possessed the minimum qualifications as an assistant delivery supervisor or a manager/supervisor as of the priority date. It is important to note that the position offered in this case is for a skilled worker, requiring at least two years of specialized training or experience. Based on the evidence submitted, the AAO is not persuaded that the beneficiary had two years of specialized training or experience in the job offered before the priority date.

For the reasons stated above, the AAO finds that the director had good and sufficient cause to revoke the approval of the petition. The petitioner has failed to establish by a preponderance of the evidence that the beneficiary had the requisite work experience in the job offered prior to the priority date.

Where the petitioner of an approved visa petition is not eligible for the classification sought, the director may seek to revoke the 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). The revocation of the previously approved petition is affirmed for the reason stated above. 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.