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: MAR 1 3 2013 OFFICE: VERMONT 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: The preference visa petition was initially approved by the director, Vermont Service Center. Upon further review, the director determined that the visa petition was approved in error and issued a Notice of Intent to Revoke (NOIR) and subsequently revoked the petition's approval. The matter is now before the Administrative Appeals Office (AAO)[1] on appeal. The appeal will be dismissed.

The petitioner claims to be a construction firm and sub-contractor. It seeks to employ the beneficiary permanently in the United States as a cement mason, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). 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 Immigrant Petition for Alien Worker (Form I-140) was filed on January 14, 2002.[2] It was initially approved on June 26, 2002. Upon further investigation and review, the director issued a NOIR the petition's approval on October 1, 2008. It informed the petitioner that , the preparer of its Form I-140 and the signatory as agent on the Form ETA 750 had pled guilty on September 12, 2007 to conspiracy to commit immigration fraud in violation of Title 18, U.S.C. sections 371 and 1546(a).[3] had submitted a wide variety of fraudulent immigration-related forms, including falsified Form I-140s. Based on this malfeasance, the director informed the petitioner of his intent to verify the *bona fides* of the petitioner's Form I-140 filed on behalf of the beneficiary. The petitioner was afforded thirty days to respond to the director's concerns raised in the NOIR.[4]

Upon review of the record and the petitioner's response to the NOIR, the director revoked (NOR) the petition's approval on July 14, 2009. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.[5] The director further determined that the petitioner had failed to

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

[2] On Part 5 of the Form I-140, the petitioner claimed that it was established in 1987, had eight workers, and reported a gross annual income of $156,844.

[3] operated a fake document mill which produced fraudulent documents including fake experience letters. He was sentenced in February 2008 to 27 months in federal prison plus 2 years of supervised release and forfeited $275,000 in illegal proceeds. *also* . (Accessed March 7, 2013).

[4] Section 205 of the Act, states: "[t] he Attorney General [now Secretary, Department of Homeland Security] may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

[5] The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *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 petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, including an examination of a petitioner's payment of wages to the beneficiary, and a review of a petitioner's net income and net current assets as shown on evidence submitted pursuant to 8 C.F.R. § 204.5(g)(2). In some cases, the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Relevant to a beneficiary's qualifying work experience, the regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
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> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified

establish the beneficiary's qualifying work experience and revoked the petition's approval accordingly.

On appeal, the petitioner, through current counsel, submits additional evidence and asserts that the petition merits approval.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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.

As stated hereinabove, section 205 of the Act, states: "[t] he Attorney General [now Secretary, Department of Homeland Security] may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

The director's NOIR issued on October 1, 2008 requested that the petitioner submit the following:

1. A statement attesting to whether your company authorized [redacted] or his company to obtain a bona fide labor certificate relating to a bona fide job offer, and to file a bona fide Form I-140.
2. Evidence that the employer had the ability to pay the proffered wage of $29,120 as of the April 12, 2001 priority date to the present.
3. U.S. Internal Revenue Service (IRS) issued transcripts of the 2001, 2001, 2003, 2004, 2005, 2006 and 2007 federal income tax returns with all schedules and attachments for the petitioning business.
4. Copies of the 2001, 2002, 2003, 2004, 2005, 2006, and 2007 federal income tax returns with all schedules and attachments for the petitioning business.
5. IRS issued transcripts of the beneficiary's 2001, 2002, 2003, 2004, 2005, 2006, 2007 Form W-2 Wage and Tax Statements and/or Form 1099 Miscellaneous Income Statements showing how much the beneficiary was paid by the petitioning business.
6. Evidence from the IRS of the federal employer identification number (FEIN) that was assigned to the petitioning business.
7. Evidence from the State Corporation Commission of Virginia that the petitioning business remains active.
8. Evidence that the beneficiary possessed two years of experience as a cement mason as of the priority date of April 12, 2001. Evidence of employment verification letters must be accompanied by other credible evidence that validates the claimed employment such as

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by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). Here, the Form ETA 750 was accepted on April 12, 2001, which establishes the priority date. The proffered wage as stated on the Form ETA 750 is $14.00 per hour ($29,120 per year), and an additional 5 hours of overtime at $21.00 per hour ($5,460).

IRS issued transcripts of the beneficiary's W-2 or Form 1099 for the claimed period of employment.

The director informed the petitioner that a decision would not be made for 33 days, but that no extensions of time could be granted. The director also informed the petitioner that if a response was not received on or before November 4, 2008, a final decision would be made based on the evidence currently in the record.

The petitioner submitted a response dated November 1, 2008 consisting of a transmittal letter from current counsel describing the response as an "interim response" and a request for an additional eight weeks. Also submitted was a copy of a letter from the stated owner of the petitioning business. This letter was not notarized and was dated March 15, 2003. It stated that the beneficiary had worked for the petitioner since January 2000, that he knows how to perform his duties and the use of the tools and equipment and that he receives a weekly salary of approximately $560 per week. The letter also expressed the opinion that the business would suffer without the beneficiary's employment. The letter did not include a statement that or his company was authorized to procure a labor certification or file a Form I-140 for the petitioner. The letter did not describe whether the beneficiary was employed as a cement mason.

The petitioner submitted no other evidence in response to the NOIR relevant to the director's issues raised in 1 through 8 above.

On July 24, 2009, the director revoked the petition's approval. Citing 8 C.F.R. §§§ 103.2 (b)(8), (12) and (14), the director reviewed the requests contained in 1 through 8 above and noted that the request for evidence was to determine eligibility for the benefit sought and that a failure to submit requested evidence that precludes a material line of inquiry is grounds for denying a petition.

The director noted that that record contained copies of the beneficiary's Forms 1099 claimed to have been issued by the petitioner in 2000 and 2001, but no documentation was submitted as requested to verify their authenticity. The AAO additionally notes that a W-2 for 2000 is contained in the record, purportedly issued by the petitioner for the same amount as claimed on the 2000 Form 1099. The AAO also notes that the Form 1099 for 2000 shows that the petitioner's FEIN was 229-xx-xxxx, while the FEIN used on the beneficiary's 2001 Form 1099 was 54-xxx-xxxx. Additionally, the beneficiary claimed a social security number of 537-xx-xxxx on the 2001 Form 1099, while on the Form I-140, the beneficiary does not claim any social security number.[6] These discrepancies form a basis for the director's concerns arising from the evidence submitted to the record. 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. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

[6] Tax returns filed for the beneficiary list a different social security number beginning 223-xx-xxxx.

The director additionally discusses the requirements of the Form ETA 750 relevant to work experience and notes that two years of experience in the job offered as a cement mason is required. In the NOR, the director concludes that the petitioner failed to establish the beneficiary's qualifying work experience because no corresponding evidence of actual employment such as IRS issued transcripts of W-2s or Form 1099s were submitted as requested by the NOIR. The AAO notes that the employment experience verification letter submitted by [redacted] of [redacted] that had been previously submitted by [redacted] was virtually identical to the one describing the job offer submitted by the petitioner. It is noted that [redacted] notarized [redacted] signature.

Other than assigning responsibility to the IRS for giving two different FEINS to the petitioner, on appeal, counsel states that the director had neglected to mention in his NOR, counsel's interim response that had been submitted in response to the NOIR. Counsel again requests additional time in the notice of appeal to produce documentation that was previously requested by the director. On Part 2 of the appeal, an additional 30 days is requested from the AAO in order to submit a brief and/or additional evidence.

Counsel subsequently submitted evidence responsive to the director's initial request in his NOIR that was issued on October 1, 2008. It is noted that the copies of the petitioner's IRS federal tax returns were not even requested until September 17, 2009, almost one year later, as set forth on the transcripts. The beneficiary's IRS transcripts were not requested until February 5, 2009. The petitioner did not submit independent, objective evidence to establish the beneficiary's experience with [redacted]

The AAO finds, like the director, that the record contained insufficient evidence to overcome the basis for the director's NOR. Other evidence that could have been provided in response to the director's NOR or even before the director's final decision was never provided until appeal. As noted above, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence as contained in the NOR. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date or establish that the beneficiary possessed the requisite experience.[7]

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[7] It is noted that the petitioner claims it is a corporation, however no corporate tax returns were submitted for 2001, the year of the priority date. The petitioner's corporation tax returns state that it

In view of the foregoing, the AAO finds that the director properly revoked the approval of the petition. Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)). In this case, the evidence contained in the record at the time the decision was rendered, warranted such denial for good and sufficient cause.

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.

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was not incorporated until January 1, 2002, after the priority date of April 12, 2001. Further, the FEIN number appearing on the IRS transcripts bears no resemblance to the other FEINS used by the petitioner. The petitioner has not addressed the issue of any successor-in-interest relationship or explained any of the discrepancies as noted herein. Additionally, it is not clear that all of the figures on the tax returns submitted match the information on the tax transcripts. The transcripts list $0 for the petitioner's net receipts, total income and total deductions, which do not match the paper tax returns submitted. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).