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

(b)(6)

[redacted]

Date: MAY 0 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:

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

cc:

DISCUSSION: The preference visa petition was initially approved by the Director, Vermont Service Center, on October 26, 2001, but on July 22, 2009, the approval was revoked by the Director, Texas Service Center (the director). The beneficiary through his counsel filed an appeal, but the appeal was summarily rejected by the director.[1] Pursuant to 8 C.F.R. § 103.3(a)(5)(ii), the AAO reopened the proceeding *sua sponte* (notice) and withdrew the decision by the director to reject the appeal on January 31, 2013.[2] The AAO noted that once the case is appealed to the AAO, the AAO, not the director, shall have the jurisdiction to adjudicate the appeal. *See* 8 C.F.R. § 103.3(a)(2)(iv). Upon review, the appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently 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).[3] As required by statute, a labor certification approved by the U.S. Department of Labor accompanied the petition. The director revoked the approval of the petition, finding that the petitioner failed to demonstrate by a preponderance of the evidence that it complied with or followed the Department of Labor (DOL) recruitment requirements.

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

As a threshold issue, we must determine whether the beneficiary or his counsel has legal standing to appeal in this proceeding.

The regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) states:

> For purposes of this section and §§ 103.4 and 103.5 of this part, affected party (in addition to the Service) means the person or entity with legal standing in a proceeding. **It does not include the beneficiary of a visa petition.** (Emphasis added).

Further, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(1) states, "An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed." The language of the cited regulations explicitly states that only the affected party has legal standing and is authorized to file the appeal in this matter.

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[1] The director stated that neither the beneficiary nor the petitioner is the affected party, as defined at 8 C.F.R. § 103.3(a)(1)(iii)(B), and therefore, the appeal must be rejected.

[2] In the January 2013 notice of the reopening of this case, the AAO advised the petitioner of specific issues with the merits of the Form I-140 petition and afforded the petitioner 30 days in which to submit a legal brief and any additional evidence. The petitioner did not respond.

[3] 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.

In this case, the appeal was authorized by the beneficiary and filed by his counsel. The Form G-28 Notice of Entry of Appearance as Attorney or Representative was signed by the beneficiary. Further, in the Form I-290B Notice of Appeal or Motion, counsel wrote, "The Beneficiary asks for reconsideration and appeal." The record contains no evidence showing that the petitioner consented to the filing of the appeal. For this reason, we find that the beneficiary and his counsel are not entitled to file the appeal in this case, and the appeal was therefore not properly filed. Therefore, the appeal must be rejected.[4]

Alternatively, even if the appeal were not rejected, the AAO concludes that the petition is not approvable, because the petitioner has failed to demonstrate by a preponderance of the evidence that the beneficiary met the minimum requirements for the job offered (two years of work experience in the job offered as of the priority date), and that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary ported to another similar employment, in accordance with section 204(j) of the Immigration and Nationality Act (the Act).[5] Beyond the decision of the director, and as an alternative decision, the appeal will be dismissed as moot.

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date, the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

Here, the Form ETA 750 was filed and accepted for processing by DOL on March 26, 2001. The name of the job title or the position for which your organization sought to hire is "cook." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, "Prepare all types of dishes," and indicated on section 14 that an applicant must have, at a minimum, two years of experience in the job offered.

The beneficiary signed the Form ETA 750B on February 8, 2001 and represented that he worked 35 hours a week as a cook for a restaurant called [redacted] in Tangara da Serra, MT (Mato Grosso), Brazil, from June 1993 to August 1998. Along with the petition and the approved Form ETA 750 labor certification, the petitioner submitted a letter of employment verification dated August 18, 1998 from [redacted] indicating that the beneficiary worked as a cook from June 18, 1993 to August 18, 1998. However, on July 22, 2009 the director issued a Notice Revocation (NOR) notifying the petitioner that the CNPJ number listed

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[4] Counsel for the beneficiary will be provided a courtesy copy of this decision since he filed the appeal.

[5] It is not clear when the beneficiary ported to another employment. In response to the director's Notice of Intent to Revoke (NOIR) dated March 9, 2009 counsel to the beneficiary submitted a letter dated March 19, 2009 from [redacted] indicating that the beneficiary has been employed as a line cook for seven years.

on the August 18, 1998 employment verification letter was not a valid number,[6] and therefore, the beneficiary could not have worked at

The AAO disagrees with the director's reasoning above. We find that the CNPJ number in and of itself is not determinative of the beneficiary's qualifications for the job offered in this case. However, we agree with the director that the petitioner has not established that the beneficiary possessed the minimum experience requirements for the proffered position. First, we note that the August 18, 1998 letter of employment verification does not comply with the regulations at 8 C.F.R. §§ 204.5(g)(1) and 204.5(l)(3)(ii)(A), in that it does not include the name and title of the author and a sufficient description of the experience or training received by the beneficiary.[7]

Moreover, we find inconsistencies in the record with regards to where the beneficiary claimed to have lived and worked between 1993 and 1998. In the Form G-325 (Biographic Information), which the beneficiary filed in connection with his Application to Register Permanent Residence or Adjust Status (Form I-485), the beneficiary claimed to have lived in Sobralia, Minas Gerais, from 1974 to January 1999. The location of where the beneficiary claimed to have worked between 1993 and 1998 in Brazil, according to the evidence submitted, was located in Tangara da Serra, MT (Mato Grosso). It is unlikely that the beneficiary worked in Tangara da Serra, MT, and lived in Sobralia, Minas Gerais, from 1993 to 1998 because the distance between Tangara da Serra, MT, and Sobralia, Minas Gerais is 1,714.42 km (approximately 1,065.29 miles).[8] 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).

On this January 2013 notice, we advised the petitioner of these issues and specifically requested the petitioner to submit independent and objective evidence, such as pay stubs, payroll records, tax documents, or Brazilian booklet of employment and social security, to resolve the inconsistencies in the record regarding the beneficiary's past work experience in Brazil. As noted above, the petitioner was given 30 days to provide a response and/or submit additional evidence. More than thirty days have passed, and the petitioner has not responded to the AAO's request. Nor has the petitioner provided any evidence to resolve the inconsistencies in the record. Therefore, we find that the petitioner has not demonstrated by a preponderance of the evidence that the beneficiary possessed the requisite work experience in the job offered as of the priority date.

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[6] CNPJ or Cadastro Nacional da Pessoa Juridica is a unique number given to every business registered with the Brazilian authority. The CNPJ database can be accessed online at the following website: http://www.receita.fazenda.gov.br/.

[7] The regulation at 8 C.F.R. §§ 204.5(g)(1) and 204.5(l)(3)(ii)(A) provide, "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."

[8] This information is from Distance Calculator, which can be accessed online at the following web address: http://www.distancecalculator.globefeed.com (last accessed January 14, 2013).

Concerning the petitioner's ability to pay, 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 demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 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 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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the 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).

As indicated above, the Form ETA 750 was accepted by the DOL for processing on March 26, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is $12.57 per hour or [redacted] per year (based on a 35-hour work per week).[9] Further, a review of USCIS electronic databases reveals that the petitioner has filed multiple immigrant visa petitions (Form I-140) for alien beneficiaries other than the beneficiary in the instant proceeding since 1998.[10]

If the instant petition were the only petition filed by the petitioner, the petitioner would have only been required to demonstrate the ability to pay the proffered wage to the single beneficiary of the instant petition. However, in this case, the petitioner has filed multiple petitions in the past.

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[9] 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 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).

[10] The AAO's January 2013 notice provided the petitioner with the names of the other beneficiaries and the details of the other petitions that the petitioner has filed since 1998.

Unless this fact is disputed (if, for instance, one or more of the petitions above have been withdrawn, or if the information provided above is inaccurate), consistent with the regulation at 8 C.F.R. § 204.5(g)(2), the petitioner is therefore required to establish the ability to pay the proffered wages *not only* for the current beneficiary but *for all* of the other immigrant visa beneficiaries until (either one or more of these circumstances apply):

a) Each beneficiary receives or received his or her legal permanent residence (LPR),
b) Unless and until we deny/revoke the petition, or
c) Unless and until your organization withdraws the petition.

The petitioner has previously submitted a letter dated March 15, 2001 from stating, among other things, that the petitioner has more than employees.

We noted in our January 2013 notice that the evidence submitted above is not sufficient to demonstrate the petitioner's ability to pay. In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That regulation further provides: "In a case where the prospective United States employer employs or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." (Emphasis added.) Considering the multiple number of other immigrant petitions that the petitioner has filed since 1998 as shown above, we find that USCIS need not exercise its discretion to accept the letter from

In addition, the record contains no copies of the acceptable evidence pursuant to 8 C.F.R. § 204.5(g)(2) to demonstrate the ability to pay, i.e. annual reports, federal tax returns, or audited financial statements for the relevant years from the priority date to corroborate statement.

For the reasons stated above, we requested that the petitioner submit annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. No such evidence has been submitted thus far. Therefore, we find that the petitioner has failed to demonstrate by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date.

Beyond the decision of the director, in the notice, the AAO noted that the petitioner has been dissolved as of March 23, 2004. Counsel for the beneficiary in appealing the matter to the AAO confirmed and stated that the petitioner had closed. The AAO in reopening the matter states that if the petitioning business has been dissolved and is no longer an active business, then no *bona fide* job offer exists and the petition and its appeal have become moot. The AAO specifically advised the petitioner that if no response was submitted within 30 days of the date the matter is reopened (January 31, 2013), the AAO may dismiss the appeal as moot.

More than thirty days since January 31, 2013 has passed, and neither the petitioner nor the beneficiary's counsel has submitted any response. Therefore, the appeal will alternatively be dismissed as moot.[11]

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

[11] Additionally, as noted in the AAO's notice, even if the appeal could be otherwise sustained, the petition's approval would be 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.