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U.S. Citizenship  
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FILE: [REDACTED]  
WAC 98 012 52515

Office: CALIFORNIA SERVICE CENTER

Date: SEP 06 2005

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** the Director, California Service Center, initially approved the employment-based preference visa petition. In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. 1155, states that "[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 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).

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 un rebutted, 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 order to properly revoke a petition on the basis of an investigative report, the report must have some material bearing on the grounds for eligibility for the visa classification. The investigative report must establish that the petitioner failed to meet the burden of proof on an essential element that would warrant the denial of the visa petition. Observations contained in an investigative report that are conclusory, speculative, equivocal, or irrelevant do not provide good and sufficient cause for the issuance of a notice of intent to revoke the approval of a visa petition and cannot serve as the basis for revocation. *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988).

On April 19, 2001, the director issued a Notice of Intent to Revoke (NOIR) to the petitioner stating that the I-140 petition was approved in error because the original ETA 750 Application for Alien Employment Certification requested four years of work experience and the petitioner on the substituted ETA 750 only required three years of work experience. The director determined that in order to be qualified for the position in the instant petition, the beneficiary must have met all of the minimum requirements as stated in Parts 14 and 15 of the original ETA 750, as of the date the request for certification was accepted for processing by any office within the empowerment service system for the Department of Labor. In his determination, the director cited *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971), and *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The director also cited the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) which

states 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.

In addition, the director stated that an investigation conducted by the then Immigration and Naturalization Service office at the American Embassy in Manila, The Philippines, revealed that the beneficiary did not work as a custom painter/foreman in the Philippines for the required four years as stated on the original ETA 750. The director stated that, in the I-140 petition, the petitioner had submitted an undated letter signed by [REDACTED] General Manager, [REDACTED]. As part of the Citizenship and Immigration Services (CIS) investigation, a field investigation was conducted at the address listed on [REDACTED] letter, namely [REDACTED] Subdivision, Muntinlupa City, Metro-Manila. During the investigation the CIS officer spoke to [REDACTED] who lives in a residence adjacent to [REDACTED] address since 1977, and to [REDACTED] who lives in a home in front of [REDACTED]. The director stated that [REDACTED] Geronimo stated that he knew [REDACTED] had had a T-shirt manufacturing business but that he was not certain it was named [REDACTED]. [REDACTED] further stated that [REDACTED] had leased the property to start his business in 1995 and ceased business operations in 1997. According to the director, [REDACTED] confirmed the years of existence of [REDACTED] business. The director concluded in his remarks on the investigation that it appeared that [REDACTED] business was not in existence from 1980 to 1983, but rather he had a T-shirt manufacturing enterprise from 1995 to 1997.

The director also stated that after a review of the petition, it was also found that the petitioner had not established that he had the ability to pay the proffered wage at the time the priority date was established. This conclusion of the director was based on an interview in March 2, 2000, in Los Angeles at the Los Angeles District Office, in which the beneficiary submitted the petitioner's Form DE-6 that the director stated had wages listed on it that appeared to be altered. The director also stated that the beneficiary submitted incomplete documentation on the petitioner's ability to pay the proffered wage from 1991 to 1997. In conclusion, the director found that good and sufficient cause existed in the instant petition to deny the beneficiary the benefit sought.

On August 22, 2002, the director issued a notice of revocation that stated the petitioner had not responded to the notice of intent to revoke the petition although a reasonable amount of time was afforded the petitioner. On motion to reopen received by the district director on September 11, 2002, counsel submitted a federal express receipt dated May 15, 2001 and stated that the petitioner had timely submitted a response to the director's notice of intent to revoke. The director reopened the matter and considered the initial response to the notice of intent to revoke the petition dated May 14, 2001.

In his response, counsel stated that the requested three years of experience on the substituted ETA 750A was inadvertently typed in error and should have properly stated four years of experience. Counsel submitted an amended ETA 750, Parts A and AB to the record. Counsel also noted that the beneficiary had been self-employed as a custom painter for two years from 1978 to 1980.

Counsel also stated that the investigation conducted in the Philippines was inadequate and incomplete for a number of reasons. First, counsel asserted that the unsworn, oral nature of the statements made by [REDACTED] and [REDACTED] made them unreliable. Second, counsel stated that no additional evidence was obtained or submitted by the investigators to support or corroborate the oral allegations made by both men. Third, counsel stated that the statement made by the two men only concluded that [REDACTED] owned a T-shirt manufacturing business from 1995 to 1997. Fourth, counsel stated that the investigator never, at any time, interviewed the beneficiary's former employer, [REDACTED]. Counsel concluded that the evidence relied upon by the investigator was insufficient to establish that [REDACTED] did not have a painting

company from 1980 to 1983, and that the beneficiary was not employed there at that time as a custom painter/foreman. Counsel submitted a new letter from [REDACTED] on the letterhead of [REDACTED], and noted that this letter contained [REDACTED] telephone number. In his undated, unnotarized letter, [REDACTED] stated that the beneficiary had worked for him as a custom painter/foreman from 1980 to 1983 and the business was small and it didn't succeed. The beneficiary resigned and decided to have a business of his own. [REDACTED] continued that he decided to try the business of T-shirt printing, which only lasted from 1995 to 1997.

Counsel also submitted a notarized affidavit signed by the beneficiary that stated he was previously self-employed from 1978 to 1989 as a custom painter for residential and small business premises, and that his business was located in San Pedro, Laguna, in the Philippines. The beneficiary also stated that after working on his own for two years, he then worked for [REDACTED] as a custom painter/foreman for three years in Manila, Philippines. The beneficiary stated that he had a total of five years of experience as a custom painter/foreman. With regard to the director's determination that the petitioner had not established it had the ability to pay the proffered wage as of the priority date and onward, counsel submitted the petitioner's Forms Schedule C Profit or Loss Statements from 1991 to 1999, copies of W-2 Wage and Tax statements issued by the petitioner to his employees from 1991 to 2000, and copies of state of California Forms DE-6 Quarterly Wage Reports from 1998 to 2000. Counsel asserted that this documentation clearly established the petitioner's ability to pay the beneficiary the proffered wage as of the priority and onward.

On April 2, 2004, the director revoked the petition. The director stated that the petitioner filed the instant petition on October 6, 1997 on behalf of the beneficiary as a substituted beneficiary, and that the original certified ETA 750 submitted to the Department of Labor (DOL) with the instant petition had required four years of work experience. The director further noted that when an ETA 750 is submitted for a substitute beneficiary, the petitioner does not need to submit a new certified ETA 750 if the substitute beneficiary meets the same required as stated on the original certified ETA 750. The director then stated that in the uncertified ETA 750 submitted by the petitioner with the petition, the petitioner had changed the requirement for work experience in block 14 from four years to three years. The director determined that the petitioner had not provided any further evidence of further work experience at the time it filed the instant petition with regard to the beneficiary's work experience, and therefore the beneficiary did not meet the requirements as set forth on the original certified ETA 750. Furthermore, the director determined that the field investigation conducted in April 2001 in Manila revealed the company with whom the beneficiary claimed to have gained three years of qualifying experience was in fact a T-shirt manufacturing enterprise that started in 1995, and not a painting company for which the beneficiary had worked from 1980 to 1983.

The director reviewed the documentation submitted by counsel in response to the director's notice of intent to revoke. The director noted that the ETA 750 form submitted by counsel and described by counsel as amended also described the beneficiary's work experience as three years, and not the four years as noted on the original Form ETA 750. The director also noted that the amended ETA documentation submitted by counsel was not certified and was not viewed as valid evidence of the beneficiary's past work experience, without supporting evidence.

On appeal, counsel reiterates that the information as to the beneficiary's work experience in the Philippines stated on the uncertified ETA 750 submitted with the instant petition on a substituted employee basis, namely three years of experience as a painter/foreman, was inadvertently typed in error and should have stated four years. Counsel states that the petitioner submitted an amended ETA 750 to correctly reflect the four years of experience that was originally requested, and that the beneficiary's self-employment was included in the amended ETA forms. Counsel also states that the CIS investigation was inadequate and incomplete, and

reiterates the reasons he believes the investigation was incomplete and inadequate that he originally raised in the response to the notice of intent to revoke. Counsel states that it has been held that an intent to revoke must state with specificity how the employer allegedly violated a section or subsection of the regulations, and that an employer must also be advised of the evidence being used against it so that it has an opportunity to rebut that evidence. Counsel states that it provided the district director with the current address and telephone number of the beneficiary's prior employer in the Philippines, thus inviting CIS to contact the previous employer. Counsel states that "this" was never done and the CIS merely ignored "this."<sup>1</sup> On appeal, counsel resubmits [REDACTED] letter previously submitted in the petitioner's response to the director's notice of intent to revoke the petition. Counsel also submits a letter from [REDACTED] General Manager, [REDACTED] Electronics Parts & Services, San Pedro, Laguna, The Philippines. This letter states that [REDACTED] has known the beneficiary from 1978 through 1979 and had recommended the beneficiary for some painting jobs in his electronics stores, as well as to friends for painting residential and commercial establishments.

At the outset, it is noted that the record of proceedings does not contain a copy of the field investigation results. Had such a record been inserted into the record of proceedings, the director's decision to revoke the employment-based petition would be well founded. Contrary to counsel's assertions, the director provided specific information in his notice of intent to revoke as to the investigation undertaken in the Philippines. Although counsel states that the investigation was incomplete and appears to suggest that CIS should conduct an additional investigation to allow [REDACTED] the former employer, to refute the information provided by the two individuals named in the investigation, counsel's remarks do not appear to be well-founded. First, it is the responsibility of the petitioner to refute any adverse information obtained in an investigation, not the beneficiary's alleged former employer. Further the new letter written by [REDACTED] and submitted by counsel to the record in 2002 is written on the letterhead for [REDACTED] at the [REDACTED] address, a business that, according to [REDACTED] ended its operations in 1983. [REDACTED] appears to suggest that the beneficiary was self-employed after he worked with [REDACTED] which appears to contradict the beneficiary's addenda on the amended Form ETA 750 that he was self-employed from 1978 to 1979 in San Pedro Laguna, or prior to his work with [REDACTED]. The use of letterhead in 2002 of a business that ended almost twenty years ago to verify the beneficiary's alleged employment, and [REDACTED] remarks about the beneficiary's self-employed work only confuses the record, and does not clarify the value of any testimony that [REDACTED] could provide.

Because the record of proceedings does not contain a record of the field investigation, the record lacks sufficient documentation to bolster the director's findings. Nevertheless, the director's comments with regard to the amended ETA submitted by counsel containing new information on the beneficiary's self-employment as a painter, and an amended number of the beneficiary's years of work experience from three years to four years, are well founded. When submitting an ETA Form 750 originally certified for one worker and then submitted for a second worker, the petitioner cannot change the academic levels of education, training or work requirements, or other special requirements sections, as described on the original certified ETA 750. If these information and employment items are different from employee to employee, the petitioner cannot submit the original certified ETA 750 with a second beneficiary's I-140 petition, and would be well advised to submit a new Form ETA 750 to the DOL for certification.

In addition, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become

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<sup>1</sup> It is not clear from counsel's wording to what "this" refers. For purposes of these proceedings, it is presumed counsel refers to an additional investigation that involved interviewing [REDACTED]

eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The priority date is the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). In the instant petition, the beneficiary would have had to have the required four years of work experience prior to August 14, 1991, the priority date identified on the original ETA 750. If the beneficiary, in the uncertified ETA 750 submitted to accompany the original certified Form ETA 750, did not have the four years of work experience as outlined in the original certified ETA 750, the service center would have been able to reject the petition prior to its initial adjudication. At a minimum, the service center could have been sent the I-140 petition back to the petitioner, noting the discrepancies in work experience, and providing the petitioner with an opportunity to withdraw the petition.

In sum, with regard to the amended ETA 750 submitted with the original certification, 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). Nevertheless, the AAO cannot overlook the fact that the record of proceedings does not contain the report of the investigation conducted in the Philippines. Such a report would have material bearing on the grounds for eligibility for the visa classification, namely, the beneficiary's previous work experience. Furthermore the observations contained in the investigative report, as reiterated by the director, do not appear to be conclusory, speculative, equivocal, or irrelevant. *Matter of Arias*. However, because the report is not in the record of proceedings, the AAO cannot conclude that the beneficiary's three years experience in the Philippines was fraudulent. However, because the petitioner has not sufficiently documented the beneficiary's claimed two years of work experience as a self-employed painter, the director's ultimate decision to revoke the petitioner was correct. While the beneficiary claims two years of self-employment as a painter, the record of proceedings does not contain sufficient compelling documentation support this claim, or the fact that such self employment was fulltime or that the beneficiary's duties could qualify as a custom painter/foreman, specifically the "foreman" duties.

Beyond the decision of the director, the petitioner did not establish that it has the ability to pay the proffered wage as of the 1991 priority date and to the present. Although the director in his notice of intent to revoke the I-140 petition, stated that the petitioner had not established its ability to pay the proffered wage, in his revocation notice, the director did not address the issue of the petitioner's ability to pay the proffered wage. The AAO will briefly address this issue. Upon review of the record, the petitioner has not submitted sufficient documentation to establish that it has the capability to pay the proffered wage, which is described on the Form ETA 750 as \$14.90 an hour, or an annual salary of \$30,160.

The record, as presently constituted, contains two IRS Forms 1040 for the years 1998 and 1999, nine Schedules C, for the years 1991 to 1999, along with W-2 Forms for the petitioner's employees for several years and state of California Forms D-6 for various quarters. Without more complete documentation, to include the petitioner's Forms 1040 from 1991 to the present, with accompanying schedules and attachments, the petitioner has not established that it has the ability to pay the entire proffered salary, or the difference between the beneficiary's actual wages and the proffered wage for the period of time in question. In addition, since the petitioner filed as a sole proprietor, he would have to establish that his financial resources are sufficient to not only pay the proffered wage, but also to support himself and any dependents listed on his federal income tax returns, as of the 1991 priority date and onward. Since the revocation of the instant petition is based on other reasons, the AAO will not review the petitioner's ability to pay proffered wage any further.

The director's decision to revoke the petition, based on the petitioner's inability to establish the beneficiary's four years of requisite work experience, shall stand, and the petition will be revoked.

**ORDER:** The appeal is dismissed.