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20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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FILE:

EAC 02 120 50227

Office: VERMONT SERVICE CENTER

Date:

**FEB 04 2009**

IN RE:

Petitioner:

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:

**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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the Director, Vermont Service Center. Based on the results of an overseas investigation, the director subsequently served the petitioner with Notice of Intent to Revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director 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 director's decision will be affirmed.

The petitioner is a restaurant. It sought to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor.

The record indicates that the I-140 was initially filed on February 15, 2002. It was approved on April 24, 2002. Based on the results of an overseas investigation, the director concluded that the I-140 was approved in error and issued a notice of intent to revoke the petition on June 1, 2006. The director concluded that the beneficiary's claimed employment history as a cook at the [REDACTED], [REDACTED], Brazil, from June 1994 to September 1997 could not be verified by the overseas consular officer.

The director based his revocation on the following:

Other employees who the overseas investigator contacted and claimed to be employed at the Brazilian restaurant during the relevant time period could not verify the beneficiary's employment. The director stated that they indicated that no male had ever worked as a cook, with one employee, a kitchen manager, stating that she had been employed by [REDACTED] the restaurant's owner, for 10 years and that she did not know any cook with the beneficiary's name.

[REDACTED] was unable to provide any verifiable tax documents to establish that the beneficiary was a legitimate employee from 1994 to 1997, claiming that the beneficiary had been paid "off the books." The owner's accountant of record from that time was contacted. She was eventually able to provide copies of documents which had been given to the beneficiary's family at their request in 2006. The director also noted that subsequent scrutiny by another accounting office, sought out by the consulate investigator, indicated that the documents the accountant provided, consisting of a "termination of work contract" and documents in the form of tax stubs that included tax deductions, were invalid. The opinion rendered by this accounting office indicated that information contained in these documents would be relevant to an officially registered employee, which might be used against the company in a legal proceeding. For that reason, a termination of work contract would not have been done for a non-registered "off-the-books" employee, such as the beneficiary. The consular investigation additionally indicated that the restaurant's owner was contacted on April 12, 2006, and he confirmed the beneficiary's employment during the three years claimed. He further stated that the beneficiary had offered to work for him as a cook and because it was not common for a male cook to be employed in the city or state of Minas region, he postponed registering the beneficiary as an official employee. He subsequently indicated that 'the time passed and [he] overlooked the need to make the beneficiary's employment agreement official.'

The consular report notes that [REDACTED] indicated that during his 20 years of business, the beneficiary was one of the few employees that was unregistered as he feared a labor grievance against his company. After the beneficiary quit, [REDACTED] stated that he never heard from the beneficiary again.

The consular investigator asked the owner to provide a document or letter from his accountant to show payment of wages to the beneficiary. It was provided and the accountant indicated that she was the owner's accountant until 1999. She also stated that the beneficiary's family had asked her a couple of months prior to provide verification of the beneficiary's work history at the restaurant. The accountant confirmed that she had a couple of documents consisting of pay statement(s) and a Termination of Work Contract, which were both given to the beneficiary's family. In what the consulate investigator considered an apparent contradiction, the accountant stated that because her firm finished business with the restaurant more than five years ago, she no longer had any other document for the restaurant.

The consulate investigator then questioned the accountant to explain how a non-official employee could have had the government tax deduction taken from the paystub and she replied that it was "only on paper." When the investigator requested why a Termination of Work Contract was also issued to this employee, the accountant stated that it was done only to protect the restaurant against labor violation charges. The investigator added that the accountant subsequently sent an e-mail confirming that these documents were issued by her office.

The petitioner was afforded thirty days to offer additional evidence or argument in opposition to the proposed revocation. In response, counsel states that the petitioner relies on: 1) [REDACTED] letter previously submitted to the file that supports the beneficiary's claimed employment; 2) [REDACTED] recent oral statement to USCIS that the beneficiary was his employee during the time period; and 3) the pay stubs and copy of the termination contract previously submitted that support the beneficiary's contention of the claimed Brazilian employment at the [REDACTED]

Counsel claims that the director's NOIR did not sufficiently identify the names, positions and time frame of employment of the employees who were consulted by the overseas investigator, and thus afford counsel the opportunity to submit an adequate rebuttal. Counsel also maintains that USCIS should provide the identity of the accounting firm who advised that the [REDACTED] would not issue pay stubs and a termination contract on an unregistered employee as well as a more detailed statement as to its qualifications to offer such an opinion. It is noted that these pay stubs and a copy of a termination contract are contained in the file.

The petition's approval was subsequently revoked on March 15, 2007, pursuant to section 205 of the Act, 8 U.S.C. § 1155. The director found that counsel's arguments raised in the response to the NOIR were insufficient to over the inconsistencies uncovered by the overseas investigation.

On appeal, counsel adopts its arguments submitted in response to the director's NOIR and asserts

that the director failed to respond adequately to the petitioner's request for more specificity.

Section 205 of 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 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).

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3) further provides:

(ii) *Other documentation—*

(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.

Eligibility in this case rests, in part, upon the petitioner demonstrating that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg.

Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 19, 2001. As set forth in item 14 of the ETA 750, the certified position requires two years of work experience in the job offered of a cook. The ETA 750B, signed by the beneficiary on January 9, 2001, lists only the position at the [REDACTED] in Brazil from June 1994 to September 1997 as his relevant employment history.

The regulation at 8 C.F.R. § 103.2(b)(3)(i) provides that if a decision will be adverse to the petitioner and is based on derogatory information considered by the USCIS, of which the petitioner is unaware, then the petitioner 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.

In trying to locate [REDACTED] the restaurant owner where the beneficiary reportedly worked, the overseas investigator also contacted other employees at the [REDACTED]. These employees could not remember the beneficiary ever working at the restaurant. On April 11, 2006, overseas investigator called the restaurant and spoke to an employee, who confirmed that the restaurant has been open for six years, and that [REDACTED] was the owner. She told the overseas investigator that she did not know the beneficiary and added that during all the time she has been working for that restaurant, only women have worked as cooks.

The AAO does not find counsel's assertions related to the employment documentation provided in support of the beneficiary's employment to be persuasive, but agrees that the two employees mentioned by the consulate investigator do not particularly confirm or deny the beneficiary's employment at the restaurant during the pertinent period. The employee's recollections, as to whether she knew the beneficiary, was not specifically probative of whether the beneficiary worked at the restaurant, since neither her dates of employment, position held and statement as to how long the restaurant was open appears to refer to the period from June 1994 to September 1997. She did state that she did not know the beneficiary, but that as far as she knew, only women had worked as cooks. It is noted that the consulate investigation confirmed that the restaurant was established in 1985.

The consulate letter also refers to one other employee. The report states that the number that one of the employees gave to the investigator in order to reach the restaurant's owner actually was for another business owned by him—a lunch/dinner delivery service. When the investigator called that number, a woman answered the call, and stated that she has been working for the restaurant's owner for 10 years. She added that she had worked at [REDACTED] (the restaurant in question) before working at the lunch/delivery service. She also stated that she did not know anyone or any cook with the beneficiary's name. She mentioned that she only knew cooks who were women. The woman stated that she only worked for the [REDACTED] on the night shift. She mentioned that the [REDACTED] was sold to the owner's brother, about a year ago. She stated that to learn more about former employees, however, '[the restaurant's owner was still the right person to speak with.'

It is not clear how long this employee worked at either of these restaurants, what position she held at

the [REDACTED], and whether her dates of employment there would have occurred during the same period of time as the beneficiary's term of employment. Her statement in common with the other employee and the [REDACTED] appears to be that it is uncommon to see male cooks in this city.

That said, we do find the narrative from the accountant to be credible or probative of the beneficiary's employment at the restaurant. The accountant stated that she had not handled the restaurant's accounting for more than five years, and did not have any other document for the restaurant, yet was able to coincidentally retrieve pay statements and a Termination of Work Contract for a specific employee, whose employment dated from the 1994 to 1997 period, in response to his family's recent inquiry. She admitted that her office issued the pay statements and Termination of Work Contract and she also indicated that they were fabricated and only on paper. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Additionally, it is observed that the owner's statements raise some questions. He stated that he had not heard from the beneficiary since the beneficiary quit in 1997, but the owner provided an employment verification letter in 2001. Moreover, one wonders who referred the beneficiary's family to an accountant who had not handled [REDACTED]'s work since 1999. Further, why would a restaurant owner hire a male cook upon the cook's request where it was not a common practice, not officially register him as a worker yet take the trouble to issue fabricated documents for the beneficiary through his accountant. There might be reliable answers to these queries, but taken together with the other evidence, the AAO must conclude that the director's decision to revoke the petition's approval was justified based upon the petitioner's failure to provide convincing evidence of his actual employment at the [REDACTED] in Brazil and overcome the discrepancies noted in the overseas investigation.

The director in his decision stated that the petitioner's response to the NOIR was "unsupported by a single piece of independent verifiable corroborative evidence to overcome the issues raised." On appeal, the petitioner does not submit any new evidence, but counsel requests the AAO to consider the petitioner's issues raised in the response to the NOIR.

In view of the foregoing, the AAO concludes 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 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 this case, the evidence contained in the record at the time the decision was rendered, warranted such denial.

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.