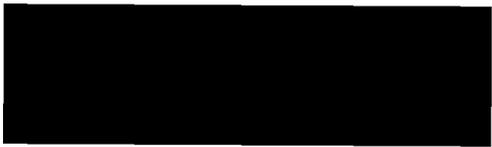


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

Date: **APR 23 2012** Office: TEXAS SERVICE CENTER FILE:

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:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On September 27, 2002, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on January 7, 2004. However, the Director of the Texas Service Center ("the director") revoked the approval of the immigrant petition on May 4, 2009, and the petitioner subsequently appealed the director's decision. The petition is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The appeal will be remanded to the director for further action, consideration, and the entry of a new decision.

The petitioner is a restaurant. It seeks to permanently employ the beneficiary 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).¹ As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). As noted above, the petition was initially approved in January 2004, but the approval was revoked in May 2009. The director found that the petitioner did not follow the Department of Labor (DOL) recruitment requirements and that it obtained the approval of the Form ETA 750 by fraud or by material misrepresentation. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal to the AAO, current counsel for the petitioner contends that United States Citizenship and Immigration Services (USCIS) lacks good and sufficient cause to revoke the approval of the petition.² Specifically, counsel states that the director's NOIR did not contain specific adverse information relating to the petition or the petitioner in the instant proceeding, nor did it request the petitioner to present specific evidence. Citing *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1988), counsel contends that where a notice of intention to revoke is based only on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence and given a reasonable opportunity to respond, the director cannot revoke the approval of the visa petition.

Counsel further claims that the director's finding of fraud or material misrepresentation against the petitioner is not supported by the evidence of record. Counsel states that the director

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 Current counsel of record, [REDACTED] will be referred to as counsel throughout this decision. Previous counsel, [REDACTED] will be referred to as previous or former counsel or by name. The AAO notes that [REDACTED] was suspended from the practice of law before the Immigration Courts, Board of Immigration Appeals (BIA), and Department of Homeland Security (DHS) for a period of three years from March 1, 2012 to February 28, 2015. [REDACTED] representations in this matter will be considered.

included no specific evidence of fraud or material misrepresentation or information relating to the petitioner, petition, or documents in either the NOIR or the Notice of Revocation (NOR). With respect to the evidence submitted in response to the director's NOIR, counsel indicates that the director wrongly rejected the evidence and should have considered it in determining whether the petitioner followed the DOL recruitment procedures or whether the beneficiary had the requisite work experience in the job offered before the priority date.

Counsel concludes that the director sent the NOIR and revoked the approval of the petition solely because the petition in the instant proceeding was filed by [REDACTED]

Finally, counsel notes that the director erred when he revoked the petition under the authority of 8 C.F.R. § 205.1. This regulation, according to counsel, only applies to automatic revocation and is therefore the wrong regulation to revoke the petition in the instant proceeding.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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.³

As a procedural matter, the AAO agrees with counsel that 8 C.F.R. § 205.1 only applies to automatic revocation and is not the proper authority to be used to revoke the approval of the petition in this instant proceeding. Under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if:

- a) The labor certification is invalidated pursuant to 20 C.F.R. § 656;
- b) The petitioner or the beneficiary dies;
- c) The petitioner withdraws the petition in writing; or
- d) The petitioner is no longer in business.

Here, the labor certification has not been invalidated; neither the petitioner nor the beneficiary has died; the petitioner has not withdrawn the petition; nor has the petitioner gone out of business. Therefore, the approval of the petition cannot be automatically revoked. The director's erroneous citation of the applicable regulation is withdrawn. Nonetheless, as the director does have revocation authority under 8 C.F.R. § 205.2, the director's denial will be considered under that provision under the AAO's *de novo* review authority.

One of the issues raised by counsel on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, states:

³ 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).

The Secretary 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. Such revocation shall be effective as of the date of approval of any such petition.

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).

However, before the director can revoke the approval of the petition, the regulation requires that notice must be provided to the petitioner. More specifically, 8 C.F.R. § 205.2 reads:

(a) *General.* Any Service [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 Service [USCIS]. (emphasis added).

In addition, 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 the Service [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.

Further, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *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.

Here, the director wrote in the Notice of Intent to Revoke (NOIR):

The Service [USCIS] is in receipt of information revealing the existence of fraudulent information in the petitions with Alien Employment Certificates (ETA 750) and/or the work experience letters in a significant number of cases submitted

to USCIS by counsel for the petitioner in the reviewed files [referring to the petitioner's former attorney of record, ██████████].

The director advised the petitioner in the NOIR that the instant case might involve fraud since the petition was filed by ██████████ who is under USCIS investigation for submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions. The director generally questioned the beneficiary's qualifications. The director also specifically stated that in many of the other petitions filed by ██████████ the respective petitioners had not followed DOL recruitment procedures. Because of these findings in other cases and since ██████████ filed the petition in this case, the director on February 10, 2009 issued the NOIR, advising the petitioner to submit additional evidence to demonstrate that the beneficiary had at least two years of work experience in the job offered before the labor certification application was filed with the DOL and that the petitioner complied with all of the DOL recruiting requirements.

The AAO finds that the director appropriately reopened the approval of the petition by issuing the NOIR. However, the director's NOIR was deficient in that it did not give the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director questioned the beneficiary's qualifications and indicated that the petitioner had not properly advertised for the position. The NOIR neither provided nor referred to specific evidence or information relating to the petitioner's failure to comply with DOL recruitment or to the beneficiary's lack of qualifications in the present case. The director also did not state which recruitment procedures were defective. The director did not notify the petitioner of specific fraud or misrepresentation. Without specifying or making available evidence specific to the petition in this case, the petitioner can have no meaningful opportunity to rebut or respond to that evidence. *See Ghaly v. INS*, 48 F.3d 1426, 1431 (7th Cir. 1995). Because of insufficient notice to the petitioner of derogatory information, the director's decision will be withdrawn. Nevertheless, the AAO agrees with the director that the approval of the petition was erroneous, and will return the petition to the director for the issuance of a new NOIR.

The next issue raised on appeal is whether the director properly concluded that the petitioner did not comply with the recruitment procedures of the DOL.

To demonstrate that the petitioner fully complied with the DOL recruitment requirements, the petitioner and/or the beneficiary submitted the following evidence:

- A copy of the letter addressed to the local DOL from ██████████ on April 24, 2001 requesting reduction in recruitment.

Counsel in her appellate brief indicates that no other evidence is available. Nevertheless, counsel contends that the documentation submitted above is sufficient to show that the petitioner conducted the reduction in recruitment process, which was allowed at the time.⁴ Counsel

⁴ Before 2005, the DOL regulations allowed employers to conduct two types of recruitment procedures – the supervised recruitment process and the reduction in recruitment process. *See* 20

additionally states on appeal that the DOL would not have approved the petitioner's Form ETA 750 had it not followed the DOL recruitment requirements.

The AAO cannot affirm the director's finding that the recruitment procedures were not followed. The record has not been sufficiently developed to support that finding. In addition, the petitioner has not been specifically notified of the derogatory information involving the recruitment process, as outlined above. Moreover, since there was no requirement to keep recruitment records once the labor certification had been approved by the DOL, the director may not make an adverse finding against the petitioner, if as in this case, the petitioner claims it no longer has the supporting documentation over five years after the labor certification was approved.⁵ Therefore, the director's conclusion that that the petitioner failed to follow the DOL recruitment procedures is erroneous and is withdrawn.

C.F.R. § 656.21 (2002). Under the supervised recruitment process an employer must first file a Form ETA 750 with the local office (State Workforce Agency), who then would: date stamp the Form ETA 750 and make sure that the Form ETA 750 was complete; calculate the prevailing wage for the job opportunity and put its finding into writing; and prepare and process an Employment Service job order and place the job order into the regular Employment Service recruitment system for a period of thirty (30) days. *See* 20 C.F.R. §§ 656.21(d)-(f) (2004). The employer filing the Form ETA 750, in conjunction with the recruitment efforts conducted by the local DOL office, should: place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication and supply the local office with required documentation or requested information in a timely manner. *See* 20 C.F.R. §§ 656.21(g)-(h) (2004).

Under the reduction in recruitment process, the employer could, before filing the Form ETA 750 with the local office, conduct all of the recruitment requirements including placing an advertisement in a newspaper of general circulation and posting a job notice in the employer's place of business. *See* 20 C.F.R. §§ 656.21(i)-(k).

⁵ The AAO acknowledges that at the time the petitioner filed the labor certification application with the DOL for processing in April 2001, employers were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the DOL. *See* 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991. Not until 2005, when the DOL switched from paper-based to electronic-based filing and processing of labor certifications, were employers required to maintain records and other supporting documentation, and even then employers were only required to keep their labor certification records for five years. *See* 69 Fed. Reg. 77386, Dec. 27, 2004 as amended at 71 Fed. Reg. 35523, June 21, 2006; *also see* 20 C.F.R. § 656.10(f) (2010).

However, the AAO acknowledges the authority and interest of USCIS to request such documentation pursuant to our invalidation authority at 20 C.F.R. § 656.31(d) and the interest of the petitioner in proving its case by retaining and submitting such documentation to USCIS particularly in response to a fraud investigation. Further, the petitioner must resolve inconsistencies in the record by independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

For the same reason, the AAO cannot affirm the director's finding that the petitioner engaged in fraud and/or material misrepresentation. The evidence of record currently does not have a sufficiently developed factual record to support the director's finding of fraud or willful misrepresentation in connection with the labor certification process or the presentation of the beneficiary's credentials. Thus, the director's finding of fraud or misrepresentation is withdrawn. In summary, the AAO withdraws the director conclusion that the petitioner failed to follow the DOL recruitment requirements. The AAO also withdraws the director's finding of fraud and/or material misrepresentation against the petitioner.

However, the petition is currently not approvable, as the record does not establish that (a) the beneficiary is qualified to perform the services of the proposed employment as of the priority date and (b) the petitioner has the continuing ability to pay the proffered wage from the priority date. The petition will be remanded to the director for issuance of a NOIR, in accordance with 8 C.F.R. § 205.2(a).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

1. The Beneficiary's Qualifications

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 – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL – 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 the DOL on April 30, 2001. The name of the job title or the position for which the petitioner seeks to hire is “cook.” Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered.

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 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).

As set forth above, the proffered position requires the beneficiary to have a minimum of two years of work experience in the job offered. On the Form ETA 750, part B, signed by the beneficiary on March 7, 2001, he represented that he worked 40 hours a week as a cook at [REDACTED] from May 1997 to June 2000. To show that the beneficiary had the requisite work experience in the job offered before April 30, 2001, the petitioner initially submitted the following evidence:

- A sworn statement dated May 4, 2001 from [REDACTED] stating that the beneficiary worked as a cook at [REDACTED] from May 15, 1997 to June 20, 2000.

In response to the director's NOIR, to demonstrate that the beneficiary had the requisite work experience in the job offered before the priority date, counsel for the petitioner submits:

- A sworn statement dated March 2, 2009 from [REDACTED] stating that the beneficiary worked as a cook at [REDACTED] located in Timoteo, [REDACTED] from May 15, 1997 to June 20, 2000;
- A copy of the business registration or CNPJ of [REDACTED]
- A copy of the contractual agreement between [REDACTED] and [REDACTED] in 1974 establishing [REDACTED]
- A copy of a letter dated October 8, 1991 reflecting some difficulties in registering the [REDACTED] with the town hall;
- [REDACTED] official registration card; and
- A copy of a tax receipt showing tax payments by [REDACTED] in 1996.

In adjudicating the appeal, the AAO observes that the beneficiary, in his Biographic Information (Form G-325) which he filed along with his Application to Register for Permanent Residence or Adjust Status (Form I-485), claimed to have lived in the city of Belo Horizonte, Minas Gerais, Brazil from June 1995 to July 1998. It is not clear where the beneficiary resided from July 1998 until before he came to the United States on July 29, 2000. Based on the evidence submitted above, the location of [REDACTED] is in the city of Timoteo, Minas Gerais, Brazil. It is unlikely that the beneficiary lived in Belo Horizonte, Minas Gerais, and worked in Timoteo, Minas Gerais, in 1997 and 1998.⁷

⁶ Businesses that are officially registered with the Brazilian government are given a unique CNPJ number. CNPJ (Cadastro Nacional da Pessoa Juridica) is similar to the federal tax ID or employer ID number in the United States. The director stated in the Notice of Revocation that the Department of State has determined that the CNPJ provides reliable verification with respect to the adjudication of employment-based petitions in comparing an individual's stated hire and working dates with a Brazilian-based company to that Brazilian company's registered creation date.

⁷ The straight-line distance between Belo Horizonte, Minas Gerais, and Timoteo, Minas Gerais, according to <http://www.distancecalculator.globefeed.com>, is 140.47 km (or 87.29 miles). The estimate road distance is more than 140.47 km or 87.29 miles. (Last accessed January 25, 2012).

Further, none of the evidence submitted above establishes that [REDACTED] and [REDACTED] are one and the same company.

Whether or not the beneficiary had two years of experience as a cook before the priority date is material in this case, since the DOL would not have approved the labor certification had it known that the beneficiary was not qualified for the job opportunity at issue. If the petitioner and/or the beneficiary misrepresented the beneficiary's past work experience by submitting a fraudulent work experience letter or sworn statement, the DOL would have been unable to make a proper investigation of the facts when determining certification because the fraudulent submission shut off a line of relevant inquiry.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. An alien is inadmissible to the United States where he or she "by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible." See section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182(a)(6)(c).⁸ USCIS may also invalidate the labor certification based on fraud or willful misrepresentation. See 20 C.F.R. § 656.31(d).⁹

⁸ The term "willfully" in the statute has been interpreted to mean "knowingly and intentionally," as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. See *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) ("knowledge of the falsity of the representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary"). Materiality is determined based on the substantive law under which the purported misrepresentation is made. See *Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); see also *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A material issue in this case is whether the beneficiary has the required experience for the position offered, since the substantive law governing the approval of immigrant visa petitions requires an employer and alien beneficiary to demonstrate that the alien meets the minimum qualifications for the job offered. See 8 C.F.R. §§ 204.5(g)(1), 204.5(l)(3)(ii)(B)-(C). Moreover, as a necessary precondition for obtaining a labor certification, employers must document that their job requirements are the actual minimum requirements for the position, see 20 C.F.R. § 656.21(b)(5) (1998), and that the alien beneficiary meets those actual, minimum requirements at the time of filing the labor certification application, see *Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant's eligibility and which might well have resulted in a proper determination that the application be denied. See *Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961).

⁹ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, Form ETA 9089, replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in

On remand, the director should issue a new Notice of Intent to Revoke (NOIR) and inform the petitioner about the derogatory information regarding where the beneficiary lived and worked between 1997 and 2000, and give the petitioner a reasonable period of time to respond. 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). Thus, the director should advise the petitioner to submit independent objective evidence, such as copies of the beneficiary's paystubs, payroll records, tax documents, or financial statements or other evidence, i.e. Brazilian booklet of employment and social security, to show that the beneficiary had the experience in the job offered before the priority date. The director should give the petitioner a reasonable period of time to respond.

Upon consideration of the response, the director may consider whether the documentation submitted by the petitioner of the beneficiary's work experience was fraudulent or a misrepresentation of a material fact as discussed above. The director may invalidate the labor certification if he finds fraud or material misrepresentation involving the labor certification.

2. 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 Federal Register on December 27, 2004, with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). The regulation cited at 20 C.F.R. § 656.31(d) is the pre-PERM regulation applicable to the instant case. The regulation stated:

If a Court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefor shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

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).

Here, as noted above, the Form ETA 750 was accepted by the DOL for processing on April 30, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$12.57 per hour or \$22,877.40 per year (based on a 35-hour work per week). Therefore, the petitioner is required to demonstrate that it has the ability to pay \$12.57 per hour or \$22,877.40 per year from April 30, 2001 and continuing until the beneficiary receives his legal permanent residence.

The petitioner has already submitted the following evidence to show that it has the continuing ability to pay the proffered wage from April 30, 2001:

- A copy of the petitioner's federal tax return (Form 1120S) for the year 2000;
- Copies of the Forms W-2 of [REDACTED] and [REDACTED] for the year 2001;¹⁰ and
- A copy of the petitioner's payroll report for the week ending May 26, 2002.

The evidence submitted above is not sufficient to demonstrate that the petitioner has the ability to continuously pay the proffered wage from the priority date until the beneficiary receives his permanent residence, or until the beneficiary ported to work for another employer in a substantially similar position, assuming that section 204(j) of the Act; 8 U.S.C. § 1154(j) as amended by section 106(c) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21) (Public Law 106-313), applies in this instant proceeding.¹¹

¹⁰ [REDACTED] stated, when submitting the Form I-140 petition, that the petitioner would be replacing these employees with the beneficiary.

¹¹ The AAO notes that the beneficiary claimed in his Biographic Information (Form G-325) which he signed on March 31, 2006 that he worked for the petitioner from April 2005 to the date he signed the Form G-325. The record contains no evidence such as paystubs or Forms W-2 or 1099-MISC to corroborate the claim that he changed jobs. Further, it is not clear when the beneficiary ported, where he ported to, and what his position is in any new job.

On the subject of porting, the AAO finds that where the approval of the Form I-140 petition is revoked for good and sufficient cause, the beneficiary cannot invoke the portability provision of section 204(j), because there would not be a valid, approved petition underlying the request to adjust status to permanent residence by virtue of having ported to the same or similar job. *See Herrera v. USCIS*, 571 F.3d 881 (9th Cir. July 6, 2009) (the Ninth Circuit held that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start).

Further, based on the evidence submitted in response to the director's NOIR and on appeal, the petitioning company appeared to have been sold by its owner, [REDACTED] in 2008. Where there is no active business, no legitimate job offer exists, and the request that a foreign

On remand, the director should issue a NOIR requesting the petitioner to demonstrate the continuing ability to pay the proffered wage from the priority date until the present or until the beneficiary ported to work for another similar employment. Therefore, to meet the burden of proving by a preponderance of the evidence that the petitioner has the continuing ability to pay the proffered wage from the priority date, the director, in the new NOIR, should, at a minimum, request the following additional evidence from the petitioner:

- Copies of the petitioning organization's federal tax returns, annual reports, and/or audited financial statements for the years 2001 through 2008 (when the business was sold);
- Copies of the beneficiary's W-2s, 1099-MISCs, paystubs, or other documents that the petitioning organization issued to the beneficiary at any time since 2001; and
- Evidentiary documents (i.e. letters, paystubs, and so forth) establishing when the beneficiary ported, where he ported to, and what position he is currently holding in his position with the ported to company.

In summary, the director's decision to revoke the approval of the petition is withdrawn. The approval of the petition, however, may not be reinstated under the facts of record. The petition is, therefore, remanded to the director for issuance of a new Notice of Intent to Revoke (NOIR) to the petitioner, specifically outlining the lack of independent objective evidence of the beneficiary's qualifications and of the petitioner's ability to pay, as discussed above. The director may request any evidence relevant to the outcome of the decision and should afford the petitioner a reasonable opportunity to respond. Upon review and consideration of any response, the director shall enter a new decision.

ORDER: The director's decision to revoke the approval of the petition is withdrawn. However, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not reinstate the approval of the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a NOIR and new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.

worker be allowed to fill the position listed in the petition has become moot. 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.