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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: **AUG 13 2012**

Office: TEXAS SERVICE CENTER



IN RE:



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 March 14, 2012 the Director, Texas Service Center, revoked the approval of the petition, invalidated the labor certification, and certified the decision to the Administrative Appeals Office (AAO) for review pursuant to 8 C.F.R. § 103.4(a).¹ Upon review, the AAO will affirm the director's decision in part and withdraw the director's decision in part.

1. Facts and Procedural History

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).² As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750).

The preference visa petition was initially approved by the Director, Vermont Service Center, on May 21, 2002, but on January 23, 2009 the Director, Texas Service Center (the director), reopened the matter and sent the petitioner a Notice of Intent to Revoke (NOIR). In the January 23, 2009 NOIR the director requested the petitioner to submit additional evidence to demonstrate that the petitioner conducted good faith recruiting efforts and that the beneficiary had the requisite work experience as a cook before the priority date. The director specifically identified in the January 23, 2009 NOIR that the CNPJ number listed on the letter of employment dated March 5, 2001 for the beneficiary from [REDACTED] is not a valid number.³

In response, counsel for the petitioner at the time, [REDACTED] submitted the following evidence:

¹ Under 8 C.F.R. § 103.4(a)(1) certifications by district directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact."

² 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.

³ [REDACTED] or [REDACTED] is a unique number given to every business registered with the Brazilian authority. In Brazil, a company can hire employees, open bank accounts, buy and sell goods only if it has a [REDACTED].

⁴ The AAO notes that [REDACTED] was under U.S. Citizenship and Immigration Services (USCIS) investigation at the time the NOIR was sent for submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions. [REDACTED] has since been suspended from practice before the United States Department of Homeland Security for three years from March 1, 2012. His representations in this matter will be considered; however, he will not be sent a copy of this decision. He will be referred to throughout this decision as previous counsel or by name.

- Copies of the newspaper tear sheet for the position of “cooks” published in the *Boston Herald* on November 5, 2000 and November 29, 2001;
- A copy of a letter dated February 14, 2001 addressed to [REDACTED] from the *Boston Herald* stating that the job ads would also be posted online on jobfind.com for 30 days;
- A statement dated February 13, 2009 from [REDACTED] stating that he is the co-owner of [REDACTED] - [REDACTED] that the beneficiary worked at his establishment as a baker from January 8, 1995 to December 28, 1997, and that the previous letter of employment for the beneficiary had a wrong CNPJ number;⁵ and
- A copy of the CNPJ (business registration) of [REDACTED]

[REDACTED] also claimed that the beneficiary no longer worked for the petitioner and had ported in accordance with section 204(j) of the Act. Accompanying this claim was a letter dated January 29, 2009 from [REDACTED] Payroll Benefits Specialist, stating that the beneficiary is currently working at [REDACTED] as a bakery production team member earning \$15 per hour and that the beneficiary has been with the company since October 26, 2007.⁶

On March 20, 2009 the director issued a Notice of Revocation (NOR), stating that none of the evidence submitted showed that the petitioner followed DOL recruitment requirements.

The beneficiary through his counsel, [REDACTED] of Joyce and Associates, P.C., subsequently filed an appeal on Form I-290B Notice of Appeal or Motion with the AAO. On August 31, 2009 the Director, Texas Service Center, rejected the appeal, stating that neither the beneficiary nor the beneficiary’s counsel was entitled to file the appeal. The director also indicated that evidence of record did not reflect that the beneficiary had the required two years of work experience in the position of cook or in the alternate occupation of assistant cook before the priority date.⁷

⁵ The CNPJ number listed on the March 5, 2001 letter from [REDACTED] was [REDACTED]

⁶ The record also contains a letter dated September 3, 2004 from [REDACTED] stating that the beneficiary works as a full time baker earning approximately \$600 per week.

⁷ Although not raised by the director, the AAO notes that this appeal was also untimely filed. In order to timely file an appeal, the regulation at 8 C.F.R. § 205.2(d) provides that the affected party must file the complete appeal within 15 days after service of the decision to revoke the approval. If the decision was mailed, the appeal must be filed within 18 days. See 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the date of actual receipt. See 8 C.F.R. § 103.2(a)(7)(i). Here, as noted above the director revoked the approval of the petition on

On July 12, 2010 the director reopened the matter *sua sponte* pursuant to 8 C.F.R. § 103.5(a)(5) and withdrew the decision issued on March 20, 2009 (the NOR).

On the same day (July 12, 2010), the director issued a second NOIR identifying the following deficiencies in the petition:

- a) Possible fraud in the employment-based immigrant visa petition filed by [REDACTED];
- b) Insufficient documentation to show that the petitioner followed DOL recruitment requirements;
- c) Lack of documentation to show the beneficiary's qualifications (the position offered in the instant case is for a cook, but all of the evidence submitted reflects that the beneficiary was a baker, and therefore the beneficiary is not qualified to perform the duties of the position); and
- d) The petitioner is no longer doing business in the U.S., and as a result, the job offer upon which the petition is based is no longer valid.

In response to the director's July 12, 2010 NOIR, counsel for the beneficiary contended that the director did not have good and sufficient cause to revoke the approval of the petition, as required by section 205 of the Act. Specifically, counsel stated that the director failed to provide specific derogatory information relating to the petition and the petitioner in the instant case. The July 12, 2010 NOIR, according to counsel, did not highlight any specific discrepancies pertaining to the labor certification process, nor does it cite any concrete basis for its belief that the requirements were not met in this case, other than its vague "guilty by association" logic.

Moreover, counsel indicated that the underlying labor certification in this case could not have initially been approved by DOL without evidence that the petitioner had taken appropriate steps to recruit American workers for the position pursuant to the regulations in effect at the time of filing. *See e.g.* 8 C.F.R. § 656.24 (2002).

Counsel also noted that the beneficiary's job experience as a baker is substantially similar to the job offered as a cook in this case. Specifically, counsel stated:

The distinction made by USCIS between the occupations of Baker and Cook is insufficient to justify the revocation of the Petitioner's approved I-140 petition based on the Department of Labor's own standards. *See* [July 12, 2010] NOIR at 3.

...

March 20, 2009. The appeal was received by the director on June 3, 2009 or 75 days after the decision was issued.

A search of the O*Net database reveals no practical distinction between the occupations of Baker and Cook. In fact, the O*Net website indicates that the original occupational code for “Bakers, Bread and Pastry,” 51-3011.01, is no longer in use, and the website instead redirects the visitor to occupational code 35-1011.00 used for “Chefs and Head Cooks,” which is presumably all-encompassing. Under the description for this latter occupational classification, “Baker (Hotel and Restaurant)” is recognized as an apprenticeable specialty for “Chefs and Head Cooks” and “Pastry Chef” is given as an example of a reported job title that would fit under the same category. The operation of “specialized bakery equipment” is also listed as one of the essential work activities for “Chefs and Head Cooks.

Counsel acknowledged that the petitioner no longer maintained its business operation in the U.S.; however counsel asserted that the beneficiary no longer sought to qualify for any benefit based on an ongoing offer of permanent employment from the petitioner. The beneficiary, according to counsel, had exercised his right to port to new employment pursuant to section 204(j) of the Act and that he had a new offer of employment from [REDACTED]

Counsel further made the argument that the beneficiary, and not the original petitioner, shall have standing to file the appeal with the AAO since (a) the beneficiary has ported to other employers doing similar jobs to the job offered by the petitioner after the petition has been approved,⁸ and (b) because the beneficiary’s application to adjust status (Form I-485) had been pending and had remained unadjudicated for more than 180 days,. This, according to the beneficiary’s counsel, is allowed by the job flexibility provisions of section 204(j) of the Act, 8 U.S.C. § 1154(j), as added by section 106(c) of the American Competitiveness in the Twenty First Century Act of 2000 (AC21).

On September 8, 2010 the director issued a Notice of Revocation (NOR) indicating that the petitioner failed to establish that the beneficiary had the requisite work experience in the job offered before the priority date. The director found, after reviewing the O*Net website (<http://online.onetcenter.org>) that cooks and bakers are separate occupations requiring different skills and categorized under distinct standard occupational classifications (SOCs).

The director also found that that the petitioner failed to establish that it followed DOL recruitment requirements, as no additional evidence was submitted. Finally, the director stated that counsel’s argument concerning portability of section 204(j) of the Act is irrelevant in this case, since the petitioner no longer has any intention to employ the beneficiary. The director stated, “The NOIR dated July 12, 2010 noted that because the petitioner was no longer operating

⁸ On appeal to the AAO (which the director rejected in August 2009), counsel for the beneficiary indicated that the beneficiary left the petitioner in 2004 to work for [REDACTED] as a baker because the petitioner abruptly closed its business operation in the United States (the petitioner is a Toronto-based corporation). The beneficiary’s counsel further stated that after working at Russo’s for approximately three and a half years the beneficiary ported once again to work at Whole Foods Market as a bakery production team member.

in the U.S., there was not a valid offer of full-time, permanent employment from a qualifying organization pursuant to section 203(b)(3) of the Act.”

The director’s September 8, 2010 NOR came with the following instruction:

Your previously filed appeal has been reopened on U.S. Citizenship and Immigration Services (USCIS) motion and forwarded to the Administrative Appeals Office for consideration. The filing fee of \$585 is not required to appeal the revocation of your immigrant petition.

Counsel for the beneficiary subsequently forwarded a response to the director’s September 8, 2010 NOR stating that USCIS failed to state good and sufficient cause to revoke the approval of the petition, that the petitioner had submitted sufficient evidence to demonstrate that the beneficiary had the requisite work experience before the priority date, and that the decision to revoke the approval of the petition years after its initial approval is a violation of procedural due process.

Counsel also contended that the beneficiary has standing to appeal the director’s decision. Specifically, counsel indicates:

Denying standing to beneficiaries with approved employment-based visa petitions who have legally “ported” to other employment frustrates Congressional intent in the American Competitiveness in the Twenty-First Century Act of 2000 (“AC21”). Pub. L. 106-23 (Oct. 17, 2000). This act amended the INA to permit the beneficiaries of approved I-140 petitions whose adjustment applications had been pending for more than 180 days to change employers without invalidating their I-140 petitions. *Id.* at § 206; *See* section 204(j) of the Act; 8 U.S.C. § 1154(j).

Moreover, due process requires that beneficiaries who have legally “ported” to other employment have standing to challenge the revocation of their approved petitions. By not allowing beneficiaries to challenge the revocation of their approved petitions, USCIS takes away the beneficiary’s due process right to seek adjustment of status to that of a permanent resident. A beneficiary’s interest in an approved employment-based visa petition is strongest in cases where the beneficiary has changed jobs in reliance on the approved petition, insofar as it allows him to seek adjustment of status without the support of his original petitioner, and where he has indeed cut ties with the original petitioner, or where the original petitioner no longer exists, as in the instant case.

The director forwarded the matter to the AAO as an appeal.

Upon *de novo* review, the AAO withdrew the director’s decision dated August 31, 2009 rejecting the June 3, 2009 appeal. The AAO also withdrew the July 12, 2010 Service motion, the July 12,

2010 NOIR, and the September 8, 2010 NOR. The AAO then remanded the matter to the director of the Texas Service Center for consideration as a motion to reconsider and the opportunity to properly certify his decision to the AAO.⁹

On May 16, 2011 the director withdrew the original decision revoking the approval of the petition [referring to the September 8, 2010 NOR].

The director then issued another NOIR on May 17, 2011 indicating that (a) the petitioner failed to establish that it followed DOL recruitment requirements; (b) the beneficiary did not have the requisite work experience in the job offered as of the priority date; and (c) the petition could not be approved since the petitioner no longer operates in the U.S., and consequently, there is no longer a valid job offer.

In response to the May 17, 2011 NOIR counsel for the beneficiary submitted a sworn statement dated June 3, 2011 from [REDACTED] stating that he is the co-owner of [REDACTED] that the beneficiary worked at his establishment as a baker from January 8, 1995 to December 28, 1997, and that the March 5, 2001 letter for the beneficiary was typed on the accountant's letterhead [REDACTED] was the business' accountant).

Counsel also attached a copy of her response to the director's September 8, 2010 NOR (where she argued that (a) USCIS failed to state good and sufficient cause to revoke the approval of the petition, (b) the petitioner had submitted sufficient evidence to demonstrate that the beneficiary had the requisite work experience before the priority date, and (c) the decision to revoke the approval of the petition years after its initial approval is a violation of procedural due process.

On March 14, 2012 the director revoked the approval of the petition and certified the decision to the AAO for review pursuant to 8 C.F.R. § 103.4(a). The director found that (a) the beneficiary did not have the requisite work experience in the job offered – that baker is not the same as cook – and (b) since the petitioner no longer operates in the U.S., the job offer is no longer valid and the revocation of the approval must be affirmed.

2. The Affected Party and Section 204(j) of the Act Portability

A threshold issue in this case is whether the beneficiary or his counsel has standing to continue the proceedings in the instant case.

Counsel in her argument essentially claims that the beneficiary who has ported to another employer under AC21 becomes the affected party as defined by the regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B), and therefore, has legal standing to appeal the revocation of the visa petition or to continue the proceedings in this case.

⁹ The director ordered the appeal to be forwarded to the AAO “for review” which fails to comply with the standards and criteria set forth at 8 C.F.R. § 103.4 for certifying a decision to the AAO.

Counsel's assertions run contrary to the regulations, however. The regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) specifically states that "an affected party is the person or entity with legal standing in a proceeding, and it does not include the beneficiary of a visa petition." The explicit language of the regulation noted above states that the beneficiary and/or his counsel are not authorized to file the appeal in this matter, and the appeal, since it was authorized by the beneficiary and filed by the beneficiary's counsel in this case, was improperly filed. 8 C.F.R. § 205.2(d); 8 C.F.R. § 103.3(a)(1)(iii)(B); 8 C.F.R. § 103.3(a)(2)(v)(A).

Further, the beneficiary may not take the place of and become the petitioner of an I-140 petition after porting under AC21.

To address this issue, it is important to analyze section 106(c) of AC21 and determine the interpretation of the statute as intended by Congress. Specifically, section 106(c) of AC21 added the following to section 204(j) to the Act:

Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence – A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Pub. L. No. 106-313, § 106(c), 114 Stat. 1251, 1254 (Oct. 17, 2000); § 204(j) of the Act, 8 U.S.C. § 1154(j).

Section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv), states further:

Long Delayed Adjustment Applicants- A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991).

In addition, we are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

Counsel for the beneficiary seems to suggest that the beneficiary has become the petitioner with respect to the approved I-140 petition by virtue of the portability provisions of AC21. That is, counsel suggests that the beneficiary became the petitioner of the I-140 petition once the I-140 petition was approved, the I-485 application had been pending for 180 days, and the beneficiary ported to a new employer and began his new employment in a similar position as the job offered by the petitioner.

It is true that, absent revocation, the beneficiary would have been eligible for adjustment of status with a new employer provided, as counsel points out, that "the new job is in the same or similar occupation as that for which the petition was filed." However, critical to section 106(c) of AC21, the petition must be "valid" to begin with if it is to "*remain* valid with respect to a new job." Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added).¹⁰

The statutory language provides no benefit or right for a new employer to "substitute" itself for the previous petitioner. Section 106(c) states that the underlying I-140 petition "shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed." Pub. L. No. 106-313, § 106(c), 114 Stat. 1251, 1254 (Oct. 17, 2000); § 204(j) of the Act, 8 U.S.C. § 1154(j). Thus, the statute simply permits the beneficiary to change jobs and remain eligible to adjust based on a prior approved petition if the processing times reach or exceed 180 days.

¹⁰ Furthermore, it would subvert the statutory scheme of the U.S. immigration laws to find that a petition is valid when that petition was never approved or, even if it was approved, if it was filed on behalf of an alien that was never entitled to the requested immigrant classification. We will not construe section 204(j) of the Act in a manner that would allow ineligible aliens to gain immigrant status simply by filing visa petitions and adjustment applications, thereby increasing USCIS backlogs, in the hopes that the application might remain unadjudicated for 180 days. In a case pertaining to the revocation of an I-140 petition, the Ninth Circuit Court of Appeals determined that the government's authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009). Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start. The Ninth Circuit stated that if the plaintiff's argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs.

There is no evidence that Congress intended to confer anything more than a benefit to beneficiaries of long delayed adjustment applications. In other words, the plain language of the statute indicates that Congress intended to provide the alien, as a "long delayed applicant for adjustment," with the ability to change jobs if the individual's I-485 took 180 days or more to process. Section 106(c) of AC21 does not mention the rights of a subsequent employer and does not provide other employers with the ability to take over already adjudicated immigrant petitions.

Counsel has failed to show that the passage of AC21 granted any rights, much less benefits, to subsequent employers of aliens eligible for the job portability provisions of section 106(c). Based on a review of the statute and legislative history, the AAO must reject counsel's assertions that the beneficiary has now become the petitioner, and an affected party, in these proceedings.

As no evidence of record suggests that the petitioner consented to appeal or continue these proceedings, the appeal was improperly filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A), and the AAO agrees that the initial appeal should have been rejected. On remand the director entered a new decision which he then certified to the AAO. The AAO is considering this petition under its certification review authority.

Upon review, the petition's approval will remain revoked since (a) the director had good and sufficient cause to revoke the approval of the petition; (b) the petitioner failed to establish that the beneficiary had the requisite work experience in the job offered as a (cook) before the priority date, and (c) the petitioner no longer operates in the U.S.

3. Sufficiency of Notice to the Petitioner

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

The Secretary of Homeland Security may, at any time, for what [s]he deems to be good and sufficient cause, revoke the approval of any petition approved by h[er] 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 provided the petitioner with notice of the derogatory information specific to the current proceeding. In the May 17, 2011 NOIR the director specifically identified the inconsistencies in the record pertaining to the beneficiary's qualifications and his prior employer. The director stated that the job offered is cook; but all of the evidence submitted suggests that the beneficiary was a baker. The director also noted the inconsistencies in the CNPJ number, address, and name of the beneficiary's employer and requested the petitioner to submit independent objective evidence to demonstrate that the beneficiary worked as a cook or assistant cook before the priority date. Moreover, the director found that the petitioner no longer operates in the U.S. and consequently, the job offer is no longer available or valid.

The petitioner has not submitted any independent objective evidence in response to the director's May 17, 2011 NOIR resolving the specific inconsistencies and the deficiencies described above. Such evidence, if provided, would have shed more light on the beneficiary's work experience in Brazil and his qualifications for the proffered job. It would also demonstrate whether the petitioner intends to still employ the beneficiary. The director provided the petitioner with specific derogatory notice and the opportunity to respond. The director's NOIR was based on good and sufficient cause, as required by section 205 of the Act, 8 U.S.C. § 1155.

4. 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 12, 2001. The name of the job title or the position for which the petitioner seeks to hire is “Cook.” The job description under section 13 of the Form ETA 750A is “Prepare all types of fish, meats, poultry, vegetables, etc.” Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two (2) years of work experience in the job offered or in the related occupation as an assistant cook.

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).

On the Form ETA 750, part B, signed by the beneficiary on March 8, 2001, he represented he worked for a restaurant called “WD-LED” as a cook from January 1995 to December 1997. Submitted along with the certified Form ETA 750 and Form I-140 petition was a letter dated March 5, 2001 from [REDACTED] stating that he is the owner and co-owner of [REDACTED] located at [REDACTED] and that the beneficiary worked as a baker from January 8, 1995 to December 28, 1997.¹¹

Throughout these proceedings, the director identified the following inconsistencies in the record pertaining to the identity of the beneficiary’s prior employer and the beneficiary’s work experience:

1. The name of the beneficiary’s employer listed on the Form ETA 750B (WD-LED) is different from the evidence submitted (letters of employment from [REDACTED] stating the beneficiary worked for his establishment, A.M.W. Panificadora e Confeitaria Ltda – ME);
2. The CNPJ number listed on the March 5, 2001 letter of employment (66.774.546/0001-05) is not valid and is different from the CNPJ number of the business registration printout of A.M.W. Panificadora e Confeitaria Ltda – ME (66.774.548/0001-05);
3. The name of the beneficiary’s employer according to the March 5, 2001 letter of employment (A.M.W. Bakery Ltda ME) is different from the June 3, 2011 letter of employment (A.M.W. Panificadora Confeitaria Ltda – ME);

¹¹ The letterhead used in this case is the letterhead of WD-LED Contabilidade S/C Ltda.

4. The address of [REDACTED] on the March 5, 2001 letter of employment [REDACTED] is different from the address on the other letters of employment [REDACTED] and [REDACTED]
5. All of the letters of employment verification from [REDACTED] state that the beneficiary worked as a baker; the job offered is cook.

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). The director asked the petitioner to provide independent objective evidence to resolve the noted inconsistencies above.

[REDACTED] stated in the June 3, 2011 and February 13, 2009 letters of employment for the beneficiary that the March 5, 2001 letter was written on his business' accountant's letterhead [REDACTED] and that the accountant made a mistake typing the CNPJ number on the March 5, 2001 letter of employment.

Regarding the address of the beneficiary's prior employer in Brazil, the beneficiary submits an affidavit dated April 14, 2012 stating that the company [REDACTED] moved locations after he received the March 5, 2001 letter of employment but before 2009 when he received the February 13, 2009 letter from [REDACTED]. The beneficiary states further that his father found the company from the phone book.

With respect to the name difference between [REDACTED] [REDACTED] counsel explains that this is not a difference; [REDACTED] means Bakery in English.

Counsel maintains on appeal that bakers and cooks are substantially the same or similar position. The beneficiary in his April 14, 2012 affidavit states that even though he was a baker he also prepared all kinds of food in addition to working with flour and bread.

We do not find that bakers and cooks are in the same category of occupation, requiring different skills. Cooks belong to Standard Occupational Code (SOC) [REDACTED] and bakers 51-0000. See <http://www.onetonline.org> (last visited July 20, 2012). Moreover, there is no independent objective evidence establishing that the beneficiary worked for [REDACTED]. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

In addition, the AAO notes that the beneficiary failed to include his employment with [REDACTED] on the Form G-325 (Biographic Information), which he filed along with the Application to Register Permanent Residence or Adjust Status.

For the reasons stated above, the AAO finds that the beneficiary did not have the requisite work experience in the job offered or in the related occupation as an assistant cook before the priority date and that the beneficiary does not qualify to perform the duties of the position.

5. The Petitioner's Intent to Employ the Beneficiary

As noted earlier, the petitioner is no longer operating its business in the U.S. The AAO agrees with the director that the petition cannot be approved if the petitioner is no longer an active business. Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Alternatively, the appeal shall be dismissed as moot.

Responding to the director's NOIR dated July 12, 2010 counsel for the beneficiary asserted that the petition should not be dismissed since the beneficiary had ported to new employment under AC21, and that the petition was approvable when initially filed.¹²

¹² The beneficiary's counsel claimed that the approved petition should remain valid for porting purposes despite the recent change in the petitioner's status. The beneficiary's counsel referred to Section I, Question 1 of the Interoffice Memorandum dated December 27, 2005 from ██████████ regarding "Interim guidance for processing I-140 employment-based immigrant petitions and I-485 and H-1B petitions affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313) (HQPRD 70/6.2.8-P)," which states:

Question 1. How should service centers or district offices process unapproved I-140 petitions that were concurrently filed with I-485 applications that have been pending 180 days in relation to the I-140 portability provisions under §106(c) of AC21?

Answer: If it is discovered that a beneficiary has ported off of an unapproved I-140 and I-485 that has been pending for 180 days or more, the following procedures should be applied:

A. Review the pending I-140 petition to determine if the preponderance of the evidence establishes that the case is approvable or would have been approvable had it been adjudicated within 180 days. If the petition is approvable but for an ability to pay issue or any other issue relating to a time after the filing of the petition, approve the petition on its merits. Then adjudicate the adjustment of status application to determine if the new position is the same or similar occupational classification for I-140 portability purposes.

B. If a request for additional evidence (RFE) is necessary to resolve a material issue, other than post-filing issues such as ability to pay, an RFE can be issued to try to resolve the issue. When a response is received, and if the petition is approvable, follow the procedures in part A above.

The assertions made by the beneficiary's counsel are not persuasive. First, the AAO determines 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).

Additionally, the I-140 petition was not approvable when initially filed. As addressed above, the petitioner has failed to establish by preponderance of the evidence that the beneficiary had the requisite work experience in the job offered as of the priority date.

4. Invalidation of the Labor Certification

Finally, the director, as stated earlier, invalidated the labor certification because there was fraud or willful misrepresentation involving the labor certification. USCIS, pursuant to 20 C.F.R. § 656.31(d) (2004), may invalidate the labor certification based on fraud or willful misrepresentation. 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 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.

Upon *de novo* review, the AAO finds that evidence of record does not support the director's conclusion that there was fraud or willful misrepresentation involving the labor certification.¹³ Therefore, the director's decision to invalidate the certified Form ETA 750 will be withdrawn.

Nonetheless, the revocation of the previously approved petition is affirmed for the above stated reasons, with each considered as an independent and alternative basis for the decision. The

¹³ The AAO notes that the director invalidated the labor certification because the petitioner failed to respond to the director's NOIR dated December 6, 2011. The record contains insufficient evidence to support the director's conclusion that there was fraud or willful misrepresentation.

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 director's decision to revoke the previously approved petition is affirmed.

FURTHER ORDER: The decision to invalidate the alien employment certification, Form ETA 750, ETA case number ██████████ is withdrawn.