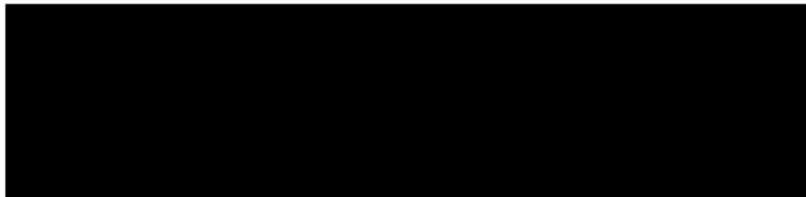


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

Date: **AUG 20 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, Vermont Service Center, on October 15, 2002, but the approval was later revoked by the Director, Texas Service Center, on April 20, 2012. The April 20, 2012 decision was certified to the Administrative Appeals Office (AAO) for review pursuant to 8 C.F.R. § 103.4(a). The matter is now before the AAO on certification. Upon review, the AAO will affirm the April 20, 2012 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). The director of the Texas Service Center (the director) revoked the approval of the petition, finding that the petitioner had failed to demonstrate that the beneficiary qualified for the position offered.

In response to the Notice of Certification (NOC), counsel for the petitioner maintains that the beneficiary qualifies for the position offered and submits additional evidence.

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 certification.²

Section 205 of the Act, 8 U.S.C. § 1155, states:

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, the regulation at 8 C.F.R. § 205.2 states:

(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

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 The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on certification. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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).

Further, 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 proceedings

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 specifically identified to the petitioner the problems or defects in the record pertaining to the beneficiary's qualifications for the job offered multiple times. First, the director stated in three Notices of Intent to Revoke (NOIR)³ that none of the letters verifying employment from Alves and Ton Ltda complies with the regulation, in that none provides the name and title of the author and none describes the duties of the beneficiary.⁴

Second, the director noted in the last NOIR (the NOIR dated November 10, 2010) that the beneficiary could not have been employed by [REDACTED] between July 1989 and March 1992 since the beneficiary's former employer in Brazil ([REDACTED]) was not registered with the Brazilian government until October 1992.

³ The record shows that the director issued three NOIRs: the first was dated October 2, 2008; the second June 1, 2009; and the third November 10, 2010.

⁴ The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) provides, "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."

Finally, the director indicated in the NOIR dated November 10, 2010 that the letter of employment verification dated March 23, 2001 from [REDACTED] and the letters from people familiar with the beneficiary's employment in Brazil were all notarized in Replendor, Minas Gerais, not in Vitoria, E.S., where [REDACTED] is located.⁵

The director specifically advised the petitioner to provide independent objective evidence to resolve the problems in the record as noted above. No independent objective evidence corroborating the beneficiary's claim of employment in Brazil has been submitted thus far. Therefore, the AAO finds that the director has good and sufficient cause to revoke the approval of the petition as required by section 205 of the Act, 8 U.S.C. § 1155.

As set forth in the director's NOC dated April 20, 2012 the issue in this case is whether the petitioner has met the burden of proving by a preponderance of the evidence that the beneficiary has the requisite work experience in the job offered as of the priority date and qualifies for the position offered.

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate that the beneficiary has all of the qualifications stated on the Form ETA 750 as certified by the U.S. Department of Labor (DOL) and submitted with the petition as of the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of DOL. 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 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).

Here, the Form ETA 750 was filed and accepted for processing by DOL on April 24, 2001. The name of the job title or the position for which the petitioner seeks to hire is "Cook, Italian-Style Food." 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.

On the Form ETA 750, part B, signed by the beneficiary on February 20, 2001, he represented he worked 40 hours a week as an Italian-style cook at [REDACTED] from July 1989 to March 1992. The beneficiary also claimed on the Form ETA 750B that he had his own catering business (self-employed) and worked as a caterer, where he prepared Italian food for small parties, from 1994 to the date he signed the form (on April 24, 2001).

⁵ We note that all of the letters of employment verification from [REDACTED] were actually notarized in Resplendor, Minas Gerais; none was notarized in Vitoria, E.S.

Submitted along with the certified Form ETA 750 and the Form I-140 petition was a letter of employment verification dated March 23, 2001 stating that the beneficiary worked in the kitchen department at [REDACTED] from July 20, 1989 to March 30, 1992.

To further demonstrate that the beneficiary worked as a cook, Italian-style, for at least two years before April 24, 2001, the petitioner submitted the following evidence:

- A statement dated October 23, 2008 from [REDACTED] stating that the beneficiary worked in the kitchen specializing in Italian cuisine from July 20, 1989 to March 20, 1992 and that the company (restaurant) was already in business in July 1989 (when the beneficiary started to work), even though it had not been registered with the Brazilian government;
- A statement dated October 29, 2008 from [REDACTED] stating that he worked together with the beneficiary in the kitchen of the restaurant [REDACTED] from 1989 to 1992;
- A statement dated June 18, 2009 from [REDACTED] stating that he worked together with the beneficiary in the kitchen of the restaurant [REDACTED] from 1989 to 1992;
- A statement dated December 9, 2010 from [REDACTED] stating that the restaurant [REDACTED] was in business, even though it was not registered with the Brazilian government until October 30, 1992;
- A copy of the business registration of [REDACTED] ME with CNPJ number of 39.272.059/0001-74,⁶ and
- An affidavit dated May 17, 2012 from the President of the petitioning company, Mr. [REDACTED] [REDACTED] stating that he knew that the beneficiary was qualified as an Italian-style cook after he worked in the kitchen on a temporary basis to prove that he had the necessary skills for the job offered.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.

⁷ In pertinent part, Mr. [REDACTED] states:

It was clear from the start that [REDACTED] [the beneficiary] knew what he was doing and he clearly had the required experience for the position. We had never met [REDACTED] prior to the initial interview. We would not have hired him unless he was capable of performing all of the duties associated with the position of "Cook, Italian-Style Food."

My brothers and I have been in the restaurant business for over 40 years and we know an experienced cook when we have one. We also have had the experience of hiring cooks and then letting them go once it became clear that the individual could not do what he represented he could do.

We agree with the director that none of the letter of employment from the beneficiary's former employer complies with the regulation at 8 C.F.R. § 204.5(I)(3)(ii)(A), in that none does not include the name and position of the writer and a description of the beneficiary's work experience or the training received. Simply stating that the beneficiary worked as a cook is not sufficient for purposes of describing the experience or the training received by the beneficiary and does not establish the reliability of the assertion.

Further, the statements from people familiar with the beneficiary's employment in Brazil and the affidavit from Mr. [REDACTED] are not corroborated or supported by any independent objective evidence such as copies of the beneficiary's government issued identification card, his employment contract, and/or social his security booklet verifying his past work experience as a cook in Brazil. 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 [REDACTED] is located in Vitoria, E.S., Brazil. The beneficiary, according to his Form G-325 (Biographic Information) that he filed along with the Application to Register Permanent Residence or Adjust Status (Form I-485), was born in Resplendor, Minas Gerais, Brazil. The beneficiary did not list on the Form G-325 where he lived outside the U.S. more than one year. We observe that the straight-line distance (or flying distance) between Vitoria, E.S. and Resplendor, Minas Gerais, is 146.36 km (approximately 90.95 miles).⁸ The director also identified other problems in the letter of employment verification dated March 23, 2001 from [REDACTED] and in the statements from people familiar with the beneficiary's employment from 1989 to 1992. First, the director noted that [REDACTED] – one of the persons who wrote the statement indicating that he worked together with the beneficiary from 1989 to 1992 – has the same last name as the beneficiary's spouse (her maiden name is [REDACTED]), suggesting family bias. No response to this issue has been provided.

Second, the director observed that the letter of employment verification dated March 23, 2001 from Alves & Ton Ltda and the statements from [REDACTED] were all notarized in Resplendor, Minas Gerais, not in Vitoria, E.S. where [REDACTED] is located.

The beneficiary's former employer [REDACTED] in the December 9, 2010 statement indicated that both [REDACTED] are currently living in Resplendor, Minas Gerais, but they used to live in the city of Vitoria, E.S. No independent objective evidence has been submitted to support the assertions above, however. Nor has Alves & Ton Ltda explained why the March 23, 2001 letter of employment was notarized in Resplendor, Minas Gerais, and not in Vitoria, E.S.

⁸ This information is according to <http://www.distancecalculator.globefeed.com> (last accessed July 30, 2012).

Without independent objective evidence showing where the beneficiary lived and worked between 1989 and 1992, the AAO cannot conclude that the beneficiary has the requisite experience in the job offered before the priority date (April 24, 2001) and that he qualifies for the job offered.

In summary, the AAO finds that the director has good and sufficient cause to reopen the matter and to revoke the approval of the petition. The petitioner failed to establish that the beneficiary possessed the requisite work experience in the job offered before the priority date. Where the beneficiary of an approved visa petition is not eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for good and sufficient cause. Notwithstanding the USCIS burden to show good and sufficient cause in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

The petition will remain revoked as the petitioner has not established by a preponderance of the evidence that the beneficiary has the requisite work experience in the job offered prior to the priority date. 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 director's decision to revoke the approval of the petition is affirmed.