

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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

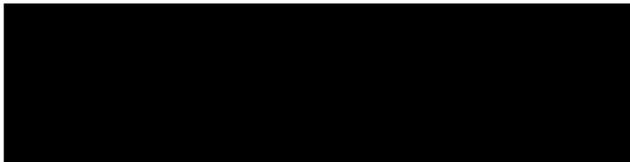
DATE: **AUG 27 2012** OFFICE: TEXAS SERVICE CENTER FILE: 

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

[REDACTED]

Page 2

cc:

[REDACTED]

DISCUSSION: The preference visa petition was approved by the Director, Vermont Service Center, on October 26, 2001, but the approval was later revoked by the Director, Texas Service Center (the director), on February 17, 2011. The petitioner has appealed the decision to revoke the approval of the petition to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a restaurant.¹ It seeks to employ the beneficiary permanently 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, a labor certification (Form ETA 750 Application for Alien Employment Certification) approved by the U.S. Department of Labor (DOL) accompanied the petition. The director revoked the approval of the visa petition, finding that evidence of record failed to demonstrate that the beneficiary had the requisite work experience in the job offered prior to the priority date and that the petitioner failed to establish the ability to pay the proffered wage from the priority date. The director also found fraud against the beneficiary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

On September 29, 2011, the AAO issued a Request for Evidence and Notice of Derogatory Information (RFE/NDI) to both the petitioner and the beneficiary, requesting additional evidence to demonstrate that the beneficiary had the requisite work experience in the job offered before the priority date. The AAO also requested the petitioner to submit evidence to demonstrate the ability to pay the proffered wages of the beneficiary and of other beneficiaries that the petitioner had sponsored since 2001.³ The AAO gave both the petitioner and the beneficiary 30 days to respond.

The petitioner did not respond to the AAO's RFE/NDI. The beneficiary, however, through her counsel, [REDACTED] responded to the AAO's RFE/NDI. [REDACTED] in his brief expressed his objection to the re-adjudication of the petition by the AAO. He specifically states:

¹ A review of the petitioner's website (<http://www.corporatechefs.com/sundry-shops.php>) shows that the petitioner offers services including: dry cleaning, flower delivery, car oil changes, auto detailing and a sundry shop. (last accessed September 7, 2011).

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 The details of the other employment-based petitions and the other alien beneficiaries associated with those petitions are disclosed in the AAO's RFE/NDI.

The Beneficiary objects to the Service's request for additional evidence without first reaching the issue of the validity of the [director's] Notice of Intent to Revoke (NOIR). Your office has asserted that it is proper to review appeals on a "de novo" basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3rd Cir. 2004). However, the case cited by the Service is not applicable in the First Circuit, where the Petitioner is located, and more importantly does not speak to the appeal of a revocation. A careful reading of the *Soltane* decision reveals that it is in fact an appeal of a visa denial.

contention that the AAO does not have *de novo* authority to adjudicate and reexamine the appeal is not persuasive. 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 (3rd Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). It is appropriate for the AAO to reexamine the validity of the visa petition and the labor certification at this stage of the proceeding, including the beneficiary's qualifications for the position.

also submits the following additional evidence to demonstrate that the beneficiary has the requisite work experience in the job offered before the priority date and that the finding of fraud against the beneficiary is not supported by evidence of record:

- A statement dated October 17, 2011 from [REDACTED] stating that the beneficiary worked as a cook at his establishment from January 20, 1997 to May 15, 1999 and that her responsibilities included preparing regional typical dishes as well as other dishes served in the restaurant;
- Copies of the beneficiary's payment stubs issued in August 1998, March 1999, and April 1999 by [REDACTED];
- A copy of the beneficiary's termination contract, showing that the beneficiary worked for [REDACTED] from January 20, 1997 to May 15, 1999; and
- A copy of the beneficiary's booklet of employment and Social Security showing that the beneficiary worked at [REDACTED] from January 20, 1997 to May 15, 1999.

Before we adjudicate the appeal, we note that neither the beneficiary nor her counsel ([REDACTED]) is considered an affected party in this proceeding. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B), stating that an affected party does not include the beneficiary of a visa petition. In this case, however, the director found fraud against the beneficiary, and the AAO issued an RFE/NDI to the beneficiary, specifically requesting the beneficiary to provide additional evidence to rebut the director's finding of fraud against him.

United States Citizenship and Immigration Services (USCIS) has the authority to enter a fraud finding, if during the course of adjudication, it discloses fraud or a material misrepresentation. In this case, the beneficiary has been given notice of the proposed findings and has been presented

with opportunity to respond to the same. Therefore, we will accept the additional evidence submitted by the beneficiary through her counsel.⁴

Upon *de novo* review, we find that viewed together, the evidence submitted above reflects that the beneficiary has the requisite work experience before the priority date. The statement dated October 17, 2011 from [REDACTED] includes the name, address, and title of the author, and has a sufficient description of the beneficiary's duties, in compliance with the regulation at 8 C.F.R. § 204.5(1)(3)(ii)(A). The beneficiary's booklet of employment and Social Security combined with her termination contract and the paystubs show that the beneficiary was employed by [REDACTED] in Brazil from January 20, 1997 to May 15, 1999. Therefore, we conclude that the beneficiary qualifies to perform the duties of the position. We will withdraw the director's finding of fraud against the beneficiary. The AAO notes that the director found fraud against the beneficiary because the petitioner failed to respond to the director's Notice of Intent to Revoke (NOIR) dated November 17, 2010. The record does not support the director's finding of fraud against the beneficiary.

Nevertheless, the appeal cannot be sustained, and the approval of the petition reinstated, as the petitioner has failed to submit additional evidence to demonstrate the ability to pay the proffered wages of the beneficiary and of other alien beneficiaries from their respective priority dates. The petitioner also has failed to provide evidence showing when the beneficiary ported to another similar employment pursuant to section 204(j) of the Act as amended by section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2001 (AC21) (Pub. L. 106-313).⁵ As noted earlier, the petitioner did not provide any response to the AAO's RFE/NDI within the time frame provided.

The AAO specifically alerted the petitioner that failure to respond to the RFE/NDI would result in dismissal without further discussion since the AAO could not substantively adjudicate the appeal

⁴ We will provide counsel for the beneficiary a courtesy copy of this decision.

⁵ On appeal counsel for the petitioner contended that the petitioner no longer had obligation to provide financial documentation such as federal tax returns, annual reports, or audited financial statements, once the beneficiary changed jobs. The record contains a letter from [REDACTED] stating that the beneficiary is currently an employee of the [REDACTED]. No indication of when the beneficiary started with the [REDACTED] what the duties of the beneficiary, and how much she is paid.

On the subject of porting, the AAO notes 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).

without the information requested. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Because the petitioner failed to respond to the RFE/NDI, the AAO is dismissing the appeal without further discussion. We conclude that the petitioner has failed to meet the burden of proving by a preponderance of the evidence that the petitioner has the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives her lawful permanent residence.

We further find that there is good and sufficient cause to revoke the approval of the petition as required by section 205 of the Act, 8 U.S.C. § 1155.

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, 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 AAO provided the petitioner with notice of the derogatory information specific to the current proceeding. In the September 29, 2011 RFE/NDI we disclosed the names of other alien beneficiaries that the petitioner had sponsored since 2001, the decision of the director on the petition filed, and the date the alien beneficiaries adjusted to lawful permanent resident. We also requested the petitioner to submit specific evidence such as copies of the beneficiary's W-2 for 2004-2009, copies of the petitioner's federal tax returns for 2004-2009, audited financial statements, or annual reports for those years. None is submitted.

The revocation of the previously approved petition is, therefore, based on 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). As the petitioner failed to demonstrate the continuing ability to pay the proffered wage from the priority date until the beneficiary receives her lawful permanent residence or until she ported in accordance with section 204(j) of the Act, the approval of the petition cannot be reinstated.

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 finding of fraud against the beneficiary is withdrawn. The appeal is dismissed. The petition remains revoked.