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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

Date:

DEC 14 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.

Thank you.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director, Vermont Service Center, on November 29, 2002; however, the Director, Texas Service Center (the director), revoked the approval of the immigrant petition on May 6, 2009, and the petitioner subsequently appealed the director's decision to revoke the petition's approval to the Administrative Appeals Office (AAO). The appeal will be sustained, and the approval of the petition will be reinstated.

The petitioner is a catering company. 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).¹ As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to follow the DOL recruitment procedures in connection with the approved labor certification application and that the documents submitted in response to the director's Notice of Intent to Revoke (NOIR) were in themselves a willful misrepresentation of material facts, constituting fraud. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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.²

On appeal, counsel for the petitioner³ contends that the director has improperly revoked the approval of the petition. Specifically, counsel asserts that the director did not have any good and sufficient cause as required by section 205 of the Act; 8 U.S.C. § 1155 to revoke the approval of 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 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).

³ Current counsel of record, [REDACTED] will be referred to as counsel throughout this decision. Previous counsel [REDACTED] will be referred to 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.

petition. Counsel argues that the petitioner did comply with the DOL recruitment requirements and that the beneficiary possessed the minimum requirements required on the ETA 750 prior to the filing of the labor certification application.

As a procedural matter, the AAO finds that the director's authority to revoke the approval of the petition under 8 C.F.R. § 205.1 is erroneous. 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) if 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.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by her under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Here, the director advised the petitioner in the Notice of Intent to Revoke dated February 6, 2009 (NOIR) that the instant case might involve fraud as the petition was filed by [REDACTED]. The director generally questioned the beneficiary's qualifications. The director also specifically stated that in many of the other petitions filed by [REDACTED] the respective petitioners had not followed DOL recruitment procedures. Because of these findings in other cases and since [REDACTED] filed the petition in this case, the director in the NOIR advised 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 while the director appropriately reopened the approval of the petition by issuing the NOIR, the director's NOIR was deficient in that it did not specifically 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 did not state which recruitment procedures were defective. 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 specific derogatory information relating to the petition in

the instant case, the director's decision to revoke the approval of the petition was not based on good and sufficient cause.

In addition, we note that the record does not show inconsistencies or anomalies in the recruitment process. In response to the director's NOIR, the petitioner submitted additional evidence to demonstrate that the recruitment efforts were conducted in good faith and in accordance with the DOL recruitment requirements. The AAO therefore withdraws the director's finding that the petitioner did not conduct good faith recruitment in advertising for the proffered position resulting in the approval of the labor certification application.

Therefore, we agree with counsel 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, 8 U.S.C. § 1155. We will withdraw the director's findings that the petitioner failed to follow DOL recruitment procedures in connection with the approved labor certification application and that the documents submitted in response to the director's NOIR were in themselves a willful misrepresentation of material facts, constituting fraud.

In addition, to be eligible for approval, the petitioner must establish by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date until the beneficiary obtains legal permanent residence. See 8 C.F.R. § 204.5(g)(2). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the priority date of the petition is April 18, 2001, which is the date the labor certification was accepted for processing by DOL, and 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).

Upon review of the entire record, including evidence submitted on appeal, the AAO is persuaded that the petitioner has the ability to pay the proffered wage of \$12.57 per hour or \$22,877.40 per year (based on a 35-hour work per week) from April 18, 2001 and continuing until the beneficiary ported to another employment in 2007 pursuant to section 204(j) of the Act, and that the beneficiary is qualified to perform the duties of the position.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved, and the director's decision to revoke the approval of the petition is withdrawn