



U.S. Citizenship
and Immigration
Services

[Redacted]

B6

Date: DEC 18 2012

TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE:

Petitioner: [Redacted]

Beneficiary: [Redacted]

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:

[Redacted]

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 September 9, 2003; however, the Director, Texas Service Center (the director), revoked the approval of the immigrant petition on June 28, 2010, 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 painting company. It seeks to employ the beneficiary permanently in the United States as a painter 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). 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 revoked the approval of the petition, finding that the beneficiary did not possess the requisite work experience in the job offered prior to the priority date and that the petitioner had submitted falsified documents in order to obtain a benefit under the Act through fraud and misrepresentation of a material fact.

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

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.

To be eligible for approval, the petitioner must establish by a preponderance of the evidence that the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition prior to the priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The priority date of the petition in this case is July 27, 2001, which is the date the labor certification was accepted for processing by DOL. See 8 C.F.R. § 204.5(d). In the Form ETA 750, the petitioner specifies that all job applicants, in order to qualify for the position should have at least two years of work experience in the job offered.

Upon review of the entire record, including evidence submitted on appeal, the AAO is persuaded that the beneficiary is qualified to perform the duties of the position. The director's finding that the petitioner had submitted materially false documents in order to obtain benefits under the Act is not supported by the evidence of record and will be withdrawn.

Beyond the decision of the director, we also find that the petitioner has the ability to pay the proffered wage of \$16.85 per hour or \$30,667 per year from the priority date and continuing until

the beneficiary receives lawful permanent residence, as required by 8 C.F.R. § 204.5(g)(2), or until the beneficiary ported to another employment pursuant to section 204(j) of the Act.¹

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).

In this case, we find 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 beneficiary did not possess the requisite work experience in the job offered prior to the priority date and that the petitioner had submitted falsified documents in order to obtain a benefit under the Act through fraud and misrepresentation of a material fact.

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.²

¹ Counsel in his brief claimed that the beneficiary ported pursuant to section 204(j) of the Act in 2008. The record contains several letters dated 2005 onwards regarding the beneficiary’s new employment.

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). However, here we find that the director did not revoke the approval of the petition based on good and sufficient cause; and therefore, the petition was valid when the beneficiary claimed to have ported in 2005, 2008, and 2009. All of his portings occurred before the director revoked the approval of the petition.

² It is also important to note here that section 204(j) of the Act does not apply to an immigrant visa petition process, but to an application for adjustment of status. Therefore, even though the appeal is sustained, and the petition approved, the beneficiary’s Application to Register Permanent Residence or Adjust Status (Form I-485) will not be automatically approved. In order to adjust his status to that of lawful permanent residence, the beneficiary will still be required to demonstrate that his employment with the ported employer is in the same or similar occupational classification as the job for which the visa petition was initially approved. See *Perez-Vargas v. Gonzales*, 478 F.3d 191, 193 (4th Cir. 2007); also see *Sung v. Keisler*, 505 F.3d 372, 374 (5th Cir. 2007).

ORDER: The director's decision to revoke the approval of the petition is withdrawn. The approval of the petition is reinstated.