



U.S. Citizenship
and Immigration
Services

[REDACTED]

B6

Date: DEC 18 2012

Office: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), 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 July 16, 2004; however, the Director, Texas Service Center (the director), revoked the approval of the immigrant petition on November 17, 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 restaurant.¹ It seeks to employ the beneficiary permanently in the United States as a food prep worker pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). 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 petitioner had submitted falsified documents in order to obtain a benefit under the Act through fraud and misrepresentation of a material fact and that the beneficiary did not possess the requisite work experience in the job offered prior to the priority date. The director also determined that the petitioner failed to comply with the DOL recruitment requirements.

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)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 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).

The priority date of the petition is November 12, 2002, which is the date the labor certification was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d). The rate of pay or the proffered wage specified on the Form ETA 750 is \$7.35 per hour or \$13,377 per year (based on a 35-hour work week).² In the Form ETA 750, the petitioner specifies that all job applicants, in

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 November 19, 2012).

² The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. See 20 C.F.R. § 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more

order to qualify for the position should have at least one month of work experience in the job offered or in a related occupation in the food industry.

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 \$7.35 per hour or \$13,377 per year from November 12, 2002, and that the beneficiary possessed the minimum experience requirements as of the priority date.

Concerning the petitioner's failure to comply with the DOL recruitment requirements, we disagree with the director, in that we do not find any inconsistencies or anomalies in the recruitment process. In response to the director's Notice of Intent to Revoke dated August 27, 2010 (NOIR), the petitioner has submitted evidence to demonstrate that the recruitment efforts were conducted in good faith and in accordance with the DOL recruitment requirements.

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, the AAO finds 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 withdraw 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.

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 director's decision to revoke the approval of the petition is withdrawn. The petition is approved.