



U.S. Citizenship
and Immigration
Services

[Redacted]

B6

DATE: 11/02/2012 OFFICE: 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 April 2, 2004; however, the Director, Texas Service Center (the director), invalidated the labor certification and revoked the approval of the immigrant petition on March 16, 2011. The petitioner subsequently appealed the director's decision 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. It seeks to employ the beneficiary permanently in the United States as a cook pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. §1153(b)(3)(A)(i).¹ As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification. As stated earlier, this petition was approved on April 2, 2004 by the VSC, but that approval was revoked in March 2011. The director determined that the petitioner failed to show (a) that proper recruitment procedures were followed, (b) that the beneficiary possessed the requisite work experience in the job offered prior to the priority date, and (c) that the petitioner has the continuing ability to pay the proffered wage from the priority date. The director concluded further that the documentation submitted to show the beneficiary's qualifications was fraudulent.

On appeal, counsel for the petitioner² contends that the director has improperly revoked the approval of the petition. Specifically, counsel asserts that the director's finding of fraud or willful misrepresentation involving the labor certification is not supported by the evidence of record. Counsel also states that the discrepancy raised in the Notice of Intent to Revoke (NOIR) was both immaterial and now has been directly rebutted by evidence on the record. Additional evidence is also submitted to demonstrate the ability to pay.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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.³

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 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.

³ 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).

USCIS, pursuant to 20 C.F.R. § 656.31(d) (2004), may invalidate the labor certification based on fraud or willful misrepresentation. However, upon *de novo* review the AAO finds that evidence of record does not support a finding of fraud or willful misrepresentation involving the labor certification. There has been an insufficient development of the facts upon which the director can make a determination of fraud or willful misrepresentation in connection with the labor certification process based on the criteria of *Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961). The AAO notes that the director found fraud or willful misrepresentation involving the labor certification and invalidated the labor certification because the petitioner failed to present independent objective evidence, i.e. the beneficiary's paystubs, tax records, and/or his employment booklet or social security record from Brazil, to demonstrate that the beneficiary worked as a cook in Brazil.

Moreover, 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 \$13.01 per hour or \$23,678.20 per year from the priority date on September 20, 2002, and that the beneficiary possessed the minimum requirement for the proffered position.

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 invalidate the alien employment certification, Form ETA 750, ETA case number [REDACTED] is withdrawn.

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

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).