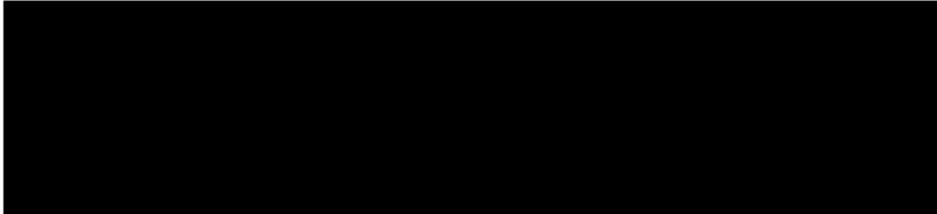


U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



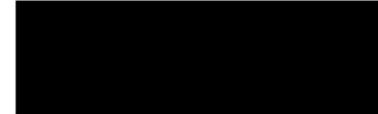
U.S. Citizenship  
and Immigration  
Services



B6

Date: DEC 24 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 October 15, 2004; however, the Director, Texas Service Center, revoked the approval of the immigrant petition on March 23, 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a host/hostess, 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).<sup>1</sup> 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 and determined that the petitioner failed to demonstrate that the beneficiary had the requisite work experience in the job offered before the priority date. The director also concluded that the petitioner failed to follow the DOL recruitment procedures.

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.<sup>2</sup>

On appeal, counsel for the petitioner at the time, [REDACTED]<sup>3</sup> asserted that U.S. Citizenship and Immigration Services (USCIS) revoked the petition not because of inconsistencies in the petition, rather because of vague and unsupported allegations that he had submitted fraudulent information with respect to other employment-based immigrant visa petitions. [REDACTED]

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<sup>1</sup> 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.

<sup>2</sup> 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).

<sup>3</sup> [REDACTED] was under USCIS investigation during the adjudication of the petition in 2009. He was alleged to have submitted fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions along with the supporting documentation, such as employment letters for the beneficiary. [REDACTED] has been 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.

concluded that the USCIS decision to revoke the approval of the petition was arbitrary and capricious.

The issue raised on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition.

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).

Before revoking the approval of any petition, however, the director must provide notice. The regulation at 8 C.F.R. § 205.2 specifically reads:

(a) *General.* Any [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 [USCIS]. (Emphasis added).

Further, 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.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *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, in the Notice of Intent to Revoke dated February 20, 2009 (NOIR), the director wrote:

The Service is in receipt of information revealing the existence of fraudulent information in the petitions with Alien Employment Certificates (ETA 750) and/or the work experience letters in a significant number of cases submitted to USCIS by counsel for the petitioner in the reviewed files [referring to the petitioner's previous counsel, ██████████],

The director advised the petitioner in the NOIR that the instant case might involve fraud since the petition was filed by ██████████. The director generally questioned the beneficiary's qualifications. The director also specifically stated that in many of the other petitions filed by ██████████, the respective petitioners had not followed DOL recruitment procedures. Because of these findings in other cases and since ██████████ 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.

Moreover, 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 May 19, 2003, 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 \$9.35 per hour or \$17,017 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 \$9.35 per hour or \$17,017 per year (based on a 35-hour work per week) from May 19, 2003 and continuing until the beneficiary ported to another employment in 2008 pursuant to section 204(j) of the Act.<sup>4</sup> Further, the AAO finds 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.<sup>5</sup>

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

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<sup>4</sup> The record contains a letter dated March 7, 2009, indicating that the beneficiary works as a full-time hostess at the Regatta of Cotuit. In addition, in response to a Notice of Intent to Deny and Request for Evidence issued by the AAO on May 15, 2012, [REDACTED] the petitioner's current counsel, asserted that the beneficiary left the employment with the petitioner on November 13, 2008 and ported her employment to a similar position with another employer.

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 (9<sup>th</sup> 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 ported in November 2008.

<sup>5</sup> It is important to note here that section 204(j) 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 her status to that of lawful permanent residence, the beneficiary will still be required to demonstrate that her 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 (4<sup>th</sup> Cir. 2007); *also see Sung v. Keisler*, 505 F.3d 372, 374 (5<sup>th</sup> Cir. 2007).