

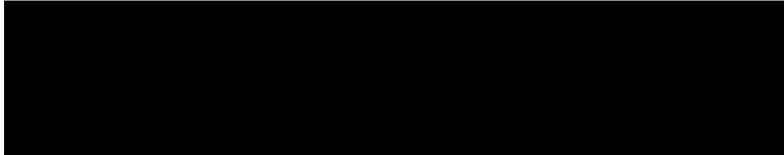
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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Date: Office: TEXAS SERVICE CENTER



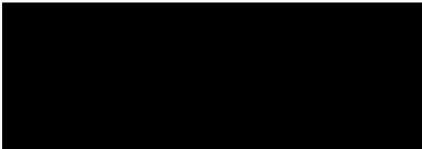
FEB 01 2012

IN RE:



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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On November 7, 2003, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on July 12, 2004. The director of the Texas Service Center (“the director”), however, revoked the approval of the immigrant petition on September 15, 2010, and the petitioner subsequently appealed the director’s decision to revoke the petition’s approval. The appeal will be dismissed.

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).

The petitioner is a granite and marble store and installer. It seeks to employ the beneficiary permanently in the United States as a stonecutter, DOT job code 771.381-014 (stone carver), 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 submitted along with an approved Form ETA 750 labor certification. As stated earlier, this petition was approved on July 12, 2004 by the VSC, but that approval was revoked in September 2010. The director determined that the petitioner failed to follow the U.S. Department of Labor (DOL) recruitment procedures and that the beneficiary did not have the requisite work experience in the job offered before the priority date. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.2.

On appeal, current counsel for the petitioner – [REDACTED] – contends that the director has improperly revoked the approval of the petition. Specifically, counsel asserts that the director did not have good and sufficient cause as required by section 205 of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1155 to revoke the approval of the petition. For instance, counsel states that the director only made vague, unsubstantiated allegations of fraud or material misrepresentation relating to other petitions and petitioners, and that neither the Notice of Intent to Revoke (NOIR) nor the Notice of Revocation (NOR) contained specific adverse information relating to the petition or the petitioner in the instant proceeding. Counsel also states that the record does not establish fraud or material misrepresentation against the beneficiary.

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 as previous or former counsel or by name.

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

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

As noted above, the Secretary of Homeland Security has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. *See* section 205 of the Act; 8 U.S.C. § 1155. This means that notice must be provided to the petitioner before a previously approved petition can be revoked. The regulation at 8 C.F.R. § 205.2 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.

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). 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).

In this case, the AAO finds that the director adequately advised the petitioner of the basis for revocation of approval of the petition. In the NOIR, the director stated that the beneficiary's former employer in [REDACTED] did not have a valid CNPJ number.⁴ In addition, the director found that the beneficiary lived in Virgonopolis, Minas Gerais, Brazil, before he came to the U.S. in 1997.⁵ Based on this information, the director stated that it was unlikely that the beneficiary lived in Virgonopolis, Minas Gerais, and worked in Florestal, Minas Gerais, between 1990 and 1992.⁶ The director concluded that the beneficiary was not qualified for the position.

In the NOIR, the director also advised the petitioner to submit additional evidence to demonstrate that the petitioner properly followed the DOL recruitment procedures.

Responding to the NOIR, the petitioner submitted the following additional evidence:

- A copy of a second Form ETA 750 signed by [REDACTED] on January 5, 2001 on behalf of the beneficiary;⁷
- A copy of an online posting for the job offered posted at the Massachusetts Job Bank;
- A letter dated November 21, 2003 from [REDACTED] stating that the position was advertised on the *Boston Herald*, online, and at workplace;
- A copy of the in-house advertisement placed from November 10 to November 30, 2003;
- An article entitled "Reining in Brazil's informal economy";
- A letter dated August 17, 2010 from Constantine Zgonis stating that the beneficiary, when he was hired, knew how to handle and polish granite and marble and knew how to cut stones, repair cracks and fissures.

Regarding the invalid CNPJ number, counsel for the petitioner stated that the beneficiary was not responsible for the proper licensing and operation of his former employer in Brazil. Counsel

⁴ Businesses that are officially registered with the Brazilian government are given a unique CNPJ number. CNPJ [REDACTED] is similar to the federal tax ID or employer ID number in the United States. The U.S. Department of State has determined that the CNPJ provides reliable verification with respect to the adjudication of employment-based petitions in comparing an individual's stated hire and working dates with a Brazilian-based company to that Brazilian company's registered creation date.

⁵ The beneficiary stated in the Form G-325, Biographic Information, that he lived in Virgonopolis, Minas Gerais, Brazil until 1997. The Form G-325 was submitted in conjunction with the Application to Register Permanent Residence or Adjust Status, Form I-485.

⁶ The distance between Virgonopolis and Florestal is about 200 miles.

⁷ This Form ETA 750 has not been certified. Also of record is a third Form ETA 750 filed on behalf of the beneficiary by Chi-Chi's Restaurant for the position of cook. This ETA 750 was filed with the DOL on June 25, 2001. The DOL certified the application on September 12, 2002. A subsequent Form I-140 was approved, and then revoked with a finding of fraud.

further stated that most businesses in Brazil are not registered.⁸ Further, counsel contended that the beneficiary last lived in Brazil in 1997, and that he possibly lived in more than one place in a seven year period between 1990 and 1997.

The director in the NOR stated that the evidence of recruitment submitted by the petitioner did not relate to the approval of the Form ETA 750.

The AAO agrees. The AAO observes that the original Form ETA 750 was originally filed by the petitioner on behalf of an alien beneficiary named [REDACTED]. This filing was accepted by the DOL for processing on June 27, 2002, and it was certified on March 21, 2003.⁹ The evidence of recruitment submitted above (i.e. the copies of the online job posting and the in-house job posting), however, shows that the petitioner started to recruit U.S. workers in November 2003, over seven months after the Form ETA 750 was certified by the DOL. Therefore, none of the evidence submitted above is relevant to this proceeding.

The DOL regulation at the time of recruitment in this case required that the employer clearly document, as a part of every labor certification application, its reasonable, good faith efforts to recruit U.S. workers without success. See 20 C.F.R. § 656.21 (2001). Such documentation, according to 20 C.F.R. § 656.21(b)(1)(i) (2001), should include the sources the employer may have used for recruitment, including, but not limited to, advertising; public and/or private employment agencies; colleges or universities; vocational, trade, or technical schools; labor unions; and/or development or promotion from within the employer's organization. Under 20 C.F.R. § 656.21(b)(1)(i) (2001), the documentation should also identify each recruitment source by name; give the number of U.S. workers responding to the employer's recruitment; give the number of interviews conducted with U.S. workers; specify the lawful job-related reasons for not hiring each U.S. worker interviewed; and specify the wages and working conditions offered to the U.S. workers.

The record contains no evidence as stated by the DOL regulation above. Nor does the record include any explanation why such evidence can no longer be produced. The attempt by the petitioner to demonstrate that it followed the DOL recruitment procedures do not relate to the current position, creating doubt about the *bona fides* of recruitment procedures conducted by the petitioner in this case.

Further, as noted by the director, the petitioner submitted a copy of a Form ETA 750 that is materially different from the certified labor certification in this case. It is incumbent upon the

⁸ Counsel specifically stated:

Upwards of 55% of businesses operate in the "grey market" in Brazil, and only 30-40% of businesses in the construction trades are registered. Thus, it would not be uncommon for a construction employer to lack CNPJ registration.

⁹ The record shows that the petitioner requested to substitute Jaime Coelho with the beneficiary in this case, when filing the Form I-140 on November 7, 2003.

petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* The petitioner's response to the director's NOIR creates an inconsistency that is not resolved in the record.

The AAO further finds that the evidence of record does not show that the recruitment conducted by the petitioner was in accord with the DOL procedures. The AAO will not remand the case to the DOL, however, as the petition will be denied on other grounds.

As noted above, the director also found that the beneficiary was not qualified to perform the services of the occupation as of the priority date. The director stated that the petitioner failed to resolve the inconsistencies in the record regarding where the beneficiary lived and worked between 1990 and 1992.

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Here, the Form ETA 750 was filed and accepted for processing by the DOL on June 27, 2002. The name of the job title or the position for which the petitioner seeks to hire is [REDACTED] [REDACTED] the job description, section 13 of the Form ETA 750, part A, the petitioner wrote:

Cut, shape, and finish rough blocks of stone; traces patterns and transfers dimensions; works surface to specified finish; cut decorative designs.

Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered.

Whether or not the beneficiary had the prerequisite work experience for the proffered position as of June 27, 2002 (the priority date) is material in this case, and USCIS should not have approved the petition, or sustained the appeal, before determining that the beneficiary qualifies for the job offered in the labor certification.

In responding to the director's NOIR, the petitioner did not explain how it was possible for the beneficiary to live in one city and work in another city some 200 miles away from each other. Counsel's explanation alone is not sufficient to resolve the inconsistencies in the record regarding this matter. Merely stating that it is possible that the beneficiary lived in more than one place between 1990 and 1997 does not make the statement reliable. Therefore, the AAO agrees with the director that the beneficiary did not have the requisite work experience in the job offered as of the priority date.

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 not met that burden.

ORDER: The appeal is dismissed. The approval of the petition remains revoked.