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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

B6

Date: **FEB 17 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.

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 May 6, 2002, 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 September 4, 2002. However, the Director of the Texas Service Center ("the director") revoked the approval of the immigrant petition on April 24, 2009, and the petitioner subsequently appealed the director's decision. The petition is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The appeal will be remanded to the director for further action, consideration, and the entry of a new decision.

The petitioner is a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook 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 Application for Alien Employment Certification (Form ETA 750). As stated above, the petition was initially approved in September 2004, but the approval was later revoked in April 2009. The director determined that the petitioner did not engage in an authentic recruitment effort for U.S. workers and had obtained the approval of the Form ETA 750 by fraud or by willfully misrepresenting material facts. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal to the AAO, current counsel for the petitioner – [REDACTED] – contends that United States Citizenship and Immigration Services (USCIS) lacks good and sufficient cause as required by section 205 of the Act to revoke the approval of the petition. Specifically, counsel states that the director's Notice of Intent to Revoke (NOIR) did not contain specific adverse information relating to the petition or the petitioner in the instant proceeding, nor did it request the petitioner to present specific evidence. Citing *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988), counsel contends that where the allegations in the NOIR are conclusory, speculative, or irrelevant they do not provide good and sufficient cause and cannot support the issuance of a NOIR. Further, counsel cites *Matter of Estime*, 19 I&N Dec. 450, 452 (BIA 1988) and states that a NOIR which is based on an unsupported statement, or unsupported presumption is invalid.

Counsel further claims that the director's finding of fraud or material misrepresentation against the petitioner, for instance, is not supported by the evidence of record. Citing *Ana Intern, Inc. v. Way*, 393 F.3d 886 (9th Cir. 2004); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Full Gospel Portland Church v. Thornburgh*, 703 F. Supp. 441, 445 (D.C. Cir. 1988), counsel stated that the director's conclusion was not supported by substantial evidence.

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 The new 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.

Counsel indicates that the Department of Labor (DOL) would not have approved the petitioner's Form ETA 750 had it not followed the DOL recruitment requirements.

Additionally, counsel asserts that USCIS could not retroactively use and apply section 205 of the Act as amended on December 17, 2004 to revoke the petition that had already been approved in September 2002. Citing *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir: 2004), counsel further claimed that the statute in effect at the time of the visa approval specifically required the Attorney General to notify the State Department of the visa revocation before the beneficiary came to the United States.³ In this case, counsel notes that since the beneficiary had already been in the United States when the decision to revoke was issued in 2009, the Attorney General should not be able to revoke the approval of the visa petition.

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.⁴

Preliminarily, as a procedural matter, the AAO finds that 8 C.F.R. § 205.1 only applies to automatic revocation and is not the proper authority to be used to revoke the approval of the petition in this instant proceeding. Under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if (A) the labor certification is invalidated pursuant to 20 C.F.R. § 656; (B) the petitioner or the beneficiary dies; (C) the petitioner withdraws the petition in writing; or (D) if the petitioner is no longer in business. Here, the labor certification has not been invalidated; neither the petitioner nor the beneficiary has died; the petitioner has not withdrawn the petition; nor has the petitioner gone out of business. Therefore, the approval of the petition cannot be automatically revoked. The director's erroneous citation of the applicable regulation is

³ At the time the visa petition in this case was approved in September 2002, section 205 of the Act, 8 U.S.C. § 1155, read as follows:

The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition. In no case, however, shall such revocation have effect unless there is mailed to the petitioner's last known address a notice of the revocation and unless notice of the revocation is communicated through the Secretary of State to the beneficiary of the petition before such beneficiary commences his journey to the United States. If notice of revocation is not so given, and the beneficiary applies for admission to the United States, his admissibility shall be determined in the manner provided for by sections 1225 and 1229a of this title.

⁴ 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).

withdrawn. Nonetheless, as the director does have revocation authority under 8 C.F.R. § 205.2, the director's denial will be considered under that provision under the AAO's *de novo* review authority.

In his brief, counsel draws the AAO's attention to a recent opinion issued by the United States Court of Appeals for the Second Circuit, *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir. 2004). In that opinion, the court in *Firstland* interpreted the third and fourth sentence of section 205 of the Act, 8 U.S.C. § 1155 (2003), to render the revocation of an approved immigrant petition ineffective where the beneficiary of the petition did not receive notice of the revocation before beginning his journey to the United States. *Firstland*, 377 F.3d at 130. Counsel asserts that the reasoning of this opinion must be applied to the present matter and accordingly, that USCIS may not revoke the approval because the beneficiary did not receive notice of the revocation before departing for the United States, since he was already in the United States when the director issued the revocation.

According to the Form G-28 submitted on appeal, the petitioner is located in South Dennis, Massachusetts, an area within the jurisdiction of the First Circuit Court of Appeals. The holding in the Second Circuit Court of Appeals, therefore, is not binding in this case; but even if this case did arise in the Second Circuit, *Firstland* is no longer a binding precedent.

On December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (S. 2845). See Pub. L. No. 108-458, 118 Stat. 3638 (2004). Specifically relating to this matter, section 5304(c) of Public Law 108-458 amends section 205 of the Act by striking "Attorney General" and inserting "Secretary of Homeland Security" and by striking the final two sentences. Section 205 of the Act now reads:

The Secretary 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 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.

Furthermore, section 5304(d) of Public Law 108-458 provides that the amendment made by section 5304(c) took effect on the date of enactment and that the amended version of section 205 applies to revocations under section 205 of the Act made before, on, or after such date. Accordingly, the amended statute specifically applies to the present matter and counsel's *Firstland* argument no longer has merit.

In addition, federal regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed or when the visa is issued by a United States consulate. 8 C.F.R. § 245.1(a), 22 C.F.R. § 42.41.

If the beneficiary of an approved visa petition is no longer eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause." Notwithstanding the USCIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The

petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

The AAO will next address whether the director adequately advised the petitioner of the basis for revocation of approval of the petition.

As noted above, section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, allows the Secretary of Department of Homeland Security to revoke the approval of any visa petition approved under section 204 so long as the revocation is made based on good and sufficient cause. The realization by the director that the petition was approved in error, for instance, may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

However, before the director can revoke the approval of the petition, the regulation requires that a notice must be provided to the petitioner. More specifically, 8 C.F.R. § 205.2 reads:

(a) *General.* Any Service [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 Service [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.

Further, *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 un rebutted, 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 (NOIR) dated February 10, 2009, 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 February 10, 2009 NOIR that the instant case might involve fraud since the petition was filed by ██████████, who is under USCIS investigation for submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions. In the NOIR, the director generally questioned the beneficiary's qualifications. The director also specifically stated that in many of the other petitions filed by previous counsel, the respective petitioners had not followed the DOL's recruitment procedures. Because of these findings in other cases and since ██████████ filed the petition in this case, the director issued the NOIR, advising 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 and that the petitioner complied with all of the DOL recruiting requirements.

The AAO finds that the director appropriately reopened the matter by issuing the NOIR. However, the director's NOIR was deficient in that it did not give the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director generally 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 derogatory information, the director's decision will be withdrawn. However, as the petition may not be approved, the case will be remanded to the director for the issuance of a new Notice of Intent to Revoke (NOIR).

The next issue is whether the director properly concluded that the petitioner did not comply with the recruitment procedures of the DOL.

To demonstrate that the petitioner fully complied with the DOL recruitment requirements, previous counsel (██████████) submitted, in response to the director's NOIR, a copy of the newspaper advertisement that the petitioner posted in the ██████████ on Sunday, February 4, 2001.

Based on the evidence submitted, the director stated in the Notice of Revocation (NOR), "Nothing was submitted that clearly proves the employer has complied with DOL advertising and recruiting requirements and has established that there no [sic] able, qualified, and available U.S. workers for the position and has rejected any U.S. job applicants for valid job-related reasons."

The AAO disagrees with the director's conclusion. First, as mentioned above, the director in the NOIR did not notify the petitioner to specifically submit any copies of the results of the recruitment efforts. Additionally, since there was no requirement to keep such records, the director may not make an adverse finding against the petitioner, if, the petitioner claims it no longer has the supporting documentation over five years after the labor certification was approved.

The AAO acknowledges that at the time the petitioner filed the labor certification application with the DOL for processing in April 2001, employers were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the DOL. *See* 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991. Not until 2005, when the DOL switched from paper-based to electronic-based filing and processing of labor certifications, were employers required to maintain records and other supporting documentation, and even then employers were only required to keep their labor certification records for five years. *See* 69 Fed. Reg. 77386, Dec. 27, 2004 as amended at 71 Fed. Reg. 35523, June 21, 2006; *also see* 20 C.F.R. § 656.10(f) (2010). Thus, the AAO will withdraw the director's finding that the petitioner failed to follow recruitment procedures.⁵

The AAO will next address the director's finding that the petitioner engaged in fraud and/or material misrepresentation. On appeal, counsel contends that the director's finding is not based on substantial evidence.

The AAO agrees with counsel. In this case, the current record does not show that the petitioner failed to follow recruitment procedures. Similarly, there has been insufficient development of the facts upon which the director can rely to find that the petitioner and/or [REDACTED] engaged in fraud or material misrepresentation.

As immigration officers, USCIS Appeals Officers and Center Adjudications Officers possess the full scope of authority accorded to officers by the relevant statutes, regulations, and the Secretary of Homeland Security's delegation of authority. *See* sections 101(a)(18), 103(a), and 287(b) of the Act; 8 C.F.R. §§ 103.1(b), 287.5(a); DHS Delegation Number 0150.1 (effective March 1, 2003).

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has

⁵ As there was no requirement to keep such records, the director may not make an adverse finding against the petitioner if it claims it does not have the documentation. However, the AAO acknowledges the authority and interest of USCIS to request such documentation pursuant to our invalidation authority at 20 C.F.R. § 656.31(d) and the interest of the petitioner in proving its case by retaining and submitting such documentation to USCIS particularly in response to a fraud investigation. Further, the petitioner must resolve inconsistencies in the record, if any, by independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I).

The administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation for any issue of fact that is material to eligibility for the requested immigration benefit. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. at 591-592.

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.⁶

Section 204(b) of the Act states, in pertinent part, that:

After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien . . . in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true.

Section 212(a)(6)(C) of the Act governs misrepresentation and states the following: "Misrepresentation. - (i) In general. - Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a

⁶ It is important to note that, while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. See *Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. See sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO and USCIS have the authority to enter a fraud finding, if during the course of adjudication, the record of proceedings discloses fraud or a material misrepresentation.

visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

- (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

Matter of S & B-C-, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750. See 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

In this case, as noted above, the factual record does not currently disclose that the petitioner and/or Mr. Dvorak engaged in material misrepresentation with respect to the recruitment process.

Nevertheless, the AAO finds that the approval of the petition on September 4, 2002 was erroneous, and will return the petition to the director for the issuance of a new NOIR.

1. Recruitment Efforts

The DOL regulation at 20 C.F.R. § 656.21 (2001) required, at the time of recruitment in this case, 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. Such documentation 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. 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. If the employer advertised the job opportunity prior to filing the application for certification, the employer shall include also a copy of at least one such advertisement.⁷

In adjudicating the appeal, the AAO finds an anomaly in the record. The record reflects that the petitioner () signed the Form ETA 750 before it completed or even began the recruitment efforts.⁸ This suggests that (the attorney who represented the petitioner in filing the Form I-140 petition) might have been impermissibly involved in the recruiting process, if the petitioner, for instance, signed the Form ETA 750 and let take over the recruitment efforts (for instance, by placing the advertisement and interviewing U.S. candidates or deciding not to refer any applicants to the petitioner for consideration).

On remand, the director should in the new NOIR request the petitioner to explain why signed the Form ETA 750 before she advertised the position in the newspaper and further outline what specific steps the petitioner took to conduct good faith recruitment, e.g. other than the advertisements in the on Sunday, February 4, 2001; whether and how the company advertised in a newspaper of general circulation, and identifying the recruitment source by name; ask the petitioner how many candidates were interviewed; and if any, whether and how the petitioner conducted interviews and determined that no other U.S. candidate was eligible for the position; and specifying the job related reason for not hiring each U.S. worker; and whether and for how long the company posted an in-house posting notice recruiting for the position. The director should specifically ask the petitioner for copies of the in-house posting notice and any other objective, independent evidence to establish that the petitioner actively participated in the recruitment process and followed the DOL requirements to ensure that no United States worker was qualified, willing and available to take the position.

The director should request a statement from , who appears to have been involved in the recruitment process. If such evidence is unavailable, the petitioner should explain why it cannot be obtained.⁹ The director should also ask , the current

⁷ Under the reduction in recruitment process, the employer could, before filing the Form ETA 750 with the local office, conduct all of the recruitment requirements including placing an advertisement in a newspaper of general circulation and posting a job notice in the employer's place of business. See 20 C.F.R. §§ 656.21(i)-(k) (2001).

⁸ The AAO notes that Owner signed the Form ETA 750 on January 5, 2001. By signing the Form ETA 750, the petitioner stated under penalty of perjury that the recruitment was complete. However, as noted above the recruitment efforts started on February 4, 2001 when the petitioner first placed the advertisement in the .

⁹ As noted above, since there was no requirement to keep recruitment records once the Form ETA 750 had been certified by the DOL before 2005, the director may not make an adverse finding against the petitioner if it claims it does not have the documentation. However, the petitioner must resolve inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

President of the company, to attest to her position at the restaurant in 2001 during the recruitment and to explain her authority to recruit workers in 2001, if any.

USCIS regulations at 8 C.F.R. §§ 103.2(b)(2)(i) and (ii) allow USCIS to accept secondary proof in the event that the primary evidence is not available. The regulations further state, "If secondary evidence also does not exist or cannot be obtained, the applicant or the petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances." 8 C.F.R. § 103.2(b)(2)(i). If the petitioner cannot submit primary evidence and detail the reasons why not, the director may accept secondary evidence.

2. The Beneficiary's Qualifications in the Job Offered

The AAO further finds that the petition is not approvable, as the record does not reflect that the beneficiary qualifies for the position offered.

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.

Here, the Form ETA 750 was filed and accepted for processing by the DOL on April 23, 2001. The name of the job title or the position for which the petitioner sought to hire is "cook." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, "Prepare all kinds of meat, fish, salads, soups, sauces, etc." Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two (2) years of work experience in the job offered.

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).

As set forth above, the proffered position requires the beneficiary to have a minimum of two years of work experience in the job offered. On the Form ETA 750, part B, signed by the beneficiary on January 5, 2001, she represented that she worked 35 hours a week at a restaurant in Brazil called "██████████" as a cook from February 1990 to September 1993.

To show that the beneficiary had the requisite work experience in the job offered before April 23, 2001, the petitioner submitted the following evidence:

- An affidavit dated January 18, 2001 from [REDACTED] stating that the beneficiary was a cook from February 1, 1990 to September 30, 1993;
- A sworn statement dated February 24, 2009 from the beneficiary stating that she was a cook with [REDACTED] from February 1, 1990 to September 30, 1993; and
- A copy of the business registration of [REDACTED] showing that the business was officially registered in the CNPJ registration system on 15/09/1977 (September 15, 1977).¹⁰

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) provides:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The AAO notes that the affidavit dated January 18, 2001 [REDACTED] does not include the name and position of the author and does not sufficiently describe the training received or the experience of the beneficiary. Simply stating that the beneficiary worked as a cook does not establish the reliability of the assertion. Further, the AAO observes that the beneficiary failed to include her employment abroad on her Form G-325 (Biographic Information), which she filed in conjunction with her Application to Register Permanent Residence or Adjust Status (Form I-485).

In the new NOIR the director should inform the petitioner about the derogatory information regarding the problems in the record as noted above and request the petitioner to produce independent objective evidence, such as the Brazilian booklet of employment and social security record, to show the beneficiary's employment at [REDACTED] between February 1990 and September 1993, to resolve the problems as noted above. If primary independent objective evidence is not available, USCIS regulations at 8 C.F.R. §§ 103.2(b)(2)(i) and (ii) allow USCIS to accept secondary proof. The regulations further state, "If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances." 8 C.F.R. § 103.2(b)(2)(i). The director should request such primary and/or secondary evidence as allowed and afford the petitioner a reasonable period of time to respond.

3. The Petitioner's Ability to Pay

¹⁰ Businesses that are officially registered with the Brazilian government are given a unique CNPJ number. CNPJ or Cadastro Nacional da Pessoa Juridica is similar to the federal tax ID or employer ID number in the United States. The director indicated in the Notice of Revocation that 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.

Lastly, the petition is not approvable since the petitioner has not established its ability to pay the proffered wage from the priority date until either the beneficiary receives her legal permanent residence or until she ports to another similar employment, pursuant to section 204(j) of the Act.¹¹

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning 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. See 8 C.F.R. § 204.5(d).

Here, as noted above, the record shows that the Form ETA 750 was received for processing on April 23, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$12.57 per hour or \$22,877.40 per year (based on a 35-hour work per week).¹²

To establish the ability to pay, the petitioner has previously submitted a copy of its federal tax return filed on the Form 1120S, U.S. Income Tax Return for an S Corporation, for the year 2000. The evidence will be considered generally, since the petitioner is required to establish the ability to pay only from April 23, 2001 (the priority date).

In adjudicating the appeal, the AAO finds that that the original petitioning business ([REDACTED]) has been dissolved as of December 31, 2005; but it is not clear whether or not the dissolved business was then bought by another business. The record contains a letter dated February 25, 2009 and addressed to "Whom it may concern" from [REDACTED], who stated that she purchased the business [REDACTED] in 2005 and that she kept key

¹¹ In response to the director's NOIR dated February 10, 2009 and in response to the AAO's Notice of Derogatory Information (NDI) dated April 7, 2010, [REDACTED] and current counsel ([REDACTED]) both stated that the beneficiary had ported pursuant to section 204(j) of the Act as amended by section 106(c) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21) (Public Law 106-313).

¹² 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 precedent establishes that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

kitchen staffs including the beneficiary. [REDACTED] further stated that the beneficiary had been working for "All American" since 1997.

If the dissolved business (the original petitioner) was bought by another business (company), the acquiring business may demonstrate that it is the successor-in-interest to the petitioner. The AAO, however, cannot accept [REDACTED] assertions as credible without supporting documentation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The new business (one that bought the petitioner) may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the job opportunity offered by the new organization must be the same as originally offered on the labor certification. Second, both the acquired and the acquiring company must establish eligibility in all respects by a preponderance of the evidence. The original petitioner is required to submit evidence of the ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) beginning on the priority date until the date the transfer of ownership to the successor company is completed. The claimed successor – the new organization – must demonstrate its continuing ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) from the transaction date forward. Third, the new organization must fully describe and document the transfer and assumption of the ownership of all, or the relevant part of, the original petitioning company.

Evidence of transfer of ownership must show that the acquiring organization not only purchased assets from the original petitioner, but also the essential rights and obligations of the original petitioner necessary to carry on the business in the same manner as the original petitioner. The acquiring organization must continue to operate the same type of business as the predecessor and the essential business functions must remain substantially the same as before the ownership transfer. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

The director should request from the new business the following evidence to demonstrate that the new business is the successor of the original petitioning company:

- Evidence concerning a transfer of assets or an assumption of liabilities, including (but not limited to) contracts, articles of merger, or purchase agreements between [REDACTED] (the petitioner) and the new organization, the [REDACTED]

If the new business is the successor-in-interest to the petitioner, then the new business is required to demonstrate the continuing ability to pay the proffered wage until the beneficiary receives lawful permanent residence.

Alternatively, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that the petitioner was making a realistic job offer and that the petitioner had the continuing ability to pay the proffered wage from the priority date, the director must give the petitioner the opportunity to demonstrate that it had financial resources sufficient to pay \$12.57 per

hour or \$22,877.40 per year from April 23, 2001 until the beneficiary ported to work for another employer doing the same or similar job.

In response to the AAO's NDI, current counsel of record, [REDACTED] contends, among other things, that the appeal should not be dismissed as moot, even though the petitioning business has already been dissolved,¹³ since the beneficiary has ported to work for another employer doing the same or similar job, pursuant to section 204(j) of the Immigration and Nationality Act ("the Act") as amended by section 106(c) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21) (Public Law 106-313). That section prescribes that "A petition . . . shall remain valid with respect to a new job if (1) the beneficiary's application for adjustment of status has remained adjudicated for at least 180 days, and (2) the beneficiary's new job is in the same or similar occupational classification as the job for which the visa petition was approved."

[REDACTED] acknowledges, however, that the beneficiary is not eligible to adjust her status to legal permanent residence under section 204(j) of the Act if the underlying petition has been revoked, but maintains that the director's decision to revoke the approval of the petition is erroneous and that it should be reversed. [REDACTED] further urges the AAO to determine whether or not the revocation of the previously approved petition was valid before dismissing the appeal as moot.

The term "valid" is not defined by the statute, nor does the congressional record provide any guidance as to its meaning. [REDACTED] *see also* H.R. Rep. 106-1048, 2001 WL 67919 (Jan. 2, 2001). However, the statutory language and framework for granting immigrant status, along with recent decisions of three federal circuit courts of appeals, clearly show that the term "valid," as used in section 204(j) of the Act, refers to an approved visa petition.

Although section 204(j) of the Act, 8 U.S.C. § 1154(j), provides that an employment-based immigrant visa petition shall remain valid with respect to a new job if the beneficiary's application for adjustment of status has been filed and remained adjudicated for 180 days, the petition must have been "valid" to begin with if it is to "remain valid with respect to a new job." *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010). To be considered valid in harmony with related provisions and with the statute as a whole, the petition must have been filed for an alien who is entitled to the requested classification and that petition must have been approved by a USCIS officer pursuant to his or her authority under the Act. An adjudicated immigrant visa petition is not made "valid" merely through the act of filing the petition with USCIS or through the passage of 180 days. *Id.*

In a case pertaining to the revocation of an I-140 petition, the Ninth Circuit Court of Appeals

¹³ Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

determined that the government's authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. *Herrera v. USCIS*, 2009 WL 1911596 (9th Cir. July 6, 2009). Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start. The Ninth Circuit stated that if the plaintiff's argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs. Under the plaintiff's interpretation, an applicant would have a very large incentive to change jobs in order to guarantee that the approval of an I-140 petition could not be revoked. *Id.*¹⁴

On remand, upon consideration of the petitioner's response to the new NOIR, if the director determines that the Form I-140 petition should be revoked for good and sufficient cause, the beneficiary may not invoke AC21's I-140 portability provisions pursuant to section 204(j). In that case, any claim by the beneficiary that she may continue with her application to adjust status to permanent residence by virtue of having ported to the same or a similar job, must be denied as there would not be a valid, approved petition underlying that request.

The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. The petition is remanded to the director for the issuance of another NOIR, giving the petitioner the opportunity to respond to the notice. The director may advise the petitioner that if it chooses to withdraw the Form I-140 petition, such withdrawal may not prevent a finding of fraud and the invalidation of the labor certification. Upon consideration of the responses, if any, and the evidence of record, the director should issue a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for the issuance of a NOIR to the petitioner, and a new detailed decision consistent with above, which if adverse to the petitioner shall be certified to the AAO for review.

¹⁴ Moreover, every federal circuit court of appeals that has discussed the portability provision of section 204(j) of the Act has done so only in the context of deciding an immigration judge's jurisdiction to determine the continuing validity of an approved visa petition when adjudicating an alien's application for adjustment of status in removal proceedings. *Sung v. Keisler*, 2007 WL 3052778 (5th Cir. Oct. 22, 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. Jun. 15, 2007); *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007). In *Sung*, the court quoted section 204(j) of the Act and explained that the provision only addresses when "an *approved* immigration petition will remain valid for the purpose of an application of adjustment of status." *Sung*, 2007 WL 3052778 at *1 (emphasis added). *Accord Matovski*, 492 F.3d at 735 (discussing portability as applied to an alien who had a "previously approved I-140 Petition for Alien Worker"); *Perez-Vargas*, 478 F.3d at 193 (stating that "[s]ection 204(j) . . . provides relief to the alien who changes jobs after his visa petition has been approved"). Hence, the requisite approval of the underlying visa petition is explicit in each of these decisions.