

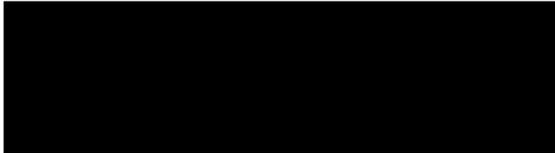
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**PUBLIC COPY**

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:

Office: TEXAS SERVICE CENTER FILE:



**FEB 29 2012**

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.

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 August 23, 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 June 29, 2004. The director of the Texas Service Center, however, revoked the approval of the immigrant petition on May 26, 2009, and the petitioner subsequently appealed the director's decision to revoke the petition's approval. The director's decision will be withdrawn.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 landscaping company.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as a landscape gardener, 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>2</sup> 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 June 29, 2004, but that approval was revoked in May 2009. The director of the Texas Service Center ("the director") concluded that the petitioner failed to submit copies of the in-house postings and thus, did not follow the U.S. Department of Labor (DOL) recruitment procedures. The director also determined that the petitioner's previous counsel, [REDACTED], paid for and created the job advertisement and thus impermissibly participated in the consideration of U.S. applicants for the job. Due to fraud/material misrepresentation in the labor certification process, the director revoked the approval of the petition, pursuant to the authority of 8 C.F.R. § 205.1.

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).

However, before the director can revoke the approval of the petition, the regulation requires that 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

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<sup>1</sup> The petitioner's website (<http://www.ajantico.com>) indicates that the petitioner is an irrigation company, offering complete lawn construction and maintenance for homes and businesses (last accessed February 1, 2012).

<sup>2</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.

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).

In addition, 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) and *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.

On appeal, current counsel for the petitioner ( ) contends that the petitioner fully complied with the DOL recruitment procedures. Counsel further states that the DOL would not have approved the petitioner's Form ETA 750 had it not followed the DOL recruitment requirements. Additionally, counsel indicates that that the director revoked the approval of the petition solely because the petition in the instant proceeding was filed by Mr. Dvorak.

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.<sup>3</sup>

Upon *de novo* review, the AAO will withdraw the director's conclusion that the petitioner did not follow the DOL recruitment procedures. First, the Notice of Intent to Revoke (NOIR) issued

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<sup>3</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).

to the petitioner by the director on February 19, 2009 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 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. The petition's approval will not be reinstated however since the petitioner has not established that the beneficiary possessed the requisite work experience in the job offered prior to the priority date, as more fully discussed below.

At the time the petitioner filed the labor certification application with the DOL for processing in July 2002, 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). As such, USCIS may not make an adverse finding against the petitioner, if, as in this case, the petitioner claims it no longer has the supporting documentation over five years after the labor certification was approved.<sup>4</sup>

In addition, the record contains no evidence showing that [REDACTED] either paid for the job advertisement or interviewed or considered candidates for the position. By itself, the letter dated February 14, 2001 addressed to [REDACTED] from the *Boston Herald* does not show that [REDACTED] paid for or impermissibly participated in the consideration of U.S. applicants for the job offered.<sup>5</sup> Further, no DOL regulations prohibit agents and/or legal representative of petitioners from placing advertisements for their clients with local newspapers. While the regulation at 20 C.F.R. §§ 656.20(b)(3)(i)-(ii) (2002)<sup>6</sup> specifically prohibited agents or legal representatives of the

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<sup>4</sup> The AAO, however, 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.

<sup>5</sup> The letter dated February 14, 2001 addressed to [REDACTED] from the *Boston Herald* stated that the job ads would also be posted online on jobfind.com for 30 days.

<sup>6</sup> This regulation is currently found at 20 C.F.R. § 656.10(b)(2) (2010). The regulation at 20 C.F.R. § 656.20(b)(3)(i) (2002) at the time of recruitment stated:

beneficiaries and the petitioners from participating in interviewing or considering applicants for the job offered, the regulation in place at the time of the recruitment in this case allowed beneficiaries and petitioners to have agents and/or attorneys (legal representatives) represent them throughout the labor certification process. *See* 20 C.F.R. § 656.20(b)(1) (2002).<sup>7</sup>

The AAO also finds that the evidence of record is not sufficiently developed to support the director's finding of fraud or willful misrepresentation in connection with the labor certification process or that the beneficiary engaged in fraud or material misrepresentation in the presentation of his credentials to the petitioner and through the petitioner to USCIS. Thus, the director's finding of fraud or misrepresentation is withdrawn.

Finally, the AAO finds that the director erred in revoking the approval of the petition under the authority of 8 C.F.R. § 205.1. The regulation at 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 withdrawn. Nonetheless, as the director does have revocation authority under 8 C.F.R. § 205.2, the director's denial is considered under that provision under the AAO's *de novo* review authority.

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It is contrary to the best interests of U.S. workers to have the alien and/or agents or attorneys for the alien participate in interviewing or considering U.S. workers for the job offered the alien. As the beneficiary of a labor certification application, the alien cannot represent the best interests of U.S. workers in the job opportunity. The alien's agent and/or attorney cannot represent the alien effectively and at the same time truly be seeking U.S. workers for the job opportunity. Therefore, the alien and/or the alien's agent and/or attorney may not interview or consider U.S. workers for the job offered to the alien, unless the agent and/or attorney is the employer's representative as described in paragraph (b)(3)(ii) of this section.

The regulation at 20 C.F.R. § 656.20(b)(3)(ii) (2002) at the time of recruitment stated:

The employer's representative who interviews or considers U.S. workers for the job offered to the alien shall be the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered the alien, but which do not involve labor certifications.

<sup>7</sup> This regulation is currently found at 20 C.F.R. § 656.10(b)(1) (2010).

In adjudicating the appeal, the AAO observes that the petitioner, before filing the current labor certification for the position of landscape gardener on July 9, 2002, filed an application for labor certification on behalf of the beneficiary for the position of pipe fitter on October 28, 1997. The AAO sent a Request for Evidence (RFE) to the petitioner on October 5, 2010, requesting the petitioner to explain (1) how the petitioner would utilize a full-time pipe fitter and (2) how the beneficiary's experience as a landscape/irrigation technician prepared him for the position of pipe fitter.

In response to the AAO's RFE, counsel states that nowhere in the record does the petitioner require the beneficiary to work as a pipe fitter. Counsel also states that there must be an error in the record.

The AAO disagrees.<sup>8</sup> A review of the letter from the Massachusetts Department of Labor and Workforce Development Division of Employment and Training dated October 29, 1998, reflects that the petitioner, before filing the current Form ETA 750 on July 9, 2002, filed an earlier labor certification application (Form ETA 750) for the beneficiary on October 28, 1997. The 1997 Form ETA 750 was for the position of pipe fitter.

In the Biographic Information (Form G-325) that the beneficiary filed in conjunction with his Application to Register Permanent Residence or Adjust Status, the beneficiary stated that he had been employed by the petitioner since 1995. This suggests that the petitioner originally employed the beneficiary as a pipe fitter in 1997 (not as a landscape gardener) and intended to permanently employ him in the United States as a pipe fitter. As the beneficiary's qualifications as a landscape gardener are material to the outcome of this proceeding, any questions raised in the record about the reliability of the evidence establishing the beneficiary's qualifications must be addressed.

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. 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);

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<sup>8</sup> The petitioner's previous counsel, [REDACTED], submitted a copy of the petitioner's prior labor certification application along with the beneficiary's application to adjust status to permanent resident in order to establish that the beneficiary could avail himself of the special adjustment provisions at section 245(i) of the Act, 8 U.S.C. § 1255(i). The beneficiary's reliance on the previously filed labor certification application negates current counsel's argument that the previously filed labor certification was in error.

*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 beneficiary on the Form ETA 750, part B, represented that he worked 40 hours a week at a landscaping company in Brazil called [REDACTED] as a landscaper/irrigation technician from January 1991 to October 1994. The information concerning when and where the beneficiary worked in Brazil is listed on the Form G-325 (Biographic Information). To show that the beneficiary had the work experience in the job offered as of the priority date (July 9, 2002), the petitioner submitted a sworn statement dated August 28, 1997 from [REDACTED], who stated that the beneficiary worked at [REDACTED] as a landscape/irrigation technician from "01.02.1991" (January 2, 1991) to October 30, 1994.

The record, however, contains no information concerning the beneficiary's prior work experience as a pipe fitter. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Therefore, on remand, the director should issue a new Notice of Intent to Revoke (NOIR) and ask the petitioner to establish the beneficiary's experience as a landscaper and as a pipe fitter with independent, objective evidence. The director should request the petitioner to submit evidence such as copies of the beneficiary's paystubs, payroll records, tax documents, or financial statements or other evidence, i.e. Brazilian booklet of employment and social security, to show that the beneficiary had the experience in landscaping as claimed and that he qualified for the job before the priority date on July 9, 2002.

Upon consideration of the response, the director may consider whether the documentation submitted by the petitioner of the beneficiary's work experience was fraudulent or a misrepresentation of a material fact in accordance with the discussion above. The director may invalidate the labor certification if he finds fraud or material misrepresentation involving the beneficiary's prior work experience in Brazil.

In summary, the director's decision to revoke the approval of the petition is withdrawn. The approval of the petition, however, may not be reinstated under the facts of record. The petition is, therefore, remanded to the director for the issuance of a new NOIR in accordance with the regulations and laws as provided above. In the NOIR, the director should specifically advise the petitioner to demonstrate that the beneficiary qualified to perform the duties in the position as a landscaper as of July 9, 2002.

The director may pursue revocation of the petition based upon fraud and/or willful misrepresentation as discussed above and as appropriate. The director may request any evidence relevant to the outcome of the decision and should afford the petitioner a reasonable opportunity to respond. Upon review and consideration of any response, the director shall enter a new decision.

**ORDER:** The director's decision to revoke the approval of the petition is withdrawn. However, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not reinstate the approval of the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a Notice of Intent to Revoke (NOIR) and a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.