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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

[redacted]

B6

Date: JUL 0 6 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner:
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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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: The preference visa petition was approved by the Director, Vermont Service Center, on March 21, 2003, but the approval was later revoked by the Director, Texas Service Center, on February 26, 2009. The petitioner has appealed the decision to revoke the approval of the petition to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook pursuant to section 203(b)(3)(A)(i) of the 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. The director revoked the approval of the visa petition, finding that evidence of record failed to demonstrate that the beneficiary had the requisite work experience in the job offered prior to the priority date and qualified for the position offered.

On appeal, current counsel for the petitioner[2] contends that the petitioner has submitted sufficient evidence to demonstrate that the beneficiary has the requisite work experience in the job offered and qualifies for the position offered.

The record shows that the appeal is 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]

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, states:

> 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 204. Such revocation shall be effective as of the date of approval of any such petition.

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).

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[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, Mr. [redacted] will be referred to as counsel or by name throughout this decision.

[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).

However, the regulation at 8 C.F.R. § 205.2 states:

> (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 proceedings

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.

Here, we find that the director provided the petitioner with notice of the derogatory information specific to the current proceeding. In the Notice of Intent to Revoke (NOIR), the director stated that the CNPJ number of the business where the beneficiary claimed to have worked in Brazil (Restaurante Bela Vista located at Av. Carlos Lindenberg No. 321, Vila Velha, ES, Brazil) was not valid,[4] and thus, concluded that beneficiary could not have the requisite work experience in

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[4] The letter of employment verification dated April 4, 2001 for the beneficiary from Restaurante Bela Vista included a CGC number [redacted] The director searched the CNPJ database (http://www.receita.fazenda.gov.br/) using the CGC number provided above, but the search did not turn up any result. Businesses that are officially registered with the Brazilian government are given a unique CNPJ number. CNPJ (Cadastro Nacional da Pessoa Juridica) is similar to the federal tax ID or employer ID number in the United States. The director stated in the NOIR that the Department of State has determined that the CNPJ provides reliable verification with respect to the adjudication of employment-based petitions in comparing an

the job offered before the priority date and that the petitioner had submitted false documentation to verify the required work experience of the beneficiary.

To rebut the director's finding about the beneficiary's former employement in Brazil, counsel submitted the following evidence:

- A sworn statement dated October 2, 2008 from the beneficiary wherein she stated:

  - ✓ That her employer, Ristorante Molise, (the petitioner) filed a labor certification application on her behalf in 2001;
  - ✓ That she brought her brother-in-law at the time, to meet Mr.[5] the attorney who filed the labor certification application on her behalf since she was not fluent in English;
  - ✓ That an agent in Brazil called "despachante" was hired to obtain the letter of employment dated April 4, 2001 because she had not been in contact with anyone from Restaurante Bela Vista since she stopped working in 1996, and since she did not have a telephone (her phone was out of service) and her mother and sister lived in the U.S. at the time;
  - ✓ That she did not see the letter that the despachante obtained and sent to her brother-in-law before it was submitted along with the I-140 petition by her attorney at the time (Mr.) in 2002;
  - ✓ That she saw the letter for the first time in 2006 and noted that although the letter contained her correct name, date of birth, and the dates of employment, none of the other information was correct;[6]
  - ✓ That upon seeing the letter for the first time, she was not able to recognize or confirm the CNPJ number because simple employees in Brazil do not have access to that information from their employer (generally, only managers and owners know the company's CNPJ);
  - ✓ That realizing the error in the letter she asked Mr. to send a letter to immigration to ignore the employment verification letter; and
  - ✓ That Mr. sent a letter to immigration on January 30, 2008.

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individual's stated hire and working dates with a Brazilian-based company to that Brazilian company's registered creation date.

[5] The AAO notes that Mr. 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 to February 28, 2015.

[6] The beneficiary does not state what information in the letter was wrong. The letter states that she worked as a cook preparing special plates with fish, pastas, and meals. The letter was signed by and the name and address of the restaurant is Restaurante Bela Vista, Av. Carlos Lindenberg no. 321, Vila Velha, ES – CEP 27900, Brazil. The Form ETA 750, part B, also lists her employer as "Restaurante Bela Vista – Av. Carlos Lindenberg 321, Vila Velha, ES, Brazil."

- A copy of a letter dated January 30, 2008 from Mr. to USCIS TSC (Texas Service Center) requesting to withdraw the employment verification letter dated April 4, 2001;
- A copy of a letter dated October 7, 2008 from Mr. to counsel (Mr.) stating that he sent the letter dated January 30, 2008 by certified mail and that according to the certified mail receipt, USCIS TSC received that letter on February 5, 2008 (the certified mail receipt is enclosed);
- A statement dated October 7, 2008 from Miriam Batista de Oliveira declaring that she knew about the hiring of despachante in 2001;
- A sworn statement dated September 29, 2008 from stating that the beneficiary worked as a cook under his supervision from May 1994 to June 1996 at Recreio Panoramico Ltda d.b.a. Restaurante Bela Vista (CNPJ number 69);
- A statement dated October 6, 2008 from stating that Ltda owned Restaurante Vista Linda before he purchased it and renamed it Restaurante Bela Vista and that Restaurante Bela Vista is commonly known as either Restaurante Bela Vista or Restaurante Vista Linda (this because both names mean the same thing in the Portuguese language – restaurant with a beautiful view);
- A sworn statement dated September 29, 2008 from stating that she worked for Pousada e Restaurante Vista Linda (Hotel and Restaurant Vista Linda) from June 1986 to September 2006 in the administrative department and that the beneficiary worked as a cook from May 1, 1994 to June 30, 1996 under the supervision of
- A statement dated October 6, 2008 from stating that Walter Assuncao owned Hotel e Restaurante Vista Linda before purchased the business and renamed it Restaurante Bela Vista and that the restaurant is commonly known by both names (Restaurante Vista Linda and Restaurante Bela Vista) because they both mean the same thing in the Portuguese language: restaurant with a beautiful view;
- CNPJ of Restaurante Bela Vista, showing the following information:
  - ✓ CNPJ number:
  - ✓ Opening date: 09/10/2006 (October 9, 2006);
  - ✓ Primary business: Restaurant;
  - ✓ Nature of the business: Snack bars, tea houses, juice and similar;
  - ✓ Neighborhood/district: Santa Isabel;
  - ✓ Municipal: Domingos Martins.
- CNPJ of Recreio Panoramico Ltda d.b.a. Restaurante Bar Hotel Vista Linda, showing the following information:
  - ✓ CNPJ number:
  - ✓ Opening date: 07/12/1982 (December 7, 1982);
  - ✓ Primary business: Hotels;
  - ✓ Nature of the business: Not available;
  - ✓ Neighborhood/district: Centro;

- ✓ Municipal: Domingos Martins.
- Several pictures of the city of Domingos Martins (the area where the beneficiary claimed she worked between 1994 and 1996) and Restaurante Vista Linda.

In the Notice of Revocation (NOR), the director stated:

> The documentation now in the record does not support the claim that Bela Vista restaurant is one and the same as Vista Linda restaurant. No hard evidence[7] was found submitted with the petition to reveal either that the two businesses have identical addresses or CNPJ numbers. Too, this office cannot now accept that the business in question is known by two different designations solely on the basis of affidavits claiming the same.

On appeal, counsel maintains that the beneficiary qualifies for the position offered, that she has the requisite work experience in the job offered, and that she worked as a cook in Brazil before the priority date. In his brief, counsel essentially contends that Restaurante Bela Vista (Bela Vista Restaurant) and Vista Linda Restaurant are used interchangeably by the local people since both names mean the same thing – a restaurant with a beautiful view. Counsel indicates that both Restaurante Bela Vista and Vista Linda Restaurant have the same address: Rod. BR 262 KM 35 Santa Izabel, Domingo Martins, E. Santo.

Counsel submits the following additional evidence:

- Receipts dated July 30, 1992; September 4, 1993; and September 19, 1993 from Recreio Panoramico Ltda ME Restaurante Bar e Hotel Vista Linda; and
- Two receipts dated March 30, 2009 from Restaurante Bela Vista Ltda ME.

In adjudicating the appeal, the AAO found that the evidence in the record is not sufficient to demonstrate that the beneficiary worked as a full-time cook at Restaurante Bela Vista from May 1, 1994 to June 30, 1996 (or July 30, 1996).

Specifically, the AAO noted the following deficiencies/inconsistencies in the record:

1. The beneficiary stated in her sworn statement dated October 2, 2008 that the employment verification letter dated April 4, 2001 was essentially fabricated since it contains information that is not truthful;

2. The beneficiary was 16 years of age when she claimed she began to work for Restaurante Bela Vista in May 1994, and it is likely that the beneficiary was in school full-time during that time period;

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[7] The petitioner bears the burden of proving eligibility based on a preponderance of the evidence. Section 205 of the Act, 8 U.S.C. § 1155. The AAO withdraws the director's requirement for hard evidence.

3. The beneficiary lived in the city of Vila Velha, Espirito Santo, between 1992 and August 1996; whereas Restaurante Bela Visa is located in the city of Domingos Martins, Espirito Santo; considering the beneficiary's young age and the distance between the two cities (38 km or roughtly 24 miles),[8] it is unlikely that the beneficiary lived in Vila Velha and worked in Domingos Martins;

4. The beneficiary failed to include her employment abroad on the Form G-325 (Biographic Information);[9] and

5. The petitioner failed to demonstrate the continuing ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence.

On May 2, 2012, the Administrative Appeals Office (AAO) issued a Notice of Intent to Dismiss and Request for Evidence and Notice of Derogatory Information (NOID/RFE/NDI) to both the petitioner and the beneficiary. The AAO advised the petitioner and the beneficiary to resolve the deficiencies and/or the inconsistencies in the record by submitting objective independent evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice).

Responding to the AAO's NOID/RFE/NDI and to resolve the deficiencies/inconsistencies in the record as described above, counsel submitted the following additional evidence:

- A sworn statement dated May 30, 2012 from the beneficiary that she stopped going to school at 8th grade in Brazil, that the restaurant was about 30-45 minutes away from her home, that she attended work after school and worked extra hours on weekends and vacations, and that she went to Vista Linda Restaurant by getting rides from her father, friends, and uncle when they had to go to work in that area (Domingos Martins);
- A statement dated May 14, 2012 from Ataide Batista de Oliveira and Maria Braga de Oliveira stating that they are parents of the beneficiary, that they authorized the beneficiary to work at Restaurante Vista Linda as a cook from May 1, 1994 to July 30, 1996, and that the beneficiary went to work by riding with known people, a bus, or with her father;
- A statement dated May 14, 2012 from Zuleika Januth stating that she worked with the beneficiary as a cook at Restaurante Vista Linda between 1994 and 1996;
- A statement dated May 16, 2012 from Jose Reynaldo Galvao de Castro stating that as a patron of the restaurant he met the beneficiary in 1995 when the beneficiary was a cook at Restaurante Vista Linda;

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[8] *See* http://www.distancecalculator.globefeed.com (last accessed April18, 2012).

[9] The beneficiary filed this form in connection with her Application to Register for Permanent Residence or Adjust Status (Form I-485).

- A statement dated May 9, 2012 from stating that he is a longtime friend of the beneficiary's family and that the beneficiary worked at Restaurante Vista Linda as a cook from 1994 to 1996;
- A statement dated May 14, 2012 from stating that he has known the beneficiary since the beneficiary's childhood, that the beneficiary worked as a cook for Restaurante Vista Linda from 1994 to 1996, that he frequented the area and give her rides to work, and that Restaurante Vista Linda is now called Restaurante Bela Vista;
- An unofficial school transcript of the beneficiary attending Veterans Memorial High School in Peabody, Massachusetts, in 1996;
- Copies of the petitioner's Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2001 through 2010; and
- Copies of the beneficiary's Forms W-2 for the years 2001through 2010.

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 seeks to hire is "Cook." 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 December 29, 2000, she represented she worked 35 hours a week at Restaurante Bela Vista as a cook from May 1994 to July 1996.

Upon review of all of the evidence in the record, the AAO agrees with the director that the petitioner has failed to demonstrate that the beneficiary qualified for the position offered as of the priority date.

The employment verification letters from dated October 6, 2008 and September 29, 2008 and from dated September 29, 2008 and October 6, 2008 do not include a description of the beneficiary's work experience or the

training received. Simply stating that the beneficiary worked as a cook does not sufficiently describe the experience or the training received by the beneficiary and does comply with the regulation governing proof of beneficiary qualifications. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A).[10]

Further, none of the statements or letters indicates that the beneficiary worked full-time. The school record from Veterans Memorial High School in Peabody, MA, reflects that the beneficiary last attended school in Brazil in 1996. This is consistent with the beneficiary's statement that she worked at the restaurant after school, on weekends, and vacations. Thus, the beneficiary does not appear to have two years of full-time work experience as a cook as of the priority date.

Moreover, the address of the Restaurante Bela Vista on the letter withdrawn by Mr. is The beneficiary signed the Form 750B under penalty of perjury on December 29, 2000 indicating that the restaurant's address is Av. Carlos Lindenberg 321, Vila Velha, ES, Brazil. These addresses are not the address of the claimed employer in Santa Isabel, Domingos Martins. The beneficiary did not attempt to revise the employment experience she listed on the Form ETA 750B before signing that document under the penalty of perjury. 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). No evidence of record explains this inconsistency.[11]

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[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.

[11] The beneficiary states that her brother-in-law, Mariano, accompanied her to Mr. office and translated communications into Portugese, and cannot claim lack of knowledge of the contents of the ETA Form 750B. The regulation at 8 C.F.R. § 103.2(a)(2) provides, in part:

> (2) Signature. An applicant or petitioner must sign his or her application or petition. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the application or petition, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the application or petition, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct.

The beneficiary did not retract her employment or point out that the address was wrong on the ETA Form 750B at the time that Mr. withdrew the employment verification letter. Further, any failure to apprise herself of the contents of the paperwork or the information being

No independent objective evidence demonstrating the beneficiary's qualifications has been submitted. The petitioner has not submitted copies of the beneficiary's pay stubs, payroll records, tax documents, or financial statements from her employment in Brazil. Nor has the petitioner produced the beneficiary's Brazilian booklet of employment and social security or a copy of her government-issued identification card reflecting where she lived and worked between 1994 and 1996. Whether or not the beneficiary had the prerequisite work experience for the proffered position as of the priority date is material in this case, since the petition cannot be approved without a determination that the beneficiary qualifies for the job offered in the labor certification.

Where the beneficiary of an approved visa petition is not 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).

For the reasons stated above, the AAO finds that the petitioner has not met its burden of proving by a preponderance of the evidence that the beneficiary qualifies for the position offered. The AAO further finds that the director's decision to revoke the approval of the petition was based on good and sufficient cause, as required by section 205 of the Act, 8 U.S.C. § 1155. The director correctly revoked the approval of the petition based on the beneficiary's lack of qualifications for the job offered.

ORDER: The appeal is dismissed. The director's decision to revoke the approval of the petition is affirmed.

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submitted constitutes deliberate avoidance and does not absolve her of responsibility for the content of her application or the materials submitted in support. *See Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents).