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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: Office: TEXAS SERVICE CENTER
JUL 19 2012

FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

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 petitioner filed an immigrant petition for alien worker, Form I-140, on May 28, 2002. The employment-based immigrant visa petition was initially approved by the Director, Vermont Service Center, on November 25, 2002. The Director, Texas Service Center, however, revoked the approval of the immigrant petition on February 26, 2009, and the petitioner subsequently appealed the director's decision. The appeal will be dismissed.

The petitioner is a bakery.¹ The business seeks to employ the beneficiary permanently in the United States as a baker 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).² 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 petitioner³ contends that the director's decision to revoke the previously approved petition was erroneous, because the decision was not based on good and sufficient cause, as required by 8 U.S.C. § 1155.

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.⁴

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]

¹ A review of the petitioner's website (<http://www.centuryhousepeabody.com/>) reveals that the petitioner is a restaurant (last accessed June 19, 2012).

² 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.

³ Current counsel of record, [REDACTED] will be referred to as counsel or by name throughout this decision.

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).

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).

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 has 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 business where the beneficiary claimed to have worked in Brazil [REDACTED], registered under the CNPJ number [REDACTED] from January 1993 to December 1998 had been closed since 1981.⁵ Therefore, the director concluded that the

⁵ The letter of employment verification dated January 6, 2001 for the beneficiary from [REDACTED] included a CNPJ number [REDACTED]. The director found that [REDACTED] was closed in 1981 by searching the CNPJ database. The CNPJ database can be

beneficiary could not have worked at [REDACTED] from January 1993 to December 1998. Further, the director indicated that the petitioner had submitted false documentation to verify the required work experience of the beneficiary.

Responding to the director's NOIR, counsel for the petitioner at the time⁶ submitted the following evidence:

- A statement dated September 15, 2008 from [REDACTED] stating that he worked with the beneficiary as a baker at [REDACTED] formerly known as [REDACTED] from January 2, 1993 to December 31, 1998;
- A statement dated September 15, 2008 from [REDACTED] stating that he worked with the beneficiary as a baker at [REDACTED] from January 2, 1993 to December 31, 1998;
- A statement dated September 15, 2008 from [REDACTED] stating that he worked with the beneficiary as a baker at [REDACTED] from January 2, 1993 to December 31, 1998; and
- A statement dated September 15, 2008 from [REDACTED] stating that he is the partner/administrator of [REDACTED] and that the beneficiary worked as a baker at [REDACTED] from January 2, 1993 to December 31, 1998.

In the Notice of Revocation (NOR), the director stated that the petitioner failed to provide hard documentary evidence regarding the beneficiary's alleged, relevant employment history.⁷ The director further indicated that no evidence of record explained how the beneficiary could work from January 1993 to December 1998 for a company that had closed in 1981, and that the petitioner had not cleared up the discrepancy in responding to the director's notice.

The AAO agrees with the director that the petitioner has failed to demonstrate that the beneficiary qualified for the position offered. The AAO further finds that there was good and sufficient cause to issue the NOIR.

accessed online at <http://www.receita.fazenda.gov.br/>. CNPJ or [REDACTED] is a unique number given to every business registered with the Brazilian authority. In Brazil, a company can hire employees, open bank accounts, buy and sell goods only if it has a CNPJ. The director indicated that the Department of State had 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.

⁶ Counsel for the petitioner at this time was [REDACTED] will be referred by name throughout this decision.

⁷ The AAO notes that the petitioner has the burden of proving by a preponderance of the evidence that the beneficiary is qualified as of the priority date and withdraws the director's requirement that such evidence must be hard documentary evidence.

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 30, 2001. The name of the job title or the position for which the petitioner seeks to hire is “Bakers.” 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).

It is also important to note that DOL's certification of the Form ETA 750 does not supercede USCIS' review and evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable, and that includes a review of whether or not the beneficiary is qualified for the proffered position, which in this case, is governed by section 203(b)(3)(A)(i) of the Act and 8 C.F.R. § 204.5(l)(3).

On appeal, current counsel for the petitioner [REDACTED] contends that the CNPJ number listed on the letter of employment verification dated January 6, 2001 for the beneficiary from [REDACTED] was erroneously typed by the accountant who prepared the letter and that this error was an innocent mistake. He further indicates that [REDACTED] CNPJ number [REDACTED] was closed in 1981 by [REDACTED] but because [REDACTED] owned another business, next door, he simply absorbed the bakery into this other business and continued to do business in the same location. [REDACTED] states that this second company, [REDACTED]

Further, [REDACTED] submits a notarized statement signed by [REDACTED] in which [REDACTED] states that:

- ✓ On June 1, 1979 [REDACTED] established a limited liability partnership, located at [REDACTED] (neighborhood), in the city of Resplendor, State of Minas Gerais. This was a

⁸ A search in the CNPJ database <http://www.receita.fazenda.gov.br/> confirms that [REDACTED] belongs to [REDACTED] (last accessed on June 19, 2012).

bakery. The fictitious name was [REDACTED] and the company's name was [REDACTED] which means bakery). The company was properly registered at the [REDACTED]

The company's CNPJ was [REDACTED]

- ✓ In addition, on the same date, June 1, 1979 [REDACTED] also established another limited liability partnership, Comercial [REDACTED] located at [REDACTED] (neighborhood), in the city of Resplendor, State of Minas Gerais. The company was also properly registered at the [REDACTED]. This was a small grocery store. The company's CNPJ is [REDACTED]
- ✓ [REDACTED] decided to voluntarily dissolve [REDACTED] on September 10, 1982. [REDACTED] ceased to operate on February 28, 1981 and canceled its CNPJ registration on December 11, 1981.
- ✓ [REDACTED] remained in business and started to operate also as a bakery, combining and expanding its purpose.
- ✓ [REDACTED] the beneficiary, worked as a baker with [REDACTED] from January 2, 1993 to December 31, 1998.

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. In the NOID/RFE/NDI, the AAO specifically outlined the following deficiencies/inconsistencies in the record:

1. The beneficiary indicated on item number 15 of the Form ETA 750, part B, that he worked for [REDACTED] from January 1993 to December 1997; the evidence submitted (the letter of employment verification and all of the statements from people who claimed to be familiar with the beneficiary's employment as a baker in Brazil), however, states that the beneficiary worked for [REDACTED] from January 1993 to December 1998;
2. The beneficiary was 16 years of age when he claimed he began to work for [REDACTED] in January 1993 and was in school full-time during that time period;
3. The beneficiary failed to include his employment abroad on the Form G-325 (Biographic Information);⁹ and

⁹ The beneficiary filed this form in connection with his Application to Register Permanent

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

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).

No independent objective evidence demonstrating the beneficiary's qualifications has been submitted. Whether or not the beneficiary had the prerequisite work experience for the proffered position as of the priority date is material in this case, as the petition cannot be approved without a determination that the beneficiary qualified for the job offered in the labor certification.

The petitioner failed to submit independent objective evidence resolving the discrepancy in the beneficiary's claimed qualifying employment. [REDACTED] does not explain how he came to write the letter in 2001 on the letterhead of [REDACTED] a company that had been dissolved since 1981, twenty years earlier. The petitioner did not submit the beneficiary's work booklet, social security records, or other objective evidence indicating where the beneficiary was employed. Given [REDACTED] failure to explain the discrepancy and the petitioner's failure to submit independent objective evidence to resolve the inconsistency, the AAO finds that the petitioner has not established the beneficiary's claimed qualifying employment and that the beneficiary was qualified to perform the job duties as of the priority date.

In response to the AAO's NOID/RFE/NDI, counsel expressed his objection to the re-adjudication or reexamination of the entire visa petition and labor certification application by the AAO. He states:

The Beneficiary objects to the Service's request for additional evidence without first reaching the issue of the validity of the Notice of Intent to Revoke (NOIR). Your office has asserted that it is proper to review appeals on a "de novo" basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3rd Cir. 2004). However, the case cited by the Service is not applicable in the First Circuit, where the Petitioner is located, and more importantly does not speak to the appeal of a revocation. A careful reading the *Soltane* decision reveals that it is in fact an appeal of a visa denial.

Counsel's contention that the AAO does not have *de novo* authority to adjudicate and reexamine the appeal is not persuasive. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also*

Soltane v. DOJ, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). It is appropriate for the AAO to reexamine the validity of the visa petition and the labor certification at this stage of the proceeding, including the beneficiary's qualifications for the position.

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). As the beneficiary is not qualified, the approval of the petition must be revoked.

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