

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: ~~NOV 29 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 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On August 2, 2001, 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 November 16, 2001. The director of the Texas Service Center (the director), however, revoked the approval of the immigrant petition on February 27, 2009, and the petitioner subsequently appealed the director's decision to revoke the petition's approval. The petitioner filed an untimely notice of appeal that was considered by the director as a motion to reopen or reconsider. The petitioner appealed the director's March 31, 2010 decision affirming the revocation of the petition to the Administrative Appeals Office (AAO). The appeal will be dismissed.

Section 205 of the Immigration and Nationality Act (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 [s]he deems to be good and sufficient cause, revoke the approval of any petition approved by h[er] 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).¹

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 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. As stated earlier, this petition was approved on November 16, 2001 by the VSC, but that approval was revoked in February 2009. The director determined that the petitioner failed to demonstrate that the beneficiary had the required experience as of the priority date. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.2(c).

On appeal, counsel for the petitioner³ contends that the director has improperly revoked the approval of the petition. Specifically, counsel asserts that the director erroneously revoked the approval of the

¹ Counsel argues on appeal that *Matter of Ho* does not support the ability of USCIS to revoke approval of a petition. Counsel notes that *Matter of Ho* involved a family based petition instead of an employment based petition and that as such, did not involve the interplay between USCIS and DOL. Counsel also states that *Matter of Ho* does not support the revocation of an approval based on misconduct by former counsel in previous petitions. As discussed more thoroughly below, *Matter of Ho* stands for the proposition that where discrepancies exist in the record, the petitioner must submit evidence to explain them. Any unexplained discrepancies may form the basis for revoking the approval of a petition regardless as to whether the petition was family or employment based.

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 throughout this decision. Previous counsel, [REDACTED], will be referred to as former counsel or by name. The AAO notes that [REDACTED] was suspended from the practice of law before the Immigration Courts. Board of

petition as it relied upon an overbroad application of *Matter of Leung* to determine that the beneficiary did not have the experience required by the terms of the labor certification.

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

As a threshold matter, the AAO will review whether the director adequately advised the petitioner of the basis for revocation of approval of the petition. As noted above, the Secretary of Homeland Security has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. *See* section 205 of the Act; 8 U.S.C. § 1155. This means that notice must be provided to the petitioner before a previously approved petition can be revoked. More specifically, the regulation at 8 C.F.R. § 205.2 reads:

(a) *General.* Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice to the petitioner** on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS]. (emphasis added).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon

Immigration Appeals (BIA), and Department of Homeland Security (DHS) for a period of three years from March 1, 2012 to February 28, 2015.

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).

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 dated August 27, 2008, the director wrote:

A review of the evidence submitted, specifically the employment verification letter . . . indicates that the petitioner has submitted false documentation to verify the required work experience of the beneficiary.

The director further advised the petitioner in the NOIR that the instant case might involve fraud. The director specifically asked the petitioner to submit additional evidence to demonstrate that the beneficiary had the required work experience as of the priority date.

As noted above, 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. at 590.

The AAO finds that the director had good and sufficient cause to issue the NOIR as he specifically questioned the credibility of the evidence submitted to establish that the beneficiary obtained work experience as a cook working for [REDACTED] in Brazil when the experience letter contained an invalid CNPJ number.⁵ The questions regarding the beneficiary’s work with [REDACTED] impacts the assessment of whether she had the qualifications for the position as of the priority date.

The AAO finds that the record does not currently establish that the beneficiary had the requisite work experience in the job offered before the priority date. Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary’s qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor

⁵ 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 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.

certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Here, the Form ETA 750 was filed and accepted for processing by the DOL on February 26, 2001. The name of the job title or the position for which the petitioner seeks to hire is "cook." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, "Prepare all types of dishes." Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered.

On the Form ETA 750, part B, signed by the beneficiary on December 29, 2000, she represented that she worked 35 hours a week at [REDACTED] in Brazil as a cook from February 1993 to March 1995. The record includes a January 10, 2001 letter from [REDACTED] stating that the beneficiary worked as an auxiliary cook from February 1993 to March 1995. The letter contains a stamp at the bottom for [REDACTED] with a CNPJ number of [REDACTED].

As stated in the director's NOIR, the CNPJ number provided is invalid. The NOIR noted those inconsistencies and requested evidence to resolve the discrepancies in keeping with *Matter of Ho*, 19 I&N Dec. at 591.

In response to the NOIR, the petitioner submitted a statement from the beneficiary dated September 23, 2008 explaining that [REDACTED] is closed and that she was unable to find the owners or anyone else who would be able to provide evidence of her employment. The petitioner also submitted news articles regarding Brazil's informal economy. The record also contains an affidavit dated April 1, 2009 from the beneficiary stating that she had more than two years of experience prior to February 2000.

As the director found in the Notice of Revocation (NOR), the documents submitted by the petitioner in response to the NOIR do not overcome the discrepancy of the invalid CNPJ number on the letter of experience. Specifically, the beneficiary's statement is self-serving and does not provide independent, objective evidence to demonstrate that [REDACTED] existed or that the beneficiary worked for that establishment. 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)).

With its motion to reopen or reconsider, the petitioner submitted a letter from [REDACTED] stating that the beneficiary worked as a cook from June 1996 through September 1998 for his prior restaurant, [REDACTED] located in Hingham, Massachusetts; a letter from [REDACTED] stating that the beneficiary worked as a cook from April 1, 1996 to June 15, 1996; and a letter from [REDACTED] stating that the beneficiary worked as a cook from January 16, 1996 to February 25, 1996.

The director's decision denying the motion to reopen and reconsider cites *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), for the proposition that "new employment not listed when the labor certification was certified or when the visa petition was filed is not credible for the issuance of an immigrant visa classification." The director then concluded that any experience claimed by the beneficiary that was not listed on the Form ETA 750B could not be considered in determining whether the beneficiary met the experience required by the terms of the labor certification. The AAO agrees.

In *Matter of Leung*, 16 I&N Dec. 2530, the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. On appeal, counsel argues that *Matter of Leung* does not provide a definitive reason to reject evidence of experience not listed on the labor certification, but instead, "requires a careful consideration of the record and determination of the credibility of the competent, objective evidence of Applicant's United States employment experience."

In this case, careful consideration of the record yields several noticeable inconsistencies that calls into question the credibility of the evidence submitted. In addition to the failure to list the experience on the Form ETA 750, the beneficiary failed to list this experience on the Form G-325 that accompanies the Application to Register Permanent Resident or Adjust Status (Form I-485). The Form G-325 specifically states that the applicant (beneficiary) must list all employment for the past five years and the last occupation abroad, if not covered by the past five years. The Form I-485 was submitted on February 8, 2002. The beneficiary's claimed employment with [REDACTED] was within five years of that date. The beneficiary's failure to include this employment on the Form G-325 further calls into question the validity of the beneficiary's claim of past employment.

The record does not contain independent, objective evidence of the beneficiary's qualifying employment to overcome the noted inconsistencies in the evidence of her employment, such as the beneficiary's Forms W-2, pay stubs, payroll records, Social Security records, or the like. Thus, the AAO agrees that the record does not establish the beneficiary's qualifications for the position.

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.⁶ If the petitioner's net income or net current assets is

⁶ See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*,

not sufficient to demonstrate the petitioner's ability to pay the proffered wage. USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the petitioner did not submit evidence that it paid the beneficiary the full proffered wage in each year from the priority date in 2001 onwards. Instead, it submitted a Form W-2 demonstrating that it paid the proffered wage in 2003, but submitted no other evidence of salaries or wages paid to the beneficiary from the priority date in 2001 onward. The petitioner did not submit any Internal Revenue Service tax returns for 2001 onward to demonstrate that its net income and net current assets were equal or greater to the proffered wage. Further, the petitioner failed to establish that factors similar to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967) existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets.

Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

In conclusion, the director's finding that the petitioner did not demonstrate that the beneficiary has the required experience is affirmed. The approval of the petition may not be reinstated under the facts of record. The approval of the petition will, therefore, remain revoked.

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

736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).