

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

[REDACTED]

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 May 16, 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 October 8, 2002. The director of the Texas Service Center (the director), however, revoked the approval of the immigrant petition on August 24, 2010, and the petitioner subsequently appealed the director's decision to revoke the petition's approval to the Administrative Appeals Office (AAO). The director's decision will be withdrawn. The petition will be remanded.

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 [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).

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).¹ 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 October 8, 2002 by the VSC, but that approval was revoked in August 2010. The director determined that the petitioner failed to demonstrate that the beneficiary possessed the requisite work experience in the job offered prior to the priority date and that the documentation submitted to show the beneficiary's qualifications was fraudulent.

On appeal, counsel for the petitioner² contends that the director has improperly revoked the approval of the petition. Specifically, counsel asserts that the director did not have any good and sufficient cause as required by section 205 of the Act; 8 U.S.C. § 1155 to revoke the approval of the petition. Counsel argues that the petitioner has submitted sufficient evidence to demonstrate that the beneficiary had the requisite work experience in the job offered before the priority date, and that the director failed to properly weigh all of the evidence presented.

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

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 [REDACTED] will be referred to as counsel throughout this decision. Previous [REDACTED] will be referred to by name. The AAO notes that [REDACTED] was 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.

143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

The threshold issue on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition. As noted above, the Secretary of DHS 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 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.

In this case, we find that the director has provided the petitioner with notice of the derogatory information specific to the current proceeding. In the Notices of Intent to Revoke (NOIR) dated September 3, 2008 and May 4, 2009, the director indicated that the business where the beneficiary

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).

claimed to have worked in Brazil [REDACTED] registered under the CNPJ number [REDACTED] from January 1995 to October 1998 was not established until May 11, 1999.⁴ Based on this finding, the director concluded that the beneficiary could not have been employed by [REDACTED] in 1995, and that the petitioner must have submitted false documentation to show that the beneficiary had the requisite work experience in the job offered. The AAO disagrees with the director's conclusion.

In response to the director's 2008 and 2009 NOIRs, the petitioner through counsel submitted the following evidence:

- A statement dated September 18, 2008 indicating that the beneficiary was employed by [REDACTED] from January 3, 1995 to October 30, 1998, that the January 19, 2001 letter of employment verification letter from [REDACTED] contained a wrong stamp, and that the correct stamp should have been [REDACTED]
- A statement dated September 17, 2008 from [REDACTED] CNPJ number [REDACTED] stating that the beneficiary was employed during the period of January 3, 1995 until October 30, 1998 as a cook;
- A copy of the beneficiary's employment registration showing that the beneficiary worked at [REDACTED] and was hired on April 1, 1995 as a [REDACTED] with wage of R\$73,00 (73 Reais) per month; and
- A copy of the beneficiary's booklet of employment and social security showing that the beneficiary worked as a grill-chef in 1995, 1996, and 1997 (pay increase in 1997).

The AAO notes that there are inconsistencies in the record pertaining to the beneficiary's past work experience in Brazil. The beneficiary claimed in part B of the Form ETA 750 that he worked as a [REDACTED] from January 1995 to January 1998. Submitted along with the approved Form ETA 750 and the Form I-140 petition was a letter of employment verification dated January

⁴ The letter of employment verification dated January 19, 2001 for the beneficiary included a stamp with the name of from [REDACTED] and a CNPJ number [REDACTED]. The director found that [REDACTED] was open in May 1999 by searching the CNPJ database. The CNPJ database can be accessed online at <http://www.receita.fazenda.gov.br/>. CNPJ or Cadastro Nacional da Pessoa Juridica 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.

⁵ The AAO notes that the translated version of the letter above contains the name of the author, [REDACTED] and her phone number. Counsel in his brief dated October 1, 2008 stated that the beneficiary never worked for [REDACTED] but instead for its sister company, [REDACTED] and that the accountant who prepared the January 19, 2001 letter of employment verification mistakenly used the [REDACTED] stamp. The mistake, according to counsel, was understandable, given that the body of the letter did not indicate the name of the company for which the beneficiary had worked.

19, 2001 stating that the beneficiary worked as a cook from January 3, 1995 to October 30, 1998. The January 19, 2001 letter contains a stamp with the name of [REDACTED] and CNPJ number [REDACTED]. When the director asked the petitioner to submit additional evidence to show the beneficiary's qualifications, the petitioner stated that the beneficiary gained his experience not from [REDACTED] but from [REDACTED].

We note that 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). The AAO concludes that the evidence submitted above, i.e. copies of the beneficiary's booklet of employment and social security and employment registration including the statements from the beneficiary's past employer, resolve the inconsistencies in the record regarding the beneficiary's qualifications for the job offered.

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate 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. The AAO finds that the beneficiary had the requisite work experience in the job offered prior to the priority date (he gained the requisite work experience from Brazil). The director's conclusion that the beneficiary did not have the requisite work experience as of the priority date will be withdrawn. We will also withdraw the director's finding that the documentation submitted to demonstrate the beneficiary's qualification is fraudulent.

Nonetheless, the petitioner must establish the continuing ability to pay the proffered wage from the priority date. 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.

In the instant case, the ETA 750 labor certification was accepted for processing on April 18, 2001. The rate of pay or the proffered wage specified on the ETA 750 is \$12.57 per hour or \$22,877.40 per year based on a 35 hour work week.⁶ The record contains an Internal Revenue Service (IRS) Form

⁶ 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 Memo indicates 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).

W-2 Wage and Tax Statement evidencing that the petitioner paid the beneficiary \$21,600 in 2001 (\$1,277.40 less than \$22,877.40). Thus, the petitioner has not established the ability to pay the proffered wage in 2001. Additionally, there is no evidence in the record to establish that the petitioner paid and employed the beneficiary beyond 2001 until the beneficiary obtains lawful permanent residence.

In summary, the previous decision of the director will be withdrawn. The petition is remanded to the director for review and consideration of the additional issue that impact the petitioner's eligibility for the visa that was not initially identified by the director, as noted above. The director may issue a new notice of intent to revoke approval of the petition and may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director may review the entire record and enter a new decision. If the new decision is contrary to the AAO's findings, it should be certified to the AAO for review.

ORDER: The director's decision to revoke the previously approved petition is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.