



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **APR 04 2013** OFFICE: VERMONT 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)

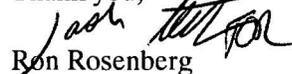
ON BEHALF OF PETITIONER:
[REDACTED]

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: The Director, Vermont Service Center, initially approved the preference visa petition, then later revoked its approval. The petitioner appealed to the Administrative Appeals Office (AAO), which dismissed the appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition's approval remains revoked.

The petitioner is a for-profit, post-secondary school. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).

On appeal, the AAO affirmed the director's decision that the petitioner failed to establish its intent to employ the beneficiary as a programmer analyst as stated on the labor certification. The AAO also found that the petitioner failed to establish the beneficiary's qualifications for the offered position. The AAO dismissed the appeal accordingly.

In its motion, the petitioner asserts that U.S. Citizenship and Immigration Services (USCIS or the Service) lacked authorization to determine the *bona fides* of the job opportunity, that the director and the AAO failed to properly analyze the petitioner's rebuttal evidence, and that the AAO erred in finding an additional ground of revocation beyond the director's decision.

The record shows that the motion is properly filed, timely and meets the applicable requirements for a motion to reconsider. *See* 8 C.F.R. § 103.5(a)(3). The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In its decision, the AAO found that *Matter of Sunoco Energy Development Company*, 17 I&N Dec. 283 (BIA 1979) and the DOL regulation at 20 C.F.R. § 656.30(c)(2) authorized the director to determine the *bona fides* of the petitioner's job offer to the beneficiary as a programmer analyst. Counsel, however, asserts that *Sunoco Energy* only allows USCIS to invalidate a labor certification where the geographic work location of the offered position is no longer within the area of intended employment specified on the labor certification.

Counsel also argues that the DOL regulation at 20 C.F.R. § 656.30(c)(2) does not authorize USCIS to determine the validity of a job opportunity. Citing the DOL regulation at 20 C.F.R. § 656.17(l), counsel asserts that only the DOL has authority to determine the *bona fides* of a job opportunity.

Counsel misinterprets the ground on which the director revoked the approval of the petition. Counsel cites the DOL regulation at 20 C.F.R. § 656.17(l), which requires an employer with ownership, family or other close ties to the beneficiary, upon audit, "to demonstrate the existence of a *bona fide* job opportunity, *i.e.*, the job is available to all U.S. workers..."¹ Counsel's citation to the

¹ The regulation at 20 C.F.R. § 656.17(l) provides, in relevant part:

regulation at 20 C.F.R. § 656.17(l) reflects an interpretation of the phrase “*bona fide* job opportunity” as whether the beneficiary exercised undue influence or control over the availability of the position to U.S. workers.

The Notice of Revocation (NOR) and the AAO’s decision, however, make clear that USCIS did not question the beneficiary’s influence or control over the job’s availability. Rather, the USCIS decisions show that the director and the AAO used the phrase “*bona fide* job opportunity” to refer to whether the petitioner intends to employ the beneficiary in the particular job opportunity of programmer analyst stated on the labor certification. The NOR stated that the petitioner’s rebuttal evidence was insufficient “to establish that the beneficiary is truly a programmer analyst.” NOR, p. 1. The AAO stated that “the primary issue in this case is whether there exists a *bona fide* job opportunity for the position of programmer analyst” and that “the petitioner has failed to establish ... that a *bona fide* job opportunity exists for the beneficiary with the petitioner as a programmer analyst.” AAO Decision, pp. 2, 9. Therefore, the director and the AAO clearly questioned the petitioner’s intent to employ the beneficiary in the offered position, not the beneficiary’s influence or control over the job’s availability.²

With the ground of revocation clarified, the AAO considers the petitioner’s argument that USCIS lacked authority to determine whether a *bona fide* job opportunity exists for the beneficiary with the petitioner in the offered position of programmer analyst.

The regulation at 20 C.F.R. § 656.30(c)(2) states:

A permanent labor certification involving a specific job offer is valid only for the particular job opportunity, the alien named on the original application (unless a substitution was approved prior to July 16, 2007), and the area of intended employment stated on the Application for Alien Employment Certification (Form ETA 750) or the Application for Permanent Employment Certification (Form ETA 9089).

20.C.F.R. § 656.30(c)(2) (2012).

Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a *bona fide* job opportunity, *i.e.*, the job is available to all U.S. workers, ...

² The AAO also notes that the regulation at 20 C.F.R. § 656.17(l) would not apply to the petitioner’s labor certification, which was filed on July 28, 2000. The regulation at 20 C.F.R. § 656.17(l) took effect on March 28, 2005 and applies to labor certification applications filed on or after that date. See 69 Fed. Reg. 77326 (Dec. 27, 2004).

The AAO agrees that the Board of Immigration Appeals (BIA) in *Sunoco Energy* held that the regulation at 20 C.F.R. § 656.30(c)(2) authorized USCIS to invalidate a labor certification - and thus deny the corresponding petition for lack of a valid labor certification - where the petitioner intended to employ the beneficiary outside the geographic area listed on the labor certification. 17 I&N Dec. at 284. The AAO, however, finds that *Sunoco Energy*'s holding has broader application than only where the worksite is outside the intended geographic area of employment stated on the labor certification.

Although the circumstances in *Sunoco Energy* involved employment beyond the geographical area specified on the labor certification, the regulation at 20 C.F.R. § 656.30(c)(2) also renders labor certifications invalid based on intended employment in a position that falls outside the "particular job opportunity" listed on the labor certification and for an alien other than the one named on the labor certification. Thus, *Sunoco Energy*, in authorizing USCIS to enforce the DOL regulation at 20 C.F.R. § 656.30(c)(2), allows USCIS to invalidate labor certifications and deny their accompanying petitions not only for intended employment beyond the geographical area stated on the labor certification, but also for intended employment beyond the scopes of the particular job opportunities and the named aliens stated on the labor certifications.

Moreover, USCIS has long held that a petitioner must establish its intent to employ the beneficiary in accordance with the terms and conditions on the labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg. Comm. 1966)(upholding denial of employment preference petition where evidence did not establish the petitioner actually desired and intended to employ the beneficiary as a live-in domestic worker); *see also Matter of Semerjian*, 11 I&N Dec. 751, 752 (Reg. Comm. 1966)(immigrant with approved professional worker petition must show *bona fide* intent to engage in his profession in the U.S.).

The AAO therefore finds that the regulation at 20 C.F.R. § 656.30(c)(2) and the case law cited above authorized USCIS to determine the *bona fide* intention of the petitioner to employ the beneficiary in the "particular job opportunity" of programmer analyst as stated on the labor certification.

Even if USCIS had authority to determine the petitioner's intent to employ the beneficiary in the offered position, counsel asserts that the director and the AAO failed to properly analyze the petitioner's rebuttal evidence in response to the Notice of Intent to Revoke (NOIR). Citing *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), counsel argues that the director failed to properly discuss or analyze the petitioner's rebuttal evidence in his decision and that the AAO also failed to consider whether the rebuttal evidence raised any material doubts.³

³ *Chawathe*'s holding - that a publicly traded corporation is an "American firm or corporation" for purposes of naturalizing under section 316(b) of the Act if the applicant establishes that the corporation is both incorporated in the U.S. and trades its stock exclusively on U.S. stock markets - is clearly irrelevant to the petitioner's case. *See* 25 I&N Dec. 370. Counsel cites *Chawathe* in his brief regarding the standard of proof in administrative proceedings.

In revocation proceedings, the burden remains with the petitioner to establish that the beneficiary qualifies for the benefit sought under the immigration laws. *Matter of Esteve*, 19 I&N Dec. 450, 452 (BIA 1987); *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968).

As indicated in *Chawathe*, the general standard of proof in administrative proceedings is “preponderance of the evidence.” 25 I&N Dec. at 375. To meet this standard, the evidence must demonstrate that the petitioner’s claim is “probably true,” based on the factual circumstances of each individual case. *Id.*, at 376, citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm’r. 1989). In evaluating evidence, “[t]ruth is to be determined not by the quantity of evidence alone but by its quality.” *Id.*, citing *E-M-* at 80.

If the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is “more likely than not” or “probably” true, the petitioner has satisfied the standard of proof, even if the director has some doubt as to the truth. *Chawathe*, at 376, citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (discussing “more likely than not” as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, however, the director should either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the petition. *Id.*

In *Chawathe*, the AAO found that an SEC Form 10-K that the parent company of the applicant’s employer had submitted to the U.S. Securities & Exchange Commission (SEC) and a letter from the applicant’s employer to be relevant, probative, and credible evidence that the employer was a subsidiary of an “American firm or corporation” for purposes of section 316(b) of the Act. *Chawathe*, at 376. Because the SEC Form 10-K is based on audited financial statements and subject to federal agency review, the AAO found the document to be “highly credible,” warranting “substantial weight.” *Id.* Although independent evidence did not support the applicant’s specific claim that his employer was a “wholly-owned subsidiary,” the AAO found the employer’s letter “relevant, uncontroverted by any other evidence, and generally supported by the SEC Form 10-K.” *Id.* The AAO therefore found the evidence established that it was “probably true” that the applicant’s employer is a subsidiary of an “American firm or corporation.” *Id.*

In the instant case, with her NOIR, the Acting Director, Vermont Service Center, sent the petitioner a redacted copy of a USCIS fraud investigation report. The report detailed the beneficiary’s U.S. immigration history, noting that her asylum application omitted the employment experience upon which she relied in her petition to qualify for the offered position. Report, p. 2. The report also recounted how, on separate occasions, both the beneficiary and another employee of the petitioner told USCIS investigators that the beneficiary worked as an administrative assistant helping foreign students who attended the petitioner’s school, rather than in the offered position of programmer analyst. *Id.*, at 2-3.

In response to the NOIR, the petitioner submitted an evaluation of the beneficiary’s foreign educational degrees and a letter confirming her previous employment experience. The petitioner did not claim that the beneficiary was working in a different position and that it intended to employ the

beneficiary in the offered position upon final approval of her immigrant visa.⁴ Rather, the petitioner stated that it already employed the beneficiary in the offered position and claimed that USCIS was mistakenly provided with incorrect information regarding the beneficiary's position and duties.

The petitioner submitted sworn affidavits from its president, senior vice president of academic affairs, and the beneficiary stating that the beneficiary temporarily helped the senior vice president with administrative duties regarding foreign students for a few months after the senior vice president joined the company in 2002. During this time, the beneficiary stated that a USCIS officer telephoned the petitioner to verify the beneficiary's employment with the school. The officer's call was transferred to the beneficiary, who said she assumed that the officer was inquiring about the immigration status of a foreign student at the school. After the officer told her that the officer sought to verify the employment of a school employee, the beneficiary stated that she told the officer that the call had been mistakenly transferred to her and that she could only verify information about foreign students. She stated that she also explained to the officer that the school had no human resources department at that time. The beneficiary said she then asked the officer for the name of the employee whose employment was to be verified, so she could transfer the officer's call to the employee. When the beneficiary learned that the officer sought to verify her employment, the beneficiary stated that she truthfully answered the officer's questions, telling the officer that she worked for the petitioner as a programmer analyst maintaining databases.

The petitioner's human resources (HR) director also stated in a sworn affidavit that a USCIS officer called her on a different occasion to verify the beneficiary's employment. Because she had only been on the job about a week at the time of the call and did not have immediate access to the beneficiary's records, the HR director stated that she asked another employee in the petitioner's business office for the beneficiary's position. She stated that the business office employee told her that the beneficiary was an administrative assistant, which she in turn told the USCIS officer. The director stated that the business office employee did not realize that the beneficiary began part-time employment with the petitioner as an administrative assistant, but was, at the time of the call, a full-time programmer analyst. The petitioner also submitted an affidavit from its information technology director and a copy of a school 2006 "College Bulletin" as evidence of the beneficiary's employment.

In his NOR, the director summarized the petitioner's rebuttal evidence as "information pertaining to [the petitioner], and several letters attesting that the beneficiary is working as a programmer analyst rather than assisting F-1 students." NOR, p. 1. The director stated that the evidence was not "as persuasive as the information found in the investigative report." *Id.* He also stated that the report showed that an employee of the petitioner and the beneficiary herself had told USCIS officers that the beneficiary was working as an administrative assistant helping foreign students. *Id.* According to the director, the report indicated that the beneficiary said she worked as a programmer analyst only after realizing that she was speaking to an immigration officer. *Id.* The director stated that the

⁴ There is no requirement that the petitioner currently employ the beneficiary in the offered position. See 8 C.F.R. § 204.5(c)(Any U.S. employer "desiring and intending to employ an alien" may file a petition for alien worker.)

petitioner's documentary rebuttal evidence does not "help to establish that the beneficiary is truly a programmer analyst." *Id.*

When revoking the approval of a petition, the director must provide the petitioner "with a written notification of the decision that explains the specific reasons for the revocation." 8 C.F.R. § 205.2(c). A federal agency abuses its discretion when its decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements. *Zhao v. United States Dep't. of Justice*, 265 F.3d. 83, 93 (2d Cir.2001).

While the NOR provided little analysis of the petitioner's rebuttal evidence, the AAO finds that the director complied with the minimum regulatory requirements and did not abuse his discretion in revoking the petition's approval. In compliance with the regulation at 8 C.F.R. § 205.2(c), the director issued a written decision that explained the specific reasons for the revocation. Although the director did not discuss and analyze each piece of evidence in the NOR, he stated that the petitioner's evidence was not "as persuasive as the information found in the investigative report" and did not "help to establish that the beneficiary is truly a programmer analyst." NOR, p. 1. Thus, the decision makes clear that the director found that the petitioner failed to establish, by a preponderance of the evidence, its intent to employ the beneficiary in the offered position of programmer analyst.

The director's revocation decision was not irrational, as the investigative report contained evidence that the beneficiary was working as an administrative assistant, rather than in the offered position of programmer analyst as the petitioner claimed. The director's decision did not inexplicably depart from established guidelines, nor was it devoid of any reasoning. The director reasoned that the initial statements of the HR director and the beneficiary herself to USCIS officers, as detailed in the investigative report, were more persuasive than the explanations that the petitioner later submitted. Finally, the director's decision contained more than summary or conclusory statements because it compared and discussed specific pieces of evidence, *i.e.*, the initial statements of the HR director and the beneficiary to USCIS officers.

Moreover, while the NOR provided little analysis of the petitioner's rebuttal evidence, the 9-page AAO decision on *de novo* review discussed and analyzed the petitioner's evidence in detail. The AAO decision listed and summarized each piece of evidence that the petitioner submitted in response to the NOIR. AAO Decision, pp. 4-5. The AAO analyzed the affidavits of the petitioner's president, senior vice president of academic affairs, and the beneficiary, noting inconsistencies among them that "undermine their credibility." *Id.*, p. 8. The AAO also noted that the beneficiary claimed in her affidavit to be providing temporary administrative help to the petitioner's senior vice president at the time the USCIS officer called her, but the beneficiary did not tell the officer that at the time. *Id.*

The AAO decision also analyzed the affidavit of the petitioner's information technology (IT) director. AAO Decision, p. 8. The AAO found that the 2006 College Bulletin that the petitioner submitted contradicted the IT director's statement that the beneficiary has been working full-time as a programmer analyst since the IT director joined the petitioner in November 2002. *Id.* The College

Bulletin identified the beneficiary as a member of the petitioner's administrative staff, not its IT department. *Id.*

The AAO also found the explanation of the petitioner's HR director to be insufficient. AAO Decision, p. 8. The HR director's claim that another employee had provided her with an incorrect, out-of-date job title for the beneficiary in response to the USCIS officer's inquiry lacked credibility in the absence of corroborating evidence, the AAO determined. *Id.*

In addition, the AAO noted that a 2001 employment letter from the petitioner and copies of the beneficiary's W-2 forms showed that the beneficiary earned substantially less than the \$71,000 annual offered wage for the position of programmer analyst. AAO Decision, pp. 8-9. The AAO decision also noted that the petitioner failed to submit independent, documentary evidence of the beneficiary's employment in the offered position, such as a copy of her offer letter, performance evaluations, examples of her work product, or correspondence regarding the performance of her duties. *Id.*, p. 6.

The AAO concluded that the petitioner's attempts to explain its employees' responses to USCIS officers "are not credible." AAO Decision, p. 9. The AAO found that the petitioner failed to establish, by a preponderance of the evidence, that it employs the beneficiary as a programmer analyst and that such a job opportunity exists for her with the petitioner. *Id.*

After careful reconsideration of its decision, the AAO finds that it discussed and analyzed each piece of evidence, compared them, explained how inconsistencies undermined their credibility, and provided a written decision that explained the specific reasons for the revocation decision. The AAO therefore properly analyzed the petitioner's rebuttal evidence and discussed the agency's material doubts regarding the evidence.

In *Chawathe*, the AAO accepted the unsworn letter from the applicant's employer as relevant, probative and credible evidence because it was "relevant, uncontroverted by any other evidence, and generally supported by the SEC Form 10-K." *Chawathe*, at 376. In contrast, while the affidavits that the petitioner submitted were relevant, they were inconsistent with other evidence and mostly uncorroborated. The affidavits of the petitioner's president, senior vice president, and the beneficiary stated inconsistent start dates of the beneficiary in the offered position. AAO Decision, p. 8. The school's 2006 College Bulletin identified the beneficiary as part of the petitioner's administrative staff, undermining the claims of the IT director and others that she was a programmer analyst. *Id.* In addition, the petitioner failed to submit independent, corroborating evidence of the beneficiary's employment as a programmer analyst, such as her job offer, performance evaluations, and/or examples of her work. *Id.*, p. 6.

Finally, counsel asserts that the AAO erred in finding an additional ground of revocation that the director had not identified in his NOR. Specifically, the AAO determined that the petitioner failed to establish the beneficiary's qualifications for the offered position as stated on the labor certification.

As counsel notes in his brief, the AAO exercises *de novo* appellate review. Thus, the AAO may deny an application or petition that fails to comply with the technical requirements of the law even if the director did 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).

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 [s]he deems to be good and sufficient cause, revoke the approval of any petition approved by h[er] under section 204.” The director’s realization 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).

A decision to revoke approval of a visa petition can only be grounded upon, and the petitioner is only obliged to respond to, the factual allegations in the record at the time of the NOIR. *Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988); see also 8 C.F.R. § 205.2(b). In addition, if USCIS intends to render an adverse decision based on derogatory information of which the petitioner is unaware, the agency must advise the petitioner of the information and offer the petitioner an opportunity to rebut the information. 8 C.F.R. § 103.2(b)(16)(i).

The AAO based its additional revocation ground, in part, on the failure of the beneficiary’s experience letter to state the hours per week in her part-time employment or to explain how the letter’s author knew of her experience at another company. AAO Decision, p. 7, *citing* 8 C.F.R. § 204.5(l)(3)(ii). The AAO also based the additional revocation ground on its questioning of how the beneficiary could work 20 hours per week from October 1993 to July 1998, as she stated in the labor certification, while attending university from 1989 to 1996 and working as a journalist from 1996 to 1998, as she stated in her asylum application. *Id.*

The investigative report that accompanied the NOIR reported the beneficiary’s statements on her asylum application regarding her attendance at university until 1996 and her employment as a journalist from 1996 to 1998. Report, p. 2 of 4. The report also noted that the beneficiary’s asylum application did not include her part-time employment as a programmer analyst from 1993 to 1998. *Id.* In addition, the report mentioned the experience letter regarding the beneficiary’s part-time employment, which the report referred to as an “affidavit.” *Id.*

Because the investigative report that accompanied the NOIR contained the facts upon which the AAO based its additional ground of revocation, the AAO finds that it did not err in additionally revoking the petition’s approval for the petitioner’s failure to establish the beneficiary’s qualifications for the position. The report notified the petitioner of the inconsistencies between the information in its petition and the information in the beneficiary’s asylum application regarding her employment history. In accordance with *Arias*, USCIS alleged facts in its NOIR that, if unexplained or un rebutted, would warrant revocation of the petition’s approval. 19 I&N at 570.

The AAO also did not base its additional ground of revocation on derogatory information that was unknown to the petitioner. *See* 8 C.F.R. § 103.2(b)(16)(i). The investigative report that accompanied the NOIR notified the petitioner of the inconsistencies between its petition and the beneficiary's asylum application regarding her employment history. The petitioner was already aware of the contents of the experience letter and the labor certification because it submitted those documents with its petition. The AAO therefore finds that it did not err in finding the additional ground of revocation.

In summary, after granting the petitioner's motion and carefully reconsidering its decision, the AAO finds that the petitioner has not established that USCIS erred in revoking the approval of its petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion to reconsider is granted and the decision of the AAO dated October 5, 2010 is affirmed. The petition's approval remains revoked.