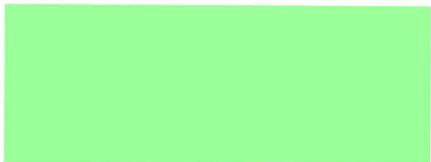




**U.S. Citizenship
and Immigration
Services**

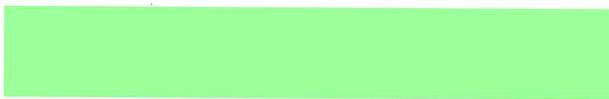
(b)(6)



DATE: **AUG 07 2013**

OFFICE: TEXAS SERVICE CENTER 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was approved on June 29, 2004 by the United States Citizenship and Immigration Services (USCIS), Texas Service Center, but that approval was revoked by the Director, Texas Service Center (director) on August 16, 2010, and the labor certification was invalidated. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained, the director's decision will be withdrawn, and the petition's approval will be reinstated.

The petitioner describes itself as a retail market. It seeks to employ the beneficiary permanently in the United States as a bookkeeper 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, Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL).

The director issued a Notice of Intent to Revoke the approval of the petition on February 18, 2009. In the NOIR, the director wrote:

The Service is in receipt of information revealing the existence of fraudulent information in the petitions with Alien Employment Certificates (ETA 750) and/or work experience letters in a significant number of cases submitted to [United States Citizenship and Immigration Service] (USCIS) by counsel for the petitioner in the reviewed files.

The petitioner has submitted an ETA 750 and an employment verification letter; however, the information the USCIS, has received has now cast doubt as to the reliability of the petitioner's documentation and compliance with DOL requirements.

The director determined that the petitioner failed to follow the DOL recruitment procedures in connection with the approved labor certification application, and submitted documents in response to the director's NOIR which were in themselves a willful misrepresentation of material facts, constituting fraud or misrepresentation. Accordingly, the director revoked the approval of the petition, and invalidated the labor certification.

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.²

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 The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case

The AAO finds that the NOIR was insufficient in detailing the director's basis for revocation of the immigrant petition in this case.

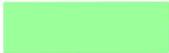
The director's decision revoking the approval of the petition and invalidating the labor certification concluded that USCIS was in receipt of information revealing the existence of possibly fraudulent information in the petition submitted with the labor certification, or work experience letters attached to the instant case. The director determined that the response submitted did not overcome the concerns of credibility with regard to the documentation submitted for the labor certification and relationships between the petitioner, others, and the beneficiary. The director also determined that, based on the record, the position offered was not a *bona fide* job offer. Accordingly, the director revoked the approval of the petition pursuant to 8 C.F.R. § 205.1. The director also invalidated the underlying labor certification ETA 750 pursuant to 20 C.F.R. § 656.30(d) due to fraud or willful misrepresentation of a material fact involving the labor certification application.

Upon review of the entire record, including evidence submitted on appeal, the AAO concludes that the record does not show inconsistencies or anomalies in the recruitment process that would justify the issuance of a NOIR based on the criteria of *Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961). Similarly, there has been an insufficient development of the facts upon which the director can make a determination of fraud or willful misrepresentation in connection with the labor certification process. *Id.*

The AAO finds that while the director appropriately reopened the approval of the petition by issuing the NOIR, the director's NOIR was deficient in that it did not specifically give the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director questioned the beneficiary's qualifications and indicated that the petitioner had not properly advertised for the position. The NOIR neither provided nor referred to specific evidence or information relating to the petitioner's failure to comply with DOL recruitment or to the beneficiary's lack of qualifications in the present case. The director did not state which recruitment procedures were defective. Without specifying or making available evidence specific to the petition in this case, the petitioner can have no meaningful opportunity to rebut or respond to that evidence. *See Ghaly v. INS*, 48 F.3d 1426, 1431 (7th Cir. 1995). Because of insufficient notice to the petitioner of derogatory information, the director's decision revoking the approval of the petition will be withdrawn.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The priority date of the petition is August 28, 2001, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

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).



Upon review of the entire record, including evidence submitted on appeal and in response to a Request for Evidence issued by the AAO, the AAO concludes that the petitioner has established that it is more likely than not that the beneficiary had all the education, training, and experience specified on the Form ETA 750 as of the priority date of the petition, August 28, 2001. The petitioner also submitted sufficient evidence demonstrating its ability to pay the proffered wage to the beneficiary from the priority date, August 28, 2001, to the time the petition was approved, June 29, 2004.

After a review of the entire record, including evidence submitted on appeal, the AAO concludes that the record does not show inconsistencies or anomalies in the petitioning process that would justify the issuance of a NOIR, pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Esteime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke 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. The director's NOIR in this case did not sufficiently detail from the evidence in the record, specific possible misrepresentations or *bona fides* of the position offer that would warrant a denial if unexplained and un rebutted. Therefore, the NOIR was not properly issued for good and sufficient cause. Similarly, there has been an insufficient development of the facts upon which the director can make a determination of fraud or willful misrepresentation in connection with the labor certification process. *Id.*

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has been met.

ORDER: The appeal is sustained.

FURTHER ORDER: The director's decision to revoke the approval of the petition, and invalidate the labor certification is withdrawn.

FURTHER ORDER: The petition's approval is reinstated.