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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: FEB 0 1 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 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 M'Connack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On January 9, 2003, 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 Director, VSC on January 22, 2004. The Director, Texas Service Center, (director) however, revoked the approval of the immigrant petition on July 25, 2009 and the petitioner subsequently appealed the director's decision to revoke the petition's approval to the Administrative Appeals Office (AAO). The appeal will be dismissed.

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 January 22, 2004 by the VSC, but that approval was revoked in July 2009. The director determined that the petitioner failed to establish that the beneficiary possessed the minimum experience requirements for the proffered position. The director also concluded that the petitioner failed to follow the U.S. Department of Labor (DOL) recruitment procedures in connection with the approved labor certification application and that the documents submitted in response to the director's two Notices of Intent to Revoke issued on September 8, 2008 (2008 NOIR) and May 19, 2009 (2009 NOIR) were in themselves a willful misrepresentation of material facts, constituting fraud.

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).

On appeal, counsel for the petitioner[2] 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 did comply with the DOL recruitment requirements and that the

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[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 counsel of record, will be referred to as counsel throughout this decision. Prior counsel, , will be referred to as former counsel or by name. The AAO notes that 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.

beneficiary possessed the minimum requirements required on the ETA 750 prior to the filing of the labor certification application.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The Administrative Appeals Office (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.[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 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 unrebutted, would warrant a denial of the visa petition based upon

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[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).

> 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 2009 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 the work experience letters in a significant number of cases submitted to USCIS by counsel for the petitioner in the reviewed files.

The AAO finds that the director appropriately reopened the approval of the petition by issuing the NOIRs, and that the director's NOIRs gave the petitioner notice of the derogatory information specific to the current proceeding with respect to the beneficiary's qualifications. In the NOIRs, the director questioned the beneficiary's qualifications and indicated that the petitioner had not properly advertised for the position. Both the 2008 NOIR and the 2009 NOIR raised concerns with regards to the beneficiary's claimed experience in Brazil from 1993 until 1998, because the Cadastro Nacional da Pessoa Juridica (CNPJ) for the business in Brazil indicated that the business had not been established until 1996 and that the record did not establish the beneficiary's qualifications as of the priority date.[4] The director also asked the petitioner to submit an original letter reaffirming its intent to employ the beneficiary in the proffered job and evidence that the beneficiary met the minimum experience requirements. The AAO finds that the director's NOIRs would warrant a revocation of approval of the petition if unexplained and unrebutted by the petitioner and thus, that the director had good and sufficient cause to issue the NOIR. *See, Matter of Arias*, 19 I&N Dec. at 568; *Matter of Estime*, 19 I&N Dec. at 450.

Another issue raised on appeal is whether the director properly concluded that the petitioner did not comply with the recruitment procedures of the DOL. The director indicated that the petitioner did not conduct good faith recruitment and found that the petitioner had engaged in fraud or material misrepresentation with respect to the recruitment process. The AAO disagrees. 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). Therefore, the director's conclusion that the petitioner did not comply with DOL requirements is withdrawn.

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[4] The director found this information 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. 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.

The director found in the NOR that the record did not establish the beneficiary's qualifications as of the priority date. The AAO agrees.

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, 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 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 January 31, 2002. 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 September 13, 2001, he represented that he worked 40 hours a week at in Brazil as a cook from January 1993 until August 1998. The record contains a letter of employment dated September 27, 2001 from stating that the beneficiary worked there as a cook "preparing the food, dinners, and receptions" from January 1993 to August 1998.

In the 2008 NOIR, the director noted that this employment verification letter from Mr. lists the CNPJ business registration for which "reveals that this business did not exist until October 31, 1996. This would indicate that the beneficiary could not have been employed by the business from January 1993 until August 1998." In response, the petitioner submitted a second notarized letter from Mr. dated September 17, 2008, attesting that:

> From 1993 to 1998, [the] period on which [the beneficiary] worked as a kitchen chef at DBA, such company was still operating informally, as it was a small family business that at the time only provided in-home service; we got a commercial license in 1996, when the business grew and we started serving the public in general. To this date, DBA is stil located at the same address.

The petitioner also submitted a notarized statement from the beneficiary, dated September 25, 2008, indicating that he had contacted Mr. for whom he had worked for five years in Brazil and was told by Mr. that "the business was informal and family owned, not being legally registered as a

business, as it is the custom among many business owners in Brazil." In addition, the petitioner submitted a picture of the restaurant taken in 1993.

The director, nonetheless issued the 2009 NOIR again raising concerns with regard to the CNPJ of the business where the beneficiary gained his experience in Brazil and advising the petitioner that "the prior response to the request for evidence does not provide any documentation the business existed in 1993." Petitioner's counsel responded asserting that the petitioner's response to the 2008 NOIR did rebut and resolve the inconsistencies with respect to when the business in Brazil where the beneficiary had gained his employment experience had been established and registered to obtain the CNPJ.

In the NOR, the director concluded that the photocopy of the previous statement from Mr. and the submission of another statement from Mr. offered "no new evidence to overcome the discrepancies noted in the [NOIR]. The photograph submitted does not show the name of the business and does not prove the existence of the Brazilian restaurant at the time in question." The AAO agrees.

On appeal, counsel asserts that:

> As to the sufficiency of the proffered letter, it is, by definition, impossible to provide registration for the period before registration. The proffered photo was rejected for lack of a date. An employer letter that asserts that the business was opened before it was formally registered and the same owner's subsequent registration gives rise to the reasonable inference that the prior informal years were stated on reasonable bases.

The petitioner did not submit any evidence on appeal. We first note that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, counsel's argument that the AAO should accept a "reasonal inference" from the evidence in the record is misplaced. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989).

In the instant case, the director issued two NOIRs in 2008 and 2009, specifically advising the petitioner of inconsistencies and discrepancies in the record. The petitioner has failed to explain or rebut these inconsistencies. It is incumbent upon the petitioner to resolve the inconsistencies by

independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho,* 19 I&N Dec. at 591-592. Given the inconsistencies in the record and the lack of independent, objective evidence such as a Brazilian work book, social security records, or other documentary evidence of the beneficiary's employment, municipal tax or license records, utility bills, bank records, or other indicia of the Brazilian employer's existence, the AAO finds that the evidence submitted does not establish that the beneficiary has the qualifying two years of work experience as a cook. Thus, the director's decision to revoke the approval of the petition will be upheld.

Further, the petitioner has not established its ability to pay the proffered wage from the priority date. 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).

With respect to the petitioner's ability to pay, the regulation at 8 C.F.R. § 204.5(g)(2), in pertinent part, provides:

> *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 January 31, 2002. The rate of pay or the proffered wage specified on the ETA 750 is $13.01 per hour or $23,678.20 per year based on the indicated 35 hour work week.[5] The record contains an Internal Revenue Service (IRS) Form W-2 evidencing that the petitioner paid the beneficiary $32,432.65 in 2001. However, there is no evidence in the record to establish that the petitioner employed the beneficiary or that it had the ability to pay the proffered wage from 2002 onwards.[6] Thus, for this additional reason, the director's decision to revoke the approval of the petition will be upheld.

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[5] 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).

[6] The record includes a letter from the petitioner, dated December 17, 2002 indicating that the beneficiary was employed as a cook on a full-time basis at a weekly gross pay of $565. However,

The AAO finds good and sufficient cause to revoke the approval of the petition based on the petitioner's failure to establish that the beneficiary possessed the minimum experience required by the proffered position and that it had the ability to pay the proffered wage as of the priority date.

The approval of the petition will remain revoked for the above stated reasons, with each considered as an independent and alternative basis for revocation. 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.

ORDER: The appeal is dismissed. The approval of the petition remains revoked

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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)).