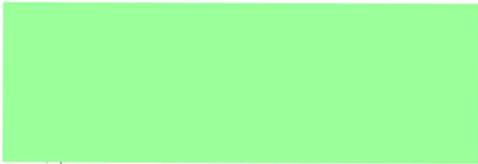




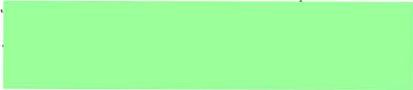
U.S. Citizenship
and Immigration
Services

(b)(6)



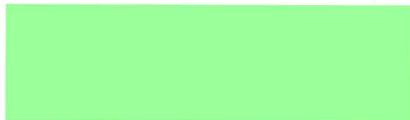
Date: Office: TEXAS SERVICE CENTER FILE: 

FEB 12 2013

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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 January 24, 2003, the Director, United States Citizenship and Immigration Services (USCIS) Vermont Service Center, approved the employment-based immigrant visa petition. However, on July 26, 2010, the Director, Texas Service Center (the director), revoked the approval of the petition with a finding of fraud. The petitioner subsequently filed a motion to reopen, and the director dismissed the motion. Following the dismissal, the petitioner then appealed the director's decision to the Administrative Appeals Office (AAO). Upon review, the director's decision will be withdrawn. The petition will be remanded.

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. 582, 590 (BIA 1988).

The petitioner is a retail store. It seeks to employ the beneficiary permanently in the United States as an assistant retail store manager 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 labor certification. As stated earlier, the employment-based visa petition was approved on January 24, 2003, but that approval was revoked on July 26, 2010. The director determined that the beneficiary did not have the requisite work experience in the job offered as of the priority date and that the petitioner submitted fraudulent documentation in order to qualify the beneficiary for an immigration benefit that he was not eligible for. The director also found that the petitioner materially and/or willfully misrepresented its familial relationship with the beneficiary on the Form ETA 750.

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.²

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

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 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).

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 the Service [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.

Here, in the Notice of Intent to Revoke (NOIR) dated February 12, 2009, 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 director advised the petitioner in the NOIR that the instant case might involve fraud, since the petition was filed by [REDACTED]³. The director also generally asked the petitioner to

³ The AAO notes that [REDACTED] was under USCIS investigation for allegedly submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions, when the director sent the NOIR on February 12, 2009. [REDACTED] has since been suspended from practice before the United States Department of Homeland Security for three years from March 1, 2012. [REDACTED] representations in this matter will be considered. He

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submit additional evidence to demonstrate that it had complied with all of the DOL recruiting requirements.

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. Nor did the director specifically indicate why the beneficiary did not qualify for the job offered, and which evidence was fraudulent. 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 will be withdrawn.

Nonetheless, the petitioner must establish that the beneficiary had the requisite work experience in the job offered before the priority date, and that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 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).

Concerning the beneficiary's qualifications for the position, the AAO finds that the record does not support the petitioner's contention 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, the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

Here, the Form ETA 750 was filed and accepted for processing by the DOL on October 2, 2001. The name of the job title or the position for which the petitioner seeks to hire is "Assistant Retail Manager." The petitioner described the position offered as follows: "Assist Owner in the management of retail market; assist with pricing, sale promotions, employee scheduling, receiving, inventory." 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, the beneficiary represented that he worked as an assistant retail manager at [REDACTED] Pakistan from April 1982 to October 1985.

will be referred to throughout this decision by name.

Submitted along with the Form ETA 750 and the Form I-140 petition was a letter of employment verification dated October 15, 1985 from the managing director of [REDACTED] stating that the beneficiary worked with us [REDACTED] from April 4, 1982 to October 15, 1985. However, this letter does not meet the requirements in the regulations as it does not contain the name or title of the author, nor does it provide a specific description of the duties performed by the beneficiary. See 8 C.F.R. §§ 204.5(g)(1) and 204.5(l)(3)(ii)(B).

In response to the director's NOIR, the petitioner submitted the following evidence:

- An affidavit from [REDACTED] who stated that [REDACTED] was closed due to the new bridge that was constructed over it in 1995; and
- An affidavit from [REDACTED] who stated that he lived around [REDACTED] Store and used to shop there and that around 1995 the Board of [REDACTED] demolished [REDACTED] to build a fly over bridge.

In the Notice of Revocation (NOR) dated July 26, 2010, the director pointed to the Temporary Protected Status (TPS) application that the beneficiary filed in October 1987. The record contains a Form I-700 Application for Temporary Resident Status as a Special Agricultural Worker (SAW) filled out and signed by the beneficiary on October 29, 1987, in which the beneficiary claimed that he entered the United States without a visa on or about April 10, 1985.⁴

Based on these TPS documents, the director determined that the beneficiary could not have worked at [REDACTED] Pakistan from April 1982 to October 15, 1985, because the record showed that the beneficiary had already been in the United States since April 1985. The director further cited the *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988), and concluded that the documents in the record "raised serious concerns regarding the credibility of the documentation."

On appeal to the AAO, the petitioner submitted the following evidence to demonstrate that the beneficiary worked as an assistant retail manager in [REDACTED] Pakistan:

- An affidavit dated February 29, 2010 from [REDACTED] who stated that he was the partner at the [REDACTED] and was heavily involved in the running of the store until it was closed due the death of [REDACTED] the managing director of the store, and that the beneficiary was indeed an employee of [REDACTED] from April 1982 to April 1985 when he left Pakistan.⁵

⁴ We note that the Form I-700 was denied on February 26, 1991, because the beneficiary's former employer pled guilty to violating 8 U.S.C. § 1160(b)(7)(A)(ii), creating and supplying false documents to SAW applicants. The record also shows that the beneficiary's appeal of the 1991 decision was dismissed by the Legalization Appeals Unit on July 28, 1993.

⁵ The affidavit also stated that the beneficiary requested leave which was granted when he left Pakistan in April 1985 and that he was not terminated from his employment until October 1985, when he contacted the store stating that he would not return to Pakistan.

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We are inclined to agree with the director that the petitioner has failed to establish that the beneficiary had the requisite work experience in the job offered as of the priority date. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence; any attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. at 591-592. Here, the petitioner has not submitted independent objective evidence to resolve the inconsistencies in the record. The statement from Mr. [REDACTED] alone is not independent objective evidence resolving the inconsistencies in the record. Nor can the affidavit from Mr. [REDACTED] or Mr. [REDACTED] be accepted as independent objective evidence. 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)).

Moreover, evidence that the petitioner or the beneficiary creates after USCIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence, as would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's decision. The record in this case does not contain evidence such as the beneficiary's government-issued identification card or other proof of employment in [REDACTED] Pakistan, to resolve the inconsistencies in the record. Accordingly, the AAO agrees with the director that the petitioner has failed to establish that the beneficiary had the requisite work experience in the job offered as of the priority date.

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 priority date is October 2, 2001. The rate of pay or the proffered wage specified on the ETA 750 is \$11 per hour or \$20,020 per year based on a 35 hour work week.⁶ The record contains an Internal Revenue Service (IRS) Form W-2 evidencing that the beneficiary received \$26,250 in 2006 from the petitioner. That payment is *prima facie* proof of

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).

the petitioner's ability to pay the proffered wage in 2006. However, the record does not contain any other evidence that the petitioner employed the beneficiary from the priority date in 2001 onward.⁷

The record also includes a copy of the petitioner's federal tax return filed on the IRS Form 1120S U.S. Income Tax Return for an S Corporation for 2001. Based on the tax return submitted, the petitioner reported the following net income:

| <i>Tax Year</i> | <i>Net Income</i> ⁸ |
|-----------------|--------------------------------|
| 2001 | \$50,983 |

The net income in 2001 exceeds the proffered wage of \$20,020/year so the petitioner has established the ability to pay in 2001. However, the record contains no other evidence of the petitioner's ability to pay. Thus, the petitioner has not established the ability to pay the proffered wage in 2002 to 2005 and from 2007 onwards until the beneficiary obtains lawful permanent residence.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for review and consideration of the additional issues that impact the petitioner's eligibility for the visa that were not initially identified by the director. 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.

⁷ The petitioner claimed in a letter dated Wednesday, November 28, 2007 that the beneficiary had been employed since September 2000. This claim alone cannot be accepted as evidence of the beneficiary's employment with the petitioner, since as noted earlier that going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Soffici*, *id.* at 165.

⁸ For an S Corporation, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S if the S corporation's income is exclusively from a trade or business. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2001) of Schedule K. See Instructions for Form 1120S, 2001, at <http://www.irs.gov/pub/irs-prior/i1120s--2001.pdf> (last accessed May 18, 2011) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In the instant case, the net income for 2001 is found on line 23 of the schedule K.

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.