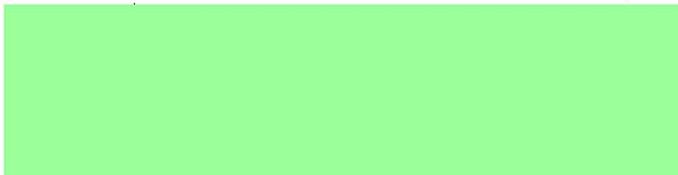


(b)(6)

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

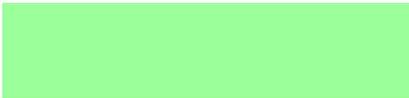
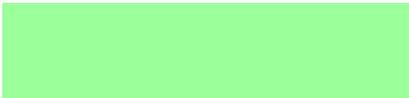


U.S. Citizenship
and Immigration
Services



DATE: **FEB 28 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)

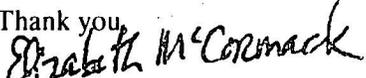
ON BEHALF OF PETITIONER:



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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was approved on January 21, 2004 by the United States Citizenship and Immigration Services (USCIS), Vermont Service Center, but that approval was revoked by the Director, Texas Service Center (director) on January 21, 2010 and is now before the Administrative Appeals Office (AAO) on appeal. 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 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, approved by the United States Department of Labor (DOL).² The director determined that the petitioner failed to establish that the beneficiary possessed the minim requirements for the position, that the petitioner failed to follow the DOL recruitment procedures in connection with the approved labor certification application and that the documents submitted in response to the director's Notice of Intent to Revoke (NOIR) were in themselves a willful misrepresentation of material facts, constituting fraud. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 petitioner³ contends that the director has improperly revoked the approval of the petition. Specifically, counsel argues that the petitioner did comply with the DOL recruitment requirements and that the beneficiary possessed the minimum requirements required on the ETA 750 prior to the filing of the labor certification application.

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.

³ Current counsel of record, [REDACTED] will be referred to as counsel throughout this decision. Prior counsel, [REDACTED] will be referred to as former counsel or 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.

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.⁴

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 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.

⁴ 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).

Here, in the Notice of Intent to Revoke (NOIR) dated October 23, 2009, the director advised the petitioner that there were several inconsistencies with the evidence submitted to establish the beneficiary's qualifications for the proffered position. Specifically, the director wrote:

The record contains the three affidavits from [REDACTED] (dated February 12, 2001; January 23, 2003; and March 3, 2009, respectively) attesting to the beneficiary's employment at [REDACTED] in Jutiapa, Guatemala. The affidavits list the years of employment; however, they do not contain the specific start and end dates of the beneficiary's employment at that establishment. The 2003 and 2009 affidavits submitted reiterate, almost verbatim, many of the statements made in the initial affidavit dated February 12, 2001. The lists of job duties performed by the beneficiary, however, noticeably expanded in the latter affidavits when compared to the duties listed in the 2001 attestation. [REDACTED] affidavit stated that the beneficiary had the capacity to prepare (5) five different types of dishes: meat, seafood, pasta, soups, and salads. The subsequent affidavits list eleven (11) and twelve (12) different types of dishes that the beneficiary is said to have prepared regularly during his employment at [REDACTED] between 1989 and 1992. The March 3, 2009 affidavit submitted in support of the beneficiary's employment does not lift the doubts cast on the validity of the initial documents submitted.

The director informed the petitioner of his intention to revoke the petition and noted that the petitioner was granted a period of thirty (30) days in which to provide a response to include:

[E]vidence to demonstrate that [the petitioner] complied with all DOL recruiting and advertising requirements in addition to clear documentation to validate the beneficiary's experience.

The AAO finds that the director appropriately reopened the approval of the petition by issuing the NOIR, and that the director's NOIR gave the petitioner notice of the derogatory information specific to the current proceeding with respect to the beneficiary's qualifications. The AAO finds that the director's NOIR would warrant a revocation of the approval of the petition if unexplained and un rebutted 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. 568; *Matter of Estime*, 19 I&N Dec. 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 AAO finds 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). Therefore, the director's conclusion that the petitioner did not comply with DOL requirements is withdrawn.

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.

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, as stated earlier, the Form ETA 750 was filed and accepted for processing by the DOL on April 9, 2001. 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 January 15, 2001, he represented that he worked 35 hours a week at [REDACTED] as a cook from 1989 to 1992. The AAO notes that the beneficiary did not include this experience on his Form G-325 Biographic Information submitted with his Application for Adjustment of Status. As noted by the director in the NOIR, the record contains three letters of employment verification from [REDACTED] dated January 31, 2003, March 3, 2009 and November 9, 2009. In response to the NOIR, the petitioner submitted a new affidavit from [REDACTED] dated November 9, 2009, without further explanation or documentation to rebut and resolve the inconsistencies with the three letters that had been detailed by the director in the NOIR. 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. *Matter of Ho*, 19 I&N Dec. at 591-592. Here, the petitioner failed to submit independent, objective evidence in response to the NOIR to explain or rebut the inconsistencies in the record. Accordingly, the AAO finds that the petitioner has failed to establish that the beneficiary possessed the minimum experience requirements for the proffered position.

Beyond the decision of the director, the AAO finds that the petitioner has failed to establish the ability to pay the proffered wage from the priority date onwards. 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 determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage. If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the ETA 750 labor certification was accepted for processing on April 9, 2001. The record closed in January 2004 with the initial approval of the petition, so the 2002 tax return would have been the most recent one available. 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.⁵ The record contains the Internal Revenue Service (IRS) Form W-2 issued by the petitioner to the beneficiary in 2001 for \$25,122.90 in wages. The record also contains a letter dated August 17, 2001 from [REDACTED] the petitioner's chief financial officer stating that:

[The petitioner] employs approximately 990 people, has an annual payroll of \$6,000,000 and gross annual income of \$20,000,000...[The petitioner] has always made his payroll without question and is clearly able to pay the salary offered to [the beneficiary].

In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That regulation further provides: "In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." (Emphasis added) However, the AAO does not find the letter from the petitioner's chief financial officer to be persuasive nor is the letter supported by any other evidence of the petitioner's ability to pay from 2002 onwards.⁶

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 AAO notes that public records indicate that the petitioner was acquired by another company in January 2002 and then sold again in September 2006. The letter from [REDACTED] cannot be considered for any year past 2001 without a successor-in-interest to the petitioner following the 2002 acquisition which has not been established.

On October 22, 2012, the AAO issued a Notice of Intent to Dismiss, Request for Evidence, and Notice of Derogatory Information (NOID/RFE/NODI) in which we informed the petitioner that the record did not contain sufficient evidence to establish the ability to pay the proffered wage from 2001 onwards. In that NOID/RFE/NODI, we specifically asked the petitioner to submit annual reports, federal tax returns, or audited financial statements for 2001 to the present, including any IRS Forms W-2 or 1099 issued to the beneficiary. The petitioner did not respond to the NOID/RFE/NODI. Accordingly, the AAO finds that the petitioner has failed to establish its continuing ability to pay the proffered wage to the beneficiary from 2002 onwards. Thus, for this additional reason, the director's decision to revoke the approval of the petition will be upheld.

Also beyond the decision of the director, the AAO notes that it appears as if the petitioner's business is dissolved. In the NOID/RFE/NODI, we advised the petitioner that:

According to the Commonwealth of Massachusetts, Corporations Division, website <http://corp.sec.state.ma.us/corp/corptest/corptestinput.asp>, (accessed on October 2, 2012), [the petitioner] was involuntarily dissolved on May 31, 2007...If [the petitioner] is no longer in business, then no *bona fide* job offer exists, and the petition and appeal are therefore moot. Even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic revocation due to the termination of your organization's business. See 8 C.F.R. § 205.1(a)(iii)(D).

The AAO also noted that if the petitioner has a successor-in-interest, it should submit evidence to establish that a petitioning successor exists and we advised the petitioner of the criteria and the evidence required to establish that any successor is a successor-in-interest.⁷ The petitioner failed to respond.⁸ Accordingly, even if the approval of the petition could be reinstated, it would be subject to automatic revocation.

⁷ As noted above, public records indicate that the petitioner was acquired by another company in January 2002 and then sold again in September 2006. The record of proceeding includes a letter, dated February 19, 2010 from [redacted] the controller of [redacted] stating that "our company purchased [redacted] in March 2009" and "as a result no one would be able to affirm to what your questions are concerning [redacted] involvement in [the beneficiary's] immigration petitions." However, the record does not contain any information or evidence to establish that there is a petitioning successor in this case in either 2002 or 2006.

⁸ The AAO received a response from the beneficiary's counsel. However, this response will not be considered as the beneficiary does not have standing in these proceedings. The regulation at 8 C.F.R. § 103.3(a)(1)(iii) states, in pertinent part:

(B) *Meaning of affected party.* For purposes of this section and sections 103.4 and 103.5 of this part, *affected party* (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition. An affected party may be represented by an attorney or representative in accordance with part 292 of this chapter.

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. In addition, we are not persuaded that the petitioner established the ability to pay the proffered wage from the priority date onwards.

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.