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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



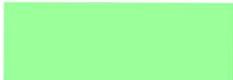
U.S. Citizenship  
and Immigration  
Services



DATE:

OFFICE: TEXAS SERVICE CENTER

FILE:

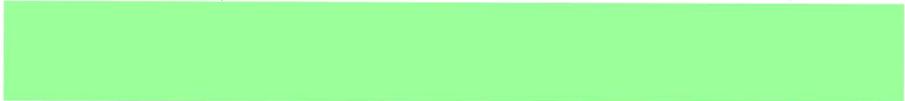


**FEB 28 2013**

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 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:** On January 6, 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 VSC director on July 13, 2005. The director of the Texas Service Center (the director), however, revoked the approval of the immigrant petition on November 10, 2010, and the petitioner subsequently appealed the director's decision to revoke the petition's approval to the Administrative Appeals Office (AAO). The director's decision will be withdrawn. The petition will be remanded.

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).

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).<sup>1</sup> 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 July 13, 2005 by the VSC, but that approval was revoked in November 2010. The director determined 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 in the record did not establish that the beneficiary had the experience required for the position at the time of the labor certification. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.2.

On appeal, counsel for the petitioner<sup>2</sup> 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 beneficiary possessed the minimum requirements required on the ETA 750 prior to the filing of the labor certification application.

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<sup>1</sup> 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.

<sup>2</sup> Current counsel of record, [REDACTED] will be referred to as counsel throughout this decision. The brief was submitted by [REDACTED]. Previous counsel [REDACTED] will be referred to by name. The AAO notes that Mr. Dvorak 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 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.<sup>3</sup>

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 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); and *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.

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<sup>3</sup> 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).

In the NOIR, the director generally questioned the beneficiary's qualifications. In addition, the director noted that the CNPJ<sup>4</sup> number provided for [REDACTED] did not exist in the CNPJ government database, thus leading to the conclusion that false documentation had been submitted to prove the beneficiary's experience. The director also specifically stated that in many of the other petitions filed by previous counsel, the respective petitioners had not followed the DOL's recruitment procedures. The director requested that the petitioner submit additional evidence to demonstrate that the beneficiary had at least two years of work experience in the job offered before the labor certification application was filed and that the petitioner complied with all of the DOL recruiting requirements.

Here, in the NOIR dated January 26, 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. The director specifically asked the petitioner to submit additional evidence to demonstrate that it had complied with all of the DOL recruiting requirements.<sup>5</sup> 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 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.

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<sup>4</sup> Businesses that are officially registered with the Brazilian government are given a unique CNPJ Cadastro Nacional de Pessoa Juridica (CNPJ) number. The CNPJ is similar to the federal tax identification number or employer identification number in the United States. The U.S. 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 company's registered creation date.

<sup>5</sup> The NOIR stated that the CNPJ number that appears on the employment verification letter sent from the beneficiary's prior employer in Brazil did not exist. The NOIR did not further question or examine the letters submitted to verify the beneficiary's experience including, but not limited to, the beneficiary's job title with the former employer, which indicates that he worked not as a cook, but as a kitchen manager.

*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.

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.

Nonetheless, the petitioner must establish its ability to pay the proffered wage from the priority date, as well as that the beneficiary had the requisite work experience in the job offered before 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).

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 March 8, 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 January 12, 2002, he represented that he worked 40 hours a week at [REDACTED] as a cook from December 1996 to February 1999. The record contains a letter of employment dated December 21, 2000 from [REDACTED], owner of [REDACTED], stating that the beneficiary worked there full-time as a cook-chief<sup>6</sup> from December 1996 until February 1999. However, the letter does not meet the

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<sup>6</sup> While the translation of the letter states that the beneficiary worked as a "cook-chief," the original Portuguese version of the letter states that the beneficiary worked as "chefe de cozinha," which is more appropriately translated as "chief of the kitchen." It is unclear whether the position described is the same profession required by the labor certification and whether such experience would qualify the beneficiary for the proffered position.

requirements in the regulations as it does not list a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A).

In response to the director's NOIR, the petitioner submitted a February 10, 2009 letter from [REDACTED] accountant, stating that the beneficiary worked as a kitchen manager for [REDACTED] from December 1996 to February 1999. In addition, [REDACTED] stated that the business operated between March 1, 1993 and April 30, 2001. No evidence was submitted to establish Mr. de Souza's identity and relation to the company. As a result, it may not be considered under 8 C.F.R. § 204.5(1)(3)(ii)(A)-(D). On motion, the petitioner submitted a December 21, 2010 letter from [REDACTED] stating that she was a regular patron of [REDACTED] and met the beneficiary in 1997 when he worked there. This letter also fails to meet the regulatory requirements. Thus, the AAO is not persuaded that the beneficiary possessed the minimum experience requirements 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, as stated above, the ETA 750 labor certification was accepted for processing on March 8, 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.<sup>7</sup> The record contains an Internal Revenue Service (IRS) Form W-2 for 2002 evidencing that the petitioner paid the beneficiary \$23,720. Thus, the petitioner has established the ability to pay the proffered wage in 2002. The petitioner also submitted paystubs for January and February 2009 demonstrating that it paid the beneficiary \$3,480 through February 5, 2009. That amount is less than the proffered wage and the petitioner submitted no additional evidence demonstrating its ability to pay the difference between the actual wage paid and the proffered wage in that year. In addition, the petitioner submitted no evidence of its ability to pay the proffered wage from 2003 through 2008 or 2010 onwards.

According to USCIS records, the petitioner has filed one other Form I-140 petition on behalf of another beneficiary. The petitioner must establish that it has had the continuing ability to pay the

<sup>7</sup> 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).

combined proffered wages to each beneficiary from the priority date of the instant petition. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). However, as stated above, the petitioner has not submitted any evidence to establish the ability to pay for these additional beneficiaries from 2002 onwards or for the beneficiary that is the subject of this petition for 2003 through 2008 and from 2010 onwards. The evidence in the record is insufficient to determine whether the petitioner had the ability to pay the proffered wage to both sponsored workers from 2002 onward.

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.

**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.