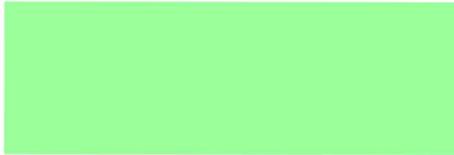


(b)(6)

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



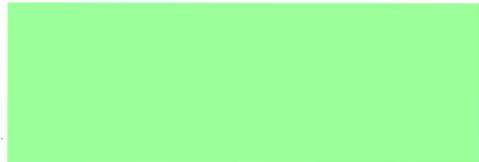
DATE: **JAN 24 2013** OFFICE: TEXAS SERVICE CENTER

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: On July 1, 2002, 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 April 1, 2003. The Director, Texas Service Center (director), however, revoked the approval of the immigrant petition in a Notice of Revocation (NOR) issued on March 25, 2009 and the petitioner subsequently appealed the director's decision to revoke the petition's approval. The appeal will be dismissed.

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 contractor. It seeks to employ the beneficiary permanently in the United States as a rough carpenter 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 April 1, 2003 by the VSC, but that approval was revoked in March 2009. 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 beneficiary did not possess the minimum experience requirements as stated on the labor certification application prior to the filing of the Form ETA 750. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.2(c).

On appeal, counsel for the petitioner² 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.

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, [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.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 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 January 23, 2009, the director wrote:

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 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 asked the petitioner to submit additional evidence to demonstrate that it had complied with all of the DOL recruiting requirements and that the beneficiary was qualified for the position. The director stated that the beneficiary's qualifying employer in Brazil was not a valid business operation. 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 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. In the NOIR, the director questioned the beneficiary's qualifications and indicated that the petitioner had not properly advertised for the position. The NOIR stated that the employment verification letter submitted by the petitioner in support of its contention that the beneficiary was qualified to perform the services of the occupation as of the priority date was signed by a person from a business that was not properly registered with the Brazilian government, and that the letter was invalid. Specifically, the director stated that the Cadastro Nacional da Pessoa Juridica (CNPJ) number [REDACTED] given by the beneficiary's former employer was invalid, and that the record did not establish the beneficiary's qualifications as of the priority date.⁴ The AAO finds that the director's NOIR would warrant a revocation of 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. 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.

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.

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 16, 2001. The name of the job title or the position for which the petitioner seeks to hire is "rough carpenter." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, "Builds rough wooden structures, flooring, framing, forms, etc. using hammers, nails." 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 March 29, 2001, he represented that he worked 35 hours a week at [REDACTED] as a carpenter from February 1993 through June, 1995.⁵ The record includes a letter from the director of [REDACTED] dated March 20, 2001, confirming the employment of the beneficiary from February 8, 1993 to June 30, 1995 in the carpenter's department. In response to the NOIR, the petitioner submitted a statement from the beneficiary dated October 10, 2011 indicating that he told his previous attorney, [REDACTED] that he worked independently on different houses and for a few companies to gain his qualifying experience in Brazil from the age of 27, and that he did not know when he submitted the letter from [REDACTED] that the company did not exist. The beneficiary did not explain whether he knew the signatory of the letter of experience, or whether he worked at a company called [REDACTED]. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. As the beneficiary implicitly admits in his statement that the company [REDACTED] did not exist, the AAO will not accept its letter to establish the beneficiary's qualifying employment.

⁵ The AAO notes that the beneficiary did not include this experience on his Form G-325 Biographic Information signed March 24, 2003.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

On appeal, the petitioner submits declarations from persons in Brazil who attest to the beneficiary's work as a carpenter on various projects.

- [REDACTED] states that the beneficiary worked as a carpenter in her residential and rural properties from January 1993 until August 1993.
- [REDACTED] states that the beneficiary worked in her property from August 1993 through March 1994 in the area of carpentry.
- [REDACTED] states that the beneficiary worked as a carpenter and cabinet maker from March through November 1994.
- [REDACTED] states that the beneficiary worked for him as a carpenter from November 1994 through June 1995 in his property.

None of these letters indicate that the beneficiary worked full-time during the dates indicated, nor do any of them describe the duties performed by the beneficiary during the time worked as required by the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A). The petitioner also submits the following declaration:

- [REDACTED] Accounting Tech, states that the beneficiary worked at [REDACTED] as a carpenter from July 1995 – November 1997.

This letter is written on the letterhead of a company different than [REDACTED] and thus does not satisfy the cited regulation's requirement that the letter of experience be written by the employer.

With respect to the evidence submitted on appeal describing the beneficiary's work experience as a carpenter in Brazil other than for [REDACTED], the beneficiary did not list any of these employers on the Form ETA 750B.⁶ In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. Nor did he explain how he worked full-time for [REDACTED] during the same time period that he worked for the employers listed on appeal. It is incumbent upon the petitioner to resolve the inconsistencies by independent objective

⁶ The AAO notes that on November 23, 2005 the beneficiary told a USCIS officer that as of June 1995 he worked as a professor at [REDACTED]

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. Given the inconsistencies in the record and the lack of independent, objective evidence such as an employment work book, social security records, or other documentary evidence, the AAO finds that the evidence does not establish that the beneficiary has the qualifying two years of work experience as a carpenter. Thus, the director's decision to revoke the approval of the petition will be upheld.

Beyond the decision of the director, the petitioner must also establish its ability to pay the proffered wage from the priority date. The record does not establish the petitioner's ability to pay the proffered wage as of the date of the director's initial approval of the petition. 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 April 16, 2001. The rate of pay or the proffered wage specified on the ETA 750 is \$16.44 per hour or \$29,920.80 per year based on a 35 hour work week.⁷

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

⁷ The job offer must be for a permanent and full-time position. See 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes 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).

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 his declaration dated October 2011, the beneficiary states that he has worked for the petitioner since 1998. The record contains Internal Revenue Service (IRS) Forms W-2 issued by the petitioner to the named beneficiary from 2001-2007 indicating that it paid in excess of the proffered wage for each year. Nevertheless, the Forms W-2 issued by the petitioner to the beneficiary have two different social security numbers: [REDACTED] in 2001, 2002 and 2003; [REDACTED] in 2004, 2005, 2006 and 2007. There is no evidence of record explaining the inconsistency between the two numbers. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. Because the record does not reliably establish the identity of the recipient of the wages, the AAO will not consider these wages when determining whether the petitioner has established the ability to pay the proffered wage to the beneficiary as of the priority date.⁸

Further, the record does not contain any tax returns of the petitioner, and as such, the AAO is unable to determine whether the petitioner had the ability to pay the beneficiary the proffered wage from its net income and/or net current assets as of the date the director initially approved the petition. Further, the petitioner failed to establish that factors similar to those listed in *Matter of Sonogawa*, 12 I&N Dec. at 612, existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets.

The record does not contain any other evidence of the petitioner's ability to pay from 2001 onwards. The petitioner has not provided tax returns, audited financial statements or annual reports from the priority date in 2001 to the present. Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

The AAO finds good and sufficient cause to revoke the approval of the petition based on the petitioner's failure to establish the proffered wage as of the priority date. For this additional reason, the approval of the petition may not be reinstated.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled

⁸ The record contains a 2004 IRS Form 1040 filed by the beneficiary and his wife using the social security number [REDACTED]. Even if the AAO were to accept the wages paid to the beneficiary under this social security number from 2004 – 2007 as evidence of the petitioner's ability to pay, the wages paid under [REDACTED] from 2001-2003 cannot be credited to the petitioner. No corroborating evidence indicates that the IRS recognizes the beneficiary under both social security numbers.

worker under section 203(b)(3)(A) of the Act.

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.