

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090



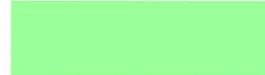
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JAN 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: On October 29, 2001, 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 (director) on December 12, 2001. The director, however, revoked the approval of the immigrant petition 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cook¹ pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).² 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 December 12, 2001 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. The director also questioned whether the beneficiary possessed 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 petitioner³ 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

¹ The AAO notes that the petitioner identified itself on the ETA 750 as a restaurant seeking to employ the beneficiary permanently as a cook, however on the Form I-140 petition, it listed its business as a bakery and the permanent job offered to the beneficiary as baker. 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'r 1986). See also, *Madany v. Smith*, 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).

² 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

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.

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

years from March 1, 2012 to February 28, 2015.

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).

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 18, 2009, the director advised the petitioner 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; 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 gave the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director advised the petitioner that "the beneficiary must have met all of the requirements listed on the ETA 750" which in this case is two years of experience as a cook. The director's NOIR sufficiently detailed the evidence of record, pointing out deficiencies in the beneficiary's qualifications that would warrant a denial if unexplained and un rebutted, and thus was properly issued for good and sufficient cause. Specifically, in the NOIR, the director indicated that the beneficiary's employment verification letter, which stated that the beneficiary was previously employed by [REDACTED] from March 5, 1995 until November 28, 1998, was inconsistent with the CNPJ⁵ records which reflected that the business was "inactive as of August 31, 1997, thus making the alleged dates of the beneficiary's employment impossible." Thus, the AAO finds that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. at 568 and *Matter of Estime*, 19 I&N Dec. at 450. Both cases held that a notice of intent to revoke 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.

In response to the NOIR, the petitioner submitted:

- A statement, dated March 3, 2009 from [REDACTED] partner and manager of [REDACTED], stating that "With the necessity to fulfill contracts with our customers, we had to stay opened and functioning, even though the company had become legally inactive since August 31, 1997;"
- Letter from the beneficiary, dated March 31, 2009, confirming that she worked at [REDACTED]; and

⁵ Businesses that are officially registered with the Brazilian government are given a unique CNPJ number. CNPJ (Cadastro Nacional da Pessoa Juridica) is similar to the federal tax ID or employer ID number in the United States. 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.

- Statement from [REDACTED] indicating that she worked with the beneficiary at [REDACTED]

In the Notice of Revocation (NOR), the director found that the beneficiary was not qualified as of the priority date. The director concluded that the statement from the beneficiary carries little weight as it is self-serving, and that the statements from the beneficiary's alleged former employer and co-worker cannot be verified. The AAO agrees and 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, the Form ETA 750 was filed and accepted for processing by the DOL on April 6, 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 kinds of meat, fish, soups, salads, sauces, etc." 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 5, 2001, she represented that she worked 40 hours a week at [REDACTED] in Brazil from March 1995 until November 1998 as a cook. With the Form I-140 petition, the petitioner submitted an employment verification letter for the beneficiary's prior experience at [REDACTED] dated January 18, 2001. However, this letter does not provide the name, title or address of the author, nor does it specify the duties and responsibilities of the beneficiary and thus fails to meet the regulatory requirements at 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A).

Furthermore, as stated above, in the NOIR, the director advised the petitioner that the CNPJ proof of business registration for [REDACTED] indicated that the business was not operational as of August 1997. None of the evidence submitted in response to the NOIR, provides independent, objective evidence to confirm the beneficiary's claimed experience with [REDACTED] until November 1998, 15 months after the business was closed according to the CNPJ records. 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 582.

On appeal, counsel argues that the director made “a speculative leap to suggest that it would be impossible for the company [in Brazil] to have been operating without CNPJ registration” and that he “was without the ‘substantial evidence’ necessary to revoke the approved visa.” We disagree. 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).

Here, the letters provided by the petitioner in response to the NOIR did not contain the specific dates of the beneficiary’s alleged experience with [REDACTED] or a reasonable explanation as to how the beneficiary could have worked at a business that was not operational. The petitioner failed to provide any independent, objective evidence to rebut and resolve the inconsistencies in the record. *See Matter of Ho*, 19 I&N Dec. at 591-592 (states that the petitioner must resolve any inconsistencies in the record by 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)).

In the NOIR, the director specifically pointed out inconsistencies in the record with regards to the beneficiary’s claimed prior experience. Further, on appeal, the petitioner had the opportunity, and failed to address or overcome these inconsistencies. We also note that the beneficiary did not list the experience in Brazil on the Form G-325 Biographic Information she submitted with her application for adjustment of status. 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.

The AAO concludes that the petitioner has failed to establish that the beneficiary possessed the minimum experience required on the ETA 750 as of the priority date and affirms the director’s finding that the beneficiary is not qualified for the proffered position.

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. at 447. Therefore, the director’s conclusion that the petitioner did not comply with DOL requirements is withdrawn.

Further, beyond the decision of the director, the approval of the petition may not be reinstated, as the petitioner must establish 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

In the instant case, the ETA Form 750 was accepted for processing by the DOL on April 6, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is \$12.57 per hour or \$22,877.40 per year based on a 35 hour work week.⁶ The record contains an Internal Revenue Service (IRS) Form W-2 issued by the petitioner to the beneficiary reflecting wages of \$11,630 in 2002. However, the record does not contain any other evidence of the petitioner's ability to pay the proffered wage in 2001, the difference between the proffered wage and the actual wage in 2002, or from 2003 onwards. The petitioner has not provided tax returns, audited financial statements or annual reports from the priority date in 2001 to the present. For this additional reason, the approval of the petition may not be reinstated.

⁶ 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).

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Furthermore, the AAO notes that it appears as if the petitioner's business is dissolved. On October 22, 2012, we issued a Notice of Intent to Dismiss and Derogatory Information advising the petitioner that according to the Commonwealth of Massachusetts, Corporations Division, website <http://corp.sec.state.ma.us/> (b)(6), (accessed on September 28, 2012), the petitioner was voluntarily dissolved on December 31, 2005. We indicated that 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 the business. See 8 C.F.R. § 205.1(a)(iii)(D). We specifically asked the petitioner to submit annual reports, federal tax returns or audited financial statements for 2001 to the present, as well as IRS Forms W-2 or 1099 issued to the beneficiary by the petitioner for 2001 to the present. The petitioner did not respond or submit any evidence to rebut the derogatory information with regards to whether it continued to operate and / or that a *bona fide* job offer exists. For this additional reason, the approval of the petition may not be reinstated.

The petition's approval 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.