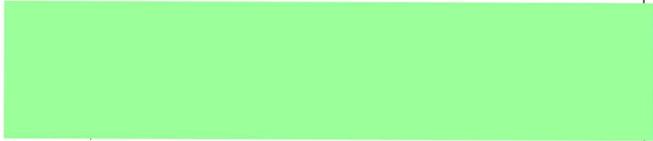




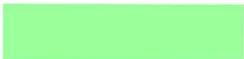
U.S. Citizenship
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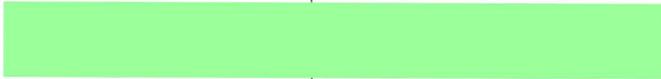


DATE: **JAN 28 2013**

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 June 10, 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 VSC director on March 5, 2003. The director of the Texas Service Center (the director), however, revoked the approval of the immigrant petition on September 22, 2010. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The petition 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 cook 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 March 5, 2003 by the VSC, but that approval was revoked in September 2010. The director determined that the petitioner failed to demonstrate that the beneficiary had the experience required by the terms of the labor certification as of the priority date. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.2.

As noted above, 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. at 590.

In the Notice of Intent to Revoke (NOIR) the director identified numerous problems including fraud and willful misrepresentation in other I-140 petitions and labor certification applications that the petitioner's former attorney of record, John K. Dvorak, filed.² Because of these other petitions and

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 petitioner's current counsel of record, [REDACTED], will be referred to throughout this decision as counsel. Previous counsel, [REDACTED], will be referred to as previous or former counsel or by name. Mr. [REDACTED] has been suspended from the practice of law before the United

since Mr. [REDACTED] filed the petition in this case, the director issued a NOIR to the petitioner on July 30, 2010 requesting that the petitioner submit additional evidence to demonstrate that the beneficiary had at least two years of employment experience in the job offered prior to the filing of the labor certification application on April 24, 2001, and that the petitioner complied with all of the DOL recruitment requirements. The director noted that the letter submitted to verify the beneficiary's experience did not include a title for the author so that it was impossible to determine whether the letter had been written by the previous employer. In addition, the director noted a discrepancy between the date of the business's creation as stated in the CNPJ³ database and the dates that the beneficiary claimed to have worked for that establishment.

In response to the director's NOIR, counsel for the petitioner submitted various documents including copies of advertisements placed in the *Boston Herald* on January 21 and March 18, 2001, a copy of the in-house recruiting announcement, a copy of the job announcement placed with www.salarylist.com, a letter from [REDACTED] to verify the beneficiary's previous employment, [REDACTED] and a letter from [REDACTED] offering the beneficiary a full-time position with that company.

On appeal to the AAO, counsel asserts that the director improperly revoked the petition's approval. The revocation, according to counsel, is not supported by any evidence in the record either with respect to the recruitment or the beneficiary's experience in Brazil. Further, counsel states that the fact that the DOL previously approved the labor certification showed that both the petitioner and the beneficiary have conformed to and met all of the DOL recruiting requirements. Counsel indicates that the director's NOIR contains only vague allegations of fraud in other petitions filed by Mr. [REDACTED]. Counsel also states that the NOIR includes no specific evidence or information relating to the petitioner, petition, or documents in the present case. Counsel states that where a notice of intention to revoke is based only on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, the director cannot revoke the approval of the visa petition, citing *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1988). Lastly, counsel asserts that the response submitted to the NOIR consisted of the documents reasonably available, noting that recruitment materials are generally not kept for longer than five years by the DOL and the regulations at the time the labor certification was submitted did not require the petitioner to keep a copy of its recruitment.

States Department of Justice and the United States Department of Homeland Security for a period of three years from March 1, 2012 to February 28, 2015.

³ 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.

Moreover, counsel states that because the NOIR did not provide a clear explanation of how to resolve the problem with the petition and did not request the petitioner to produce specific evidence to overcome the grounds of revocation, the director's decision to revoke the approval is not based on good and sufficient cause, as required by 8 U.S.C. § 1155, section 205 of the Immigration and Nationality Act (the Act).

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.⁴

A threshold issue on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, states:

The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204. Such revocation shall be effective as of the date of approval of any such petition.

The regulation at 8 C.F.R. § 205.2 states:

(a) *General.* Any Service [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 Service [USCIS]. (emphasis added).

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

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).

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.

Further, *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 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.

The director advised the petitioner in the NOIR that the instant case might involve fraud. In the NOIR, the director generally questioned the beneficiary's qualifications. In addition, the director noted that the [REDACTED] number provided for [REDACTED] indicated that the establishment was not formed until after the beneficiary stated that he worked for the restaurant, 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.

The AAO finds that the director had good and sufficient cause to issue the NOIR. He specifically questioned the credibility of the evidence submitted to establish that the beneficiary obtained work experience as a cook working for [REDACTED]. The NOIR stated that the CNPJ number that appears on the employment verification letter sent from the beneficiary's prior employer in Brazil indicated that the restaurant did not start operations until 2000 whereas the beneficiary claimed to have worked there from 1995 to 1998. With respect to the petitioner's failure to follow recruitment procedures, however, the AAO finds the director's NOIR was deficient. The NOIR neither provided nor referred to specific evidence or information relating to the petitioner's failure to comply with DOL recruitment. 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. *See Ghaly v. INS*, 48 F.3d 1426, 1431 (7th Cir. 1995).

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 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 April 24, 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 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 March 14, 2001, she represented that she worked 35 hours a week at [REDACTED] in Brazil as a cook from January 1995 to December 1998. The record contains a letter of employment dated March 20, 2001 from [REDACTED] stating that the beneficiary worked there as a cook from January 10, 1995 until December 18, 1998. The petitioner submitted a second letter dated August 25, 2010 from [REDACTED] on behalf of the establishment verifying the beneficiary's dates of employment with [REDACTED]. On appeal, the petitioner submitted the corresponding employee register. This evidence is sufficient to establish that the beneficiary had the work experience required by the terms of the labor certification 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 April 24, 2001. 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 the indicated 35 hour work week.⁵ The record contains no evidence that the petitioner paid the beneficiary a salary or any wages. The petitioner submitted its 2001 Form 1120 stating net income of \$77,025 and net current assets of \$77,986. The petitioner has not submitted any other evidence of its ability to pay the proffered wage from 2002 onwards.

According to USCIS records, the petitioner has filed six Form I-140 petitions on behalf of other beneficiaries. The petitioner must establish that it has had the continuing ability to pay the 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 2001 onwards or for the beneficiary that is the subject of this petition for 2002 onwards. Therefore, the director's decision that the petitioner failed to establish the ability to pay the proffered wage is affirmed.

Beyond the decision of the director, the petitioner has failed to establish that it has a successor-in-interest to the entity that filed the labor certification and the Form I-140 petition. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the appellant is a different entity than the petitioner/labor certification employer, it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

An appellant may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, it must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, it must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, it must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The petitioner submitted a letter dated October 29, 2010 from [REDACTED], the owner of [REDACTED] stating that he bought [REDACTED] (the petitioner) in 2004 and that he continued to sponsor the beneficiary's immigrant petition although he has no knowledge or documents concerning the case specifically. The petitioner submitted a Statement of Appointment of Registered Agent issued by The Commonwealth of Massachusetts Secretary of the Commonwealth (Massachusetts) on November 9, 2004 naming Mr. [REDACTED] the registered agent for [REDACTED]. Although Mr. [REDACTED] letter contains the federal employer identification number of the petitioner, he submitted no evidence concerning the transfer of ownership including sale documents or other evidence

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).

concerning the transaction. The Massachusetts records establish a change in registered agent, not a change in ownership.

Moreover, the evidence in the record does not demonstrate that the job opportunity will be the same as originally offered and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. The evidence in the record is insufficient to demonstrate a valid successor-in-interest and, as a result, the petition may be denied on this basis as well.

On appeal, counsel argues that although the petitioner does not wish to employ the beneficiary, it is "not the only entity that may act as [the beneficiary's] current sponsor." The petitioner submitted a letter dated October 26, 2010 from [redacted] owner of [redacted] offering the beneficiary future employment with that establishment. Counsel argues that the beneficiary is allowed to commence a new employment pursuant to the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). The AAO does not agree that the terms of AC21 make it so that the instant immigrant petition can be approved despite the fact that the petitioner has not demonstrated its eligibility. AC21 allows an application for adjustment of status to be approved despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid" suggests that the petition must be valid prior to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar.

It is true that, absent revocation, the beneficiary would have been eligible for adjustment of status with a new employer provided that "the new job is in the same or similar occupation as that for which the petition was filed." However, critical to section 106(c) of AC21, the petition must be "valid" to begin with if it is to "**remain valid with respect to a new job.**" Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added).⁶

⁶ Furthermore, it would subvert the statutory scheme of the U.S. immigration laws to find that a petition is valid when that petition was never approved or, even if it was approved, if it was filed on behalf of an alien that was never entitled to the requested immigrant classification. We will not construe section 204(j) of the Act in a manner that would allow ineligible aliens to gain immigrant status simply by filing visa petitions and adjustment applications, thereby increasing USCIS backlogs, in the hopes that the application might remain adjudicated for 180 days. In a case pertaining to the revocation of an I-140 petition, the Ninth Circuit Court of Appeals determined that the government's authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009). Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been

Section 106(c) states that the underlying I-140 petition "shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed." Pub. L. No. 106-313, § 106(c), 114 Stat. 1251, 1254 (Oct. 17, 2000); § 204(j) of the Act, 8 U.S.C. § 1154(j). Thus, the statute simply permits the beneficiary to change jobs and remain eligible to adjust based on a prior approved petition if the processing times reach or exceed 180 days.

There is no evidence that Congress intended to confer anything more than a benefit to beneficiaries of long delayed adjustment applications. In other words, the plain language of the statute indicates that Congress intended to provide the alien, as a "long delayed applicant for adjustment," with the ability to change jobs if the individual's application for adjustment of status took 180 days or more to process. Thus, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer. See *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010). The AAO concludes that is not the case here, as the underlying petition has been revoked.

In addition, the terms of Mr. [REDACTED] letter indicate that the beneficiary would be eligible for future employment, not that she is currently employed by his restaurant. As a result, the beneficiary seems to currently be unemployed and therefore, cannot have "ported" under the provisions of AC21.

The petition will remain revoked for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 director's decision is affirmed. The approval of the petition remains revoked.

valid from the start. The Ninth Circuit stated that if the plaintiff's argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs.