U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 0 4 2013 Office: NEBRASKA SERVICE CENTER

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 with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director (director), Vermont Service Center, initially approved the preference visa petition. Upon review of the record, the director of the Nebraska Service Center subsequently served the petitioner with Notice of Intent to Revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is hotel. It seeks to employ the beneficiary permanently in the United States as a night manager pursuant Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), which 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. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition.[1]

The petition was initially approved. Upon reviewing the petition,[2] the director determined that the petitioner had not established that the job offer was *bona fide* and had not established that the

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[1]DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a). USCIS evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable includes a review of whether the beneficiary is qualified for the proffered position, which in this case, is governed by 203(b)(3)(A)(i). USCIS has authority to evaluate whether the alien is eligible for the classification sought and has authority to evaluate whether the alien is qualified for the job offered.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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*, *Mandany 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] Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the

beneficiary possessed the required experience. The director served the petitioner with a NOIR the approval of the petition. Upon receipt of the petitioner's response to the NOIR and a review of the record, the director revoked[3] the approval by NOR of the preference petition on April 19, 2012. The matter is now before the AAO on appeal.[4]

On appeal, the petitioner, through counsel, asserted that the director had erred and submitted additional evidence.

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 he deems to be good and sufficient cause, revoke the approval of any petition approved by him 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).

As noted herein, the petitioner must establish that its ETA Form 9089 job offer to the beneficiary is realistic and *bona fide*. The petitioner must show that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The petitioner must also demonstrate that that it has the ability to pay the proffered wage. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case the priority date is July 14, 2005, as stated on the ETA Form 9089 filed on behalf of the beneficiary. The ETA Form 9089 requires a high school education and requires the beneficiary to have 24 months of experience in the job offered as a night manager. The job duties as described on Part H.11 of the ETA Form 9089 are:

> Overall management in the evening, including personnel administration and supervision, accounting, establishing room rates, advertising, and food selection.

> petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

[3] In *Tongatapu Woodcraft Hawaii, Ltd. v. INS,* 736 F.2d 1305, 1308 (9th Cir. 1984), the court stated that "[I]t is important to note that a *visa petition* is not the same thing as a *visa.* An approved visa petition is merely a preliminary step in the visa application process. It does not guarantee that a visa will be issued, nor does it grant the alien any right to remain the United States." (Citations omitted) (Original emphasis).

[4]The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

> Oversee maintenance of guestrooms, parking lot, and outside grounds. Process reservations. Deal with customers' inquiries and complaints.

On Part 5 of the Immigrant Petition for Alien Worker, Form I-140, it is indicated that the petitioner was originally established in 1999, employs eight workers, and reports a gross annual income of $356,953. The ETA Form 9089 indicates that the petitioner has not employed the beneficiary.

***Bona fides* of the job offer**

As indicated by the record and by the director, the petitioner is located in North Carolina and was originally formed under the laws of the Commonwealth of Virginia in 1999. According to Virginia, petitioning organization (identification number was cancelled on December 31, 2007. A copy of the status report is attached. According to the state of North Carolina, where the certified job offer is located, the registration for the petitioning organization (identification number in that state was revoked on August 13, 2010. A copy of this status report is attached.

On appeal, counsel asserts that the petitioner "operated as a business entity between the years 2006 and 2010." He asserts the following chronology is representative of the petitioner's corporate existence:

1. The petitioner, was a "fully formed company under the laws of the Commonwealth of Virginia until it dissolved and formed a new LLC on October 6, 2010."
2. The petitioner was a foreign limited liability company (LLC) registered "under North Carolina law from April 25, 2002 (date received Certificate of Authority) through August 13, 2010 (date of suspension of Certificate of Authority)."
3. After the labor certification employer, was dissolved in Virginia on October 6, 2010, "the Petitioner *immediately* applied for Articles of Organization to form an LLC using a different name.... and was registered as a business entity in North Carolina as of October 19, 2010." (Original emphasis).

According to this account, it appears that there was an approximately 13-day gap between the time the labor certification employer, , ceased to exist in Virginia, October 6, 2010, and the time that the appellant was formed in North Carolina, October 19, 2010. However, the record and publicly available information indicates otherwise.

The record contains Articles of Organization of a Domestic Liability Company, signed on July 12, 1999, for a Virginia LLC named The record also contains a Certificate of Organization documenting that was recognized as formed by the Virginia State Corporation Commission on July 13, 1999. Va. Code Ann. § 13.1-1004(B)("[t]he existence of a limited liability company shall begin at the time the Commission issues a certificate of organization"). The record also contains a Certificate of Assumed Name indicating that registered the assumed name of in the Township of

effective July 15, 1999. The record also contains a Certificate of Existence, dated September 26, 2003, indicating that was authorized to do business in North Carolina as a foreign LLC as of April 25, 2002, under the assumed name of The record is unclear as to whether the Orchard Inn Motel, L.L.C. was operating in North Carolina as a foreign company prior to that date with authorization. Therefore, the record contains evidence that the was a Virginia LLC as of July 13, 1999, and that said LLC was authorized to conduct business in North Carolina as of April 25, 2002 as a foreign LLC.

As indicated above, the authority to operate was cancelled by the state of Virginia on December 31, 2007, pursuant to Virginia Code § 13.1-1050.2(A), which requires automatic cancelation of the LLC's existence if the LLC has not paid its annual fee in over 15, months. Therefore, it appears that the labor certification employer ceased to exist on or before December 31, 2007, approximately two (2) years and 10 months before the appellant, a separately registered company, was formed in North Carolina. The foreign LLC registered in North Carolina likewise ceased to have authorization to operate, as its existence is tied to the Virginia's LLC existence. *See* N.C. Gen. Stat. § 57C-7-01 (the laws of the state under which a foreign limited liability company is formed shall govern its formation, organization, and internal affairs).

Counsel asserts that the foreign LLC continued to operate until the North Carolina Secretary of State revoked its Certificate of Authority on August 13, 2010, citing to N.C. Gen. Stat. §105-230 (stating that an LLC's powers and privileges terminate upon the LLC's suspension). However, such an assertion fails to account for the petitioner's authority to operate in North Carolina, which, as a foreign LLC, is predicated upon its continued existence in Virginia. Chapter 105 of the North Carolina General Statutes, as relied upon by counsel, relates to taxation only. Chapter 57C of the North Carolina Limited Liability Company Act governs the formation, operation, and termination of domestic and foreign LLCs in North Carolina. As indicated above, a foreign LLC's existence is governed by its domestic state's laws. N.C. Gen. Stat. § 57C-7-01. Virginia's statutes state that an LLC does not have the power or authority to transact business after its cancelation. Va. Code Ann. § 13.1-1050.2 (C). As the petitioner ceased to exist under Virginia law on or before December 31, 2007, the foreign LLC would likewise cease to have the authority to operate in North Carolina as of that date. *Id.* at § 57C-7-01 ("A foreign limited liability company with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic limited liability company of like character.")

Therefore, it is concluded that the petitioner had no authority to operate as a foreign limited liability company in North Carolina since at least December 31, 2007. As such, it had no authority to make a *bona fide* job offer to a foreign worker. The petition and appeal are therefore moot.[5] The appeal will be dismissed, in part, on this basis.

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[5] 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 organization's authority to operate a business.

Beneficiary's experience

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> > (A) *General.* 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.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

With the Form I-140, in support of the beneficiary's requisite 24 months of previous work experience in the job offered as a night manager, the petitioner submitted a letter from the New York, dated July 1, 2005, and signed by ' The letter states that the beneficiary worked as a manager for that establishment from September 1998 to May 2002. It described his management duties as including the overall management of the motel and supervising and guiding the staff as well as handling all the accounting functions. As indicated by the record, and the beneficiary are married and were co-owners of this motel, although it had been sold by the date of letter. Counsel asserts that the letter was not misleading as indicated by the director because Mrs. Patel was only affirming the beneficiary's employment while she was owner and not stating that she was the current owner. Counsel additionally submits affidavits subsequently from the beneficiary and his wife asserting the same and also stating that the ETA 9089 erred in stating that was the beneficiary's supervisor during this employment.

Another letter was submitted to the record, dated June 9, 2009, from the New York. It is signed by as General Manager. The letter states that the beneficiary was currently employed there as a financial manager and describes his duties. As noted by the director, an Immigration and Customs Enforcement (ICE) investigation determined that Mr. signature was fraudulently used on the certain of the beneficiary's documentation in connection with non-immigrant petitions.

The AAO has reviewed other documentation relevant to the beneficiary's experience that is

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See 8 C.F.R. § 205.1(a)(iii)(D).

contained in the record, including his G-325A, Biographic Information signed by him on August 10, 2007 filed with his Form I-485, Application to Register Permanent Residence or Adjust Status; Part K of the ETA Form 9089; a supplement to the beneficiary's non-immigrant visa application signed by him on February 4, 2004; and the beneficiary's resume submitted in connection with a non-immigrant petition (Form I-129) filed by

On Part K of the ETA Form 9089, the beneficiary lists two prior jobs:

1. , New York, full-time as a manager from April 15, 2003 with no end date given. However, the beneficiary signed the ETA Form 9089 on September 16, 2005. His wife is listed as his supervisor. The beneficiary is described as the overall manager of the hotel, including personnel, accounting, advertising, food selection, maintenance, parking lot and outside grounds. He also processed reservations and dealt with customer inquiries and complaints. The beneficiary also owned this facility. However, as expressed on his resume submitted in 2011 in support of a Form I-129, the beneficiary describes this employment as "Investor, 4/15/03-current (investor located in Canada)." Further, it is noted that the duties described by the beneficiary on his resume only include accounting, pricing and responsibility for the corporate organization.

2. On the ETA Form 9089, the other job listed by the beneficiary was employment by the New York as a full-time manager from September 15, 1998 to May 15, 2002, when, as the record suggests the facility was sold to having also been owned by the beneficiary prior to that time. However, on the G-325, the beneficiary states that he was working as a computer programmer for ocated in Canada from January 1994 until April 2000. Moreover, on the beneficiary's resume, the employment is not present and the beneficiary describes his position at Budget Inn as an "Investor/part-time proprietor, 9/28/1998-5/13/02."

Given the discrepancies and inconsistencies as set forth above, the AAO cannot conclude that either the chronology or the substance of the beneficiary's claimed work experience as a night manager has been credibly established, including the organizational hierarchy of his wife acting as the beneficiary's supervisor. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner has not resolved any of the discrepant information as noted above. In this matter, as the record stands, it may not be concluded that the petitioner has credibly established that the beneficiary acquired two years of work experience as a night manager pursuant to the ETA Form 9089 and 8 C.F.R. § 204.5(l)(3)(ii).

The petitioner has not established that the beneficiary possessed the requisite qualifying experience

as of the priority date. The petitioner has additionally failed to establish that the job offer remained a *bona fide* offer of employment. In view of the foregoing, the AAO finds that the director properly revoked the approval of the petition. Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)). In this case, the evidence contained in the record at the time the decision was rendered, warranted such denial for good and sufficient cause.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.