(b)(6)

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

U.S. Citizenship and Immigration Services

Date: JUN 2 8 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.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director, Vermont Service Center, on December 4, 2002; however, the Director, Texas Service Center (the director), revoked the approval of the immigrant petition on November 29, 2012, and the petitioner subsequently appealed the director's decision to revoke the petition's approval to the Administrative Appeals Office (AAO). The appeal will be sustained, and the approval of the petition will be reinstated.

The petitioner describes itself as a bakery shop.[1] It seeks to employ the beneficiary permanently in the United States as a baker, pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1153(b)(3)(A)(i).[2] As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to demonstrate that it complied with the DOL recruitment requirements. The director also found that the petitioner failed to demonstrate the continuing ability to pay the proffered wage from the priority date. Additionally, the director concluded that the beneficiary did not possess the requisite work experience in the job offered before the priority date.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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.[3]

On appeal, counsel for the petitioner[4] contends that the director has improperly revoked the approval of the petition. Specifically, counsel contends that the director's finding of fraud with regards to the petitioner's recruitment requirements is not supported by evidence of record. Counsel maintains that the petitioner has conducted recruitment efforts in accordance with the DOL's regulations, and further argues that neither the Notice of Intent to Revoke (NOIR) nor the

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[1] The petitioner operates a

[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] 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).

[4] Current counsel of record, will be referred to as counsel for the petitioner or counsel throughout this decision.

Notice of Revocation (NOR) contained specific adverse information relating to the finding of fraud. Counsel also asserts that the beneficiary possessed the minimum requirements required on the ETA 750 prior to the filing of the labor certification application, and states that the petitioner has submitted sufficient evidence to show that it has the ability to continuously pay the proffered wage of the beneficiary from the priority date.

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. 582, 590 (BIA 1988).

This means that the director must provide notice before revoking the approval of any petition. Specifically, 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.

Both *Matter of Arias* and *Matter of Estime*, as noted above, 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 unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof.

Here, the director advised the petitioner in the NOIR dated May 27, 2011 that the instant case might involve fraud as the petition was filed by [5] The director further stated that in many other petitions filed by Mr. the respective petitioners had not followed DOL recruitment procedures. In this case, the director also found that the CNPJ number of the business where the beneficiary claimed to have worked in Brazil located at was not valid.[6] The director therefore concluded that beneficiary could not have the requisite work experience in the job offered before the priority date. For these reasons, the director in the NOIR advised the petitioner to 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 with the DOL and that the petitioner complied with all of the DOL recruiting requirements. The director also requested that the petitioner submit additional evidence to demonstrate its ability to pay.

In response to the NOIR, counsel submitted additional evidence to show that the petitioner complied with DOL's recruitment requirements, that it has the continuing ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence, and that was a legitimate company when the beneficiary claimed to have worked over there from August 1986 to October 1989.

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[5] The AAO notes that the Form I-140 petition and the Form ETA 750 were both filed by Mr. was under USCIS investigation for submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions at the time the NOIR was sent in 2011. He 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. He will be referred to by name.

[6] 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.

In this case, however, the AAO notes that the letter of employment verification dated January 19, 2001 for the beneficiary from contains a CGC number, not a CNPJ number. The director erroneously searched the CNPJ database (http://www.receita.fazenda.gov.br/) using the CGC number provided above. The search did not turn up any result for this reason.

Upon review of the entire record, including evidence submitted on appeal, the AAO agrees with counsel that the director's finding of fraud involving the recruitment requirements is not substantiated by the evidence of record. The record does not show inconsistencies or anomalies in the recruitment process. The AAO therefore withdraws the director's finding of fraud.

In addition, the AAO finds that the petitioner has submitted sufficient evidence to demonstrate that it has the continuing ability to pay the proffered wage from the priority date and that the beneficiary possessed the requisite work experience in the job offered before the priority date. Consistent with 8 C.F.R. § 204.5(g)(2), the petitioner is required to establish by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date until the beneficiary obtains legal permanent residence. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the priority date of the petition is April 9, 2001, which is the date the labor certification was accepted for processing by DOL, and the rate of pay or the proffered wage as indicated on the Form ETA 750 is $12.61 per hour or $22,950.20 per year (based on a 35-hour work per week). To qualify for the job offered, the petitioner requires two years of work experience in the job offered. Based on the evidence submitted, the AAO is persuaded that the petitioner has the continuing ability to pay the proffered wage of $12.61 per hour or $22,950.20 per year (based on a 35-hour work per week) from April 9, 2001 onwards, and that the beneficiary is qualified to perform the duties of the position.

In summary, the AAO concludes that the director did not have good and sufficient cause to revoke the approval of the petition, as required by section 205 of the Act, 8 U.S.C. § 1155. 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 met that burden.

ORDER: The appeal is sustained. The director's decision to revoke the approval of the petition is withdrawn and the approval of the petition is reinstated.