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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

[Redacted]

DATE: **MAR 11 2013** OFFICE: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:

[Redacted]

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 14, 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 February 19, 2003. The director of the Texas Service Center (the director), however, revoked the approval of the immigrant petition on August 5, 2009, and the petitioner subsequently appealed the director's decision to revoke the petition's approval to the Administrative Appeals Office (AAO). The director's decision will be affirmed. The approval of the petition will remain revoked.

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).<sup>1</sup> 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 February 19, 2003 by the VSC, but that approval was revoked in August 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 documents submitted in response to the director's Notice of Intent to Revoke (NOIR) were in themselves a willful misrepresentation of material facts, constituting fraud. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal, counsel for the petitioner<sup>2</sup> contends that the director has improperly revoked the approval of the petition. Specifically, counsel asserts that the director did not have specific evidence for this case to demonstrate that the approval of the petition should be revoked under section 205 of the Act; 8 U.S.C. § 1155. Counsel argues that the director erred in finding that the petitioner did not comply with the DOL recruitment requirements.

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<sup>1</sup> 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.

<sup>2</sup> Current counsel of record, [REDACTED], will be referred to as counsel throughout this decision. Previous counsel, [REDACTED], will be referred to by name. The AAO notes that Mr. [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 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.<sup>3</sup>

Although not raised by counsel, as a procedural matter, the AAO finds that 8 C.F.R. § 205.1 only applies to automatic revocation and is not the proper authority to be used to revoke the approval of the petition in this instant proceeding. Under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if (A) the labor certification is invalidated pursuant to 20 C.F.R. § 656; (B) the petitioner or the beneficiary dies; (C) the petitioner withdraws the petition in writing; or (D) if the petitioner is no longer in business. Here, the labor certification has not been invalidated; neither the petitioner nor the beneficiary has died; the petitioner has not withdrawn the petition; nor has the petitioner gone out of business. Therefore, the approval of the petition cannot be automatically revoked. The director's erroneous citation of the applicable regulation is withdrawn. Nonetheless, as the director does have revocation authority under 8 C.F.R. § 205.2, the director's denial will be considered under that provision under the AAO's *de novo* review authority.

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 DHS 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,

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<sup>3</sup> 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).

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); 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 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 NOIR dated February 18, 2009, the director wrote:

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 advised the petitioner in the NOIR 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. 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 while the director appropriately reopened the approval of the petition by issuing the NOIR, the director's NOIR was deficient in that it did not specifically give the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director questioned the beneficiary's qualifications and indicated that the petitioner had not properly advertised for the position. The NOIR neither provided nor referred to specific evidence or information relating to the petitioner's failure to comply with DOL recruitment or to the beneficiary's lack of qualifications in the present case. 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). Because of insufficient notice to the petitioner of derogatory information, the director's decision will be withdrawn.

Nevertheless, the approval of the petition may not be reinstated. On December 14, 2012, the AAO sent a Notice of Intent to Dismiss and Derogatory Information (NOID/NODI) to the petitioner raising concerns with the *bona fide* nature of the proffered position. The AAO indicated that USCIS made two calls to the petitioner on January 26, 2009 and January 25, 2010; both times, the employee answering the phone stated that the petitioner did not employ any cooks nor did the establishment have a restaurant. The NOID/NODI further noted that the petitioner's employees professed an unfamiliarity with the beneficiary, thus casting doubt on claims of his employment. The petitioner

was advised that it had the burden of resolving these inconsistencies in the record with independent, objective evidence in accordance with *Matter of Ho*, 19 I&N Dec. at 591-92.

The petitioner failed to respond to the AAO's NOID/NODI or to provide any additional evidence. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). In addition, willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. See Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible." Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750. See 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

The petitioner's representation to the DOL and to USCIS that it operated a restaurant and that said restaurant required the employment of a cook constitutes a willful misrepresentation of a material fact in this matter.

Beyond the decision of the director, 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).

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 30, 2001. The rate of pay or the proffered wage specified on the ETA 750 is \$13.01 per hour or \$23,678.20 per year based on the indicated 35 hour work week.<sup>4</sup> The record contains no Internal Revenue Service (IRS) Forms W-2, pay subs, or other evidence that the petitioner employed and/or paid the beneficiary at any time. The petitioner submitted its 1999 Form 1120,<sup>5</sup> however, the tax return covers a period prior to the priority date and, therefore, can be considered only generally. Thus, the petitioner has not established the ability to pay the proffered wage in any year. The petition will remain revoked on this basis as well.

Concerning the beneficiary's qualifications for the position, 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.

Here, as stated earlier, the Form ETA 750 was filed and accepted for processing by the DOL on April 30, 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 26, 2001, she represented that she worked 35 hours a week at [REDACTED] in India as a cook from January 1995 to December 1998. The record contains a letter of employment dated January 1, 1999 from [REDACTED], stating that the beneficiary worked at [REDACTED] as a cook from January 21, 1995 until December 31, 1998. However, the letter does not meet the requirements in the regulations as it does not state the title of the author, nor does it list a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). The petition will remain revoked for this reason as well.

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.

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<sup>4</sup> 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).

<sup>5</sup> The petitioner's tax year runs from October 1 through September 30.

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**ORDER:** The director's decision to revoke the approval of the petition is affirmed.

**FURTHER ORDER:** The labor certification is invalidated.

**FURTHER ORDER:** The petition is revoked under 8 C.F.R. § 205.2 with a finding of fraud.