



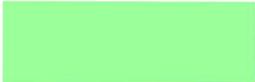
U.S. Citizenship
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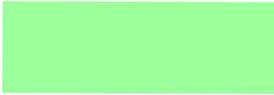
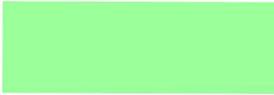
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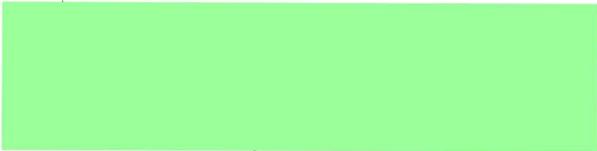
OFFICE: TEXAS SERVICE CENTER

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

cc: JOYCE & ASSOCIATES, P.C.
205 PORTLAND STREET, THIRD FLOOR
BOSTON, MA 02114

DISCUSSION: On November 23, 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 VSC director on March 11, 2002. The director of the Texas Service Center (the director), however, revoked the approval of the immigrant petition on August 2, 2010, 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 withdrawn. The petition will be remanded.

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 bakery. It seeks to employ the beneficiary permanently in the United States as a baker 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 11, 2002 by the VSC, but that approval was revoked in August 2010. 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 evidence submitted did not demonstrate that the beneficiary had the full two years of 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.

On appeal, counsel for the petitioner² 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 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.

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 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 [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.³

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, 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 March 24, 2009, the director wrote:

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).

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.

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. 436, 447 (A.G. 1961). Therefore, the director's conclusion that the petitioner did not comply with DOL requirements is withdrawn.

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, the Form ETA 750 was filed and accepted for processing by the DOL on April 18, 2001. The name of the job title or the position for which the petitioner seeks to hire is "baker." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, "Mix & bakes ingredients to produce all types of Pastries, muffins, 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 December 19, 2000, she represented that she worked 40 hours a week at [REDACTED] in Brazil as a baker from June 1995 to October 1997. The record contains a letter of employment dated January 26, 2001 submitted both with the initial submission and in response to the director's NOIR. The translation submitted with the initial submissions states that the beneficiary worked, as stated on the letterhead, at the [REDACTED] as a baker and confectioner. The translation states no dates of employment and notes that the letter bore an illegible signature although a notary public certified the signature of [REDACTED]. The translation submitted in response to the NOIR states that the beneficiary worked at [REDACTED] as a baker and confectioner from June 1, 1995 until October 30, 1997. The translation does not translate either stamp that appears on the bottom of the letter. The letter in the original Portuguese bears a letterhead of [REDACTED]. It does not contain an address, the name [REDACTED] or a CNPJ number, which are instead found on a stamp near the bottom. Furthermore, the letter does not contain the name and title of the author. Thus, the letter does not meet the requirements at 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A), which require all letters from former employers include the name and title of the author as well as a description of the job duties performed by the beneficiary.

Moreover, the director noted in the NOR that the CNPJ⁴ number is assigned to [REDACTED] and that the company ceased operations in 2003. On appeal, the petitioner submitted a letter dated September 7, 2010 from [REDACTED] stating that the beneficiary worked as a "helper of bakery and pastry" from 1995 to 1997 for [REDACTED]. The petitioner also submitted a number of invoices issued by [REDACTED] in 1997. Those invoices demonstrate that the company was selling beverages at a wholesale level. The evidence submitted demonstrates that [REDACTED] operated in 1997. The evidence submitted does not demonstrate, however, that the company engaged in a business requiring a full-time baker. In addition, the 2010 letter states that the beneficiary was self-employed during this time so that even if a baker was sometimes required by the company, it may not have been on a full-time basis. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. The petitioner also submitted a letter from the beneficiary to verify her work experience with [REDACTED]. The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of her prior work experience. *See Id.* In

⁴ 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.

conclusion, the AAO is not persuaded that the petitioner has established that the beneficiary possessed the full two years of experience required by the terms of the labor certification.

Nonetheless, 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.

In the instant case, as stated above, the ETA 750 labor certification was accepted for processing on April 18, 2001. The rate of pay or the proffered wage specified on the ETA 750 is \$12.61 per hour or \$22,950.20 per year based on the indicated 35 hour work week.⁵ The record contains Internal Revenue Service (IRS) Forms W-2 evidencing that the petitioner paid the beneficiary \$12,380.95 in 2003. As this amount is less than the proffered wage, it is insufficient to demonstrate the petitioner's ability to pay the proffered wage in that year. The petitioner submitted no additional evidence to demonstrate its ability to pay the proffered wage from 2001 onwards.⁶

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).

⁶ The petitioner submitted its 1999 IRS Form 1120S, however, as that form predates the priority date, it cannot demonstrate the petitioner's ability to pay the proffered wage from the priority date onward.

The AAO notes that the record contains two letters from the petitioner dated November 4, 2004 and April 14, 2009 indicating that the beneficiary was employed there on a full-time basis. However, 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)).

(b)(6)

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In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for review and consideration of the additional issues that impact the petitioner's eligibility for the visa that were not initially identified by the director. The director may issue a new notice of intent to revoke approval of the petition and may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director may review the entire record and enter a new decision. If the new decision is contrary to the AAO's findings, it should be certified to the AAO for review.

ORDER: The director's decision to revoke the previously approved petition is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.