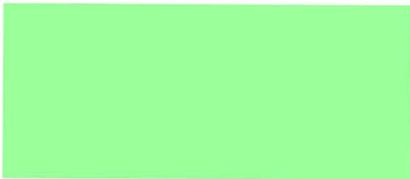


(b)(6)

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

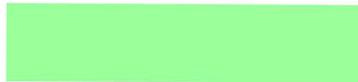


DATE: **MAY 02 2013**

OFFICE: TEXAS SERVICE CENTER

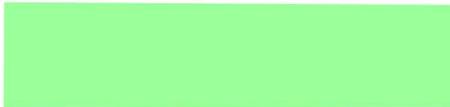
FILE: 

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On March 10, 2003, 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 June 16, 2003. The director of the Texas Service Center (the director), however, revoked the approval of the immigrant petition on November 10, 2010. The petitioner then filed a motion to reopen and reconsider the decision. The director denied the motion to reopen and granted the motion to reconsider and affirmed the previous decision on April 16, 2012. The petitioner then filed a motion to reconsider the decision. On May 31, 2012, the director denied the motion. The matter is now before the Administrative Appeals Office (AAO) on appeal.¹ The director's decision is affirmed. The appeal 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 market. 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).² 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 June 16, 2003 by the VSC, but that approval was revoked in November 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 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.

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

¹ 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.

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.

143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

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 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 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

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).

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.

The director advised the petitioner in the Notice of Intent to Revoke (NOIR) dated August 27, 2010 that the instant case might involve fraud and identified numerous problems including fraud and willful misrepresentation in other I-140 petitions and labor certification applications filed by the petitioner's former attorney of record, [REDACTED]. More specifically, the director noted that the letter submitted to verify the beneficiary's experience at [REDACTED] did not include a. CNPJ⁴ number, so the U.S. Consulate in Sao Paulo, Brazil was asked to verify the beneficiary's employment. The results of the Consulate's investigation were that the establishment was a supermarket at the address listed until 1998 and that the owner of the property, [REDACTED] stated he did not write the employment verification letter and that he did not own a restaurant or hotel.

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.

The AAO finds that the director appropriately reopened the approval of the petition by issuing the NOIR, and that the director's NOIR gave the petitioner notice of the derogatory information specific to the current proceeding with respect to the beneficiary's qualifications. As noted earlier, the AAO finds that the director's NOIR would warrant a revocation of the approval of the petition if unexplained and un rebutted by the petitioner and thus, that the director had good and sufficient cause to issue the NOIR. *See Matter of Arias*, 19 I&N Dec. at 568; *Matter of Estime*, 19 I&N Dec. at 450.

In response to the director's NOIR, counsel for the petitioner submitted:

- A copy of the CNPJ report for [REDACTED]
- A letter from [REDACTED] dated September 23, 2010, stating that the beneficiary worked as a cook from May 1, 1998 to May 31, 2000. He further stated that the beneficiary worked in the restaurant/deli at his [REDACTED] rather than in the hotel restaurant,

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.

[REDACTED] which he also owned. He further stated that the Consulate never contacted him;

- Copies of advertisements placed in the [REDACTED] on January 30, February 1, February 3, 2002; and
- An affidavit from [REDACTED] the petitioner's president, stating that he posted a job notice internally for two weeks, and advertised the position in the [REDACTED] on January 31, February 1, and February 3, 2002 as instructed by prior counsel. He further stated that he received no response to the advertisements.

The director in the Notice of Revocation (NOR) dated November 10, 2010 acknowledged the petitioner's response to the NOIR, but concluded that the response did not demonstrate that the petitioner followed proscribed recruitment procedures or that the evidence in the record persuasively determined the beneficiary's experience. The director specifically noted that the letter from Mr. [REDACTED] did not resolve the discrepancy between the Consular findings that [REDACTED] did not operate a hotel or restaurant. The director also noted that no evidence had been submitted to demonstrate that [REDACTED] operated as anything other than a supermarket. The director thus held that the evidence in the record was unpersuasive concerning the beneficiary's prior experience. The director also noted that the Form ETA 750 was not signed by the petitioner.

On the motions to reopen and reconsider, counsel asserted that the director improperly revoked the petition's appeal. The revocation, according to counsel, is not supported by any evidence in the record with respect to the beneficiary's experience with [REDACTED]. Counsel asserted that the director misconstrued the original letter from [REDACTED] in that the letter did not state that the beneficiary worked for a restaurant or hotel so was not inconsistent with the Consular investigation that found [REDACTED] owned a supermarket. In addition, counsel stated that the director ignored that portion of [REDACTED] second letter where he stated that he had not been contacted by the Consulate. The motions also state that the director did not indicate a reason for finding that the petitioner had not followed recruitment requirements and that the petitioner did, in fact, submit evidence demonstrating that it followed the recruitment requirements. Counsel also asserted that it was outside of the purview of USCIS to review recruitment, documents and procedures and that the DOL certified the labor certification only after reviewing the recruitment materials submitted and determining that the requirements had been met. Lastly, counsel asserted that the case had been decided extrajudicially because of prior counsel's involvement with the case.

The director's April 16, 2012 decision denied the petitioner's motion to reopen and granted the petitioner's motion to reconsider and affirmed the revocation. In considering the second letter submitted from [REDACTED] stating that he had not been contacted by any U.S. government official about the beneficiary's previous employment, the director cited *Matter of Ho*, 19 I&N Dec. at 582, concerning the discrepancies raised in the record. The director stated that the petitioner submitted no independent, objective evidence as required by *Matter of Ho* to resolve the discrepancies and, therefore, the petitioner had not established that the beneficiary had the experience claimed. Without such evidence, the director was unable to conclude that the beneficiary had the experience required by the terms of the labor certification. Concerning the petitioner's recruitment activities, the director

stated that USCIS has a joint authority to investigate the job opportunity to ensure that a bona fide offer was presented and available to U.S. workers and that a petitioner who misrepresents recruitment that has been completed warrants USCIS invalidating the labor certification. The director cited *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983); and *Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1988), in support. The director stated that no affirmative evidence of misrepresentation or fraud was present in the case, so that the labor certification would not be invalidated. Lastly, the director stated that the involvement of prior counsel in the instant petition did not prejudice the petitioner and only discrepancies in the current petition led to the revocation.

The petitioner then filed a motion to reconsider the director's decision, re-asserting that the director lacked good and sufficient cause to revoke the petition's approval. Specifically, counsel cited the same argument made in the previous motion to reopen and reconsider concerning the misconstruction of [REDACTED] original letter as compared to the results of the Consular investigation. Counsel stated that the inconsistency relied upon by the director was not defined and, to the extent that the inconsistency was between the consular investigation and [REDACTED] letters, such an inconsistency would not be considered a reason to doubt [REDACTED] credibility as Mr. [REDACTED] letters were consistent, specific, and detailed as required by *Matter of Y-B*, 21 I&N Dec. 1126 (BIA 1998). To the extent that any question arose concerning the validity of Mr. [REDACTED] business, the petitioner states that the CNPJ print-outs submitted establish that [REDACTED] does own and operate the business claimed and that such evidence resolved any discrepancy. The petitioner additionally submitted the approval notices for two other sponsored beneficiaries to demonstrate that similar arguments had prevailed.

On May 31, 2012, the director issued a decision denying the petitioner's motion to reconsider. The director stated that each case is determined on the particular facts and evidence submitted so that the decisions regarding the two other beneficiaries sponsored by the petitioner did not bear upon the revocation or facts in the instant case. The director noted that counsel did not raise any question or misinterpretation of law in the motion to reconsider and that any additional arguments made by counsel were unsupported by caselaw, statute, regulation, or policy, so that the submissions did not meet the requirements of a motion to reconsider. As a result, the director denied the petitioner's motion to reconsider.

On appeal to the AAO, counsel asserts that the director erred in denying the motion to reconsider, because the crux of the motion was that the petitioner had satisfied the preponderance of the evidence standard, which constitutes a legal argument, and that the director lacked good and sufficient cause to revoke the petition's approval. In addition, counsel asserts that the motion to reconsider concerned the entire case instead of just the director's previous decision concerning the motion to reopen and reconsider. Counsel asserts again that no good and sufficient cause existed to revoke the petition's approval and that the petitioner satisfied the preponderance of the evidence standard in documenting that the beneficiary had the experience required by the terms of the labor certification. Counsel then re-asserts the arguments made earlier in the proceedings concerning Mr. [REDACTED] letters.

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 March 8, 2002. 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 types of lunches & dinners." 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 January 16, 2001, he represented that he worked 35 hours a week at [REDACTED] in Brazil as a cook from May 1, 1998 to May 31, 2000.

As discussed above, the original letter from [REDACTED] dated January 15, 2003, written on letterhead [REDACTED] states that the beneficiary worked "in the restaurant" from May 1, 1998 to May 2000 as a cook. [REDACTED] letter dated September 23, 2010, submitted on paper with no letterhead, states that the beneficiary worked "at the restaurant . . . at [the] [REDACTED] rather than in the [REDACTED]. Neither letter contains a description of the job duties of the position as required by 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A).

In addition, as stated above, the information contained in the letters from [REDACTED] conflicts with evidence gathered during a Consular investigation. As stated in the NOIR, the U.S. Consulate in Sao Paulo discovered that the address provided on [REDACTED] 2003 letter corresponded to a supermarket and that the owner of the property, [REDACTED] did not own a hotel, but instead owned a supermarket. This finding is supported by the CNPJ report submitted by the petitioner in response to the NOIR, which corresponds to a [REDACTED]. The Consulate indicated that it spoke with [REDACTED] who could not confirm that he wrote the employment letter and who stated that he owns a supermarket. 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.

Counsel argues on appeal that [REDACTED] is credible because all aspects of his letters are consistent outside of the letterhead of the first letter. However, "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." *Id.* The director requested corroborative evidence to determine whether the information presented by [REDACTED] in fact represented the beneficiary's previous work experience. The petitioner, however, submitted no independent, objective evidence, such as pay stubs, tax returns, or other contemporaneous documentation, to demonstrate that the

beneficiary worked for [REDACTED]⁵ Therefore, the AAO is not persuaded that the beneficiary possessed the minimum two years of experience in the proffered job as of 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 at 145 (noting that the AAO conducts appellate review on a de novo basis).

Beyond the decision of the director, 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 March 8, 2002. The rate of pay or the proffered wage specified on the ETA 750 is \$12.65 per hour or \$23,023.00 per year based on the indicated 35 hour work week.⁶ The record contains a 2001 Internal Revenue Service (IRS) Form W-2 stating that the petitioner paid the beneficiary \$10,029.01. As this amount is less than the proffered wage, the petitioner must demonstrate its ability to pay the difference between the actual wage paid and the proffered wage, which is \$12,993.99. The petitioner submitted its 2001 Form 1120 reflecting net income of \$25,464 and net current assets of \$43,390. Although this net income and net current assets exceed the difference between the actual wage paid to this beneficiary and the proffered wage, as stated by the petitioner, two additional

⁵ The AAO also notes that the beneficiary indicated on her Form G-325, submitted in conjunction with her Form I-485 Application to Register Permanent Residence or Adjust Status, that she resided in Domingos Martins, Espirito Santo, Brazil from 1994 to 2001. We note that Domingos Martins is 300 kilometers away from Mantopolis, the location of [REDACTED]. It seems highly unlikely that the beneficiary could have worked at a location more than a four hour drive from her home. In any further filings, the petitioner should submit evidence to overcome this additional discrepancy.

⁶ 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).

beneficiaries were sponsored by the petitioner and the petitioner must demonstrate he 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). The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. As a result, the petitioner did not establish its ability to pay the proffered wage in 2001. The petitioner did not submit any additional financial documents to demonstrate its ability to pay the proffered wage from 2002 onward. As a result, the petitioner has not established the ability to pay the proffered wage from the priority date in 2001 onwards and the petition may be revoked on this basis 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.

ORDER: The director's decision is affirmed. The appeal is dismissed and the approval of the petition remains revoked.