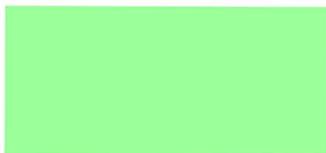


(b)(6)

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

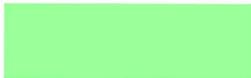


U.S. Citizenship
and Immigration
Services

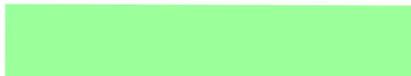


DATE: **MAY 03 2013**

OFFICE: TEXAS SERVICE CENTER

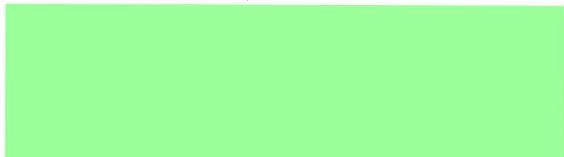
FILE: 

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 July 2, 2007, 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 December 17, 2007. The director of the Texas Service Center (the director), however, revoked the approval of the immigrant petition on March 20, 2012. 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a food service supervisor² pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).³ As required by statute, the petition is submitted along with an approved ETA Form 9089 labor certification. As stated earlier, this petition was approved on December 17, 2007 by the VSC, but that approval was revoked in March 2012. In the Notice of Revocation (NOR), the director determined that the petitioner failed to demonstrate that the beneficiary had the education

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 [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 The AAO notes that the petitioner listed “counter supervisor” for the job title on the Form I-140 petition. However, To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (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 Madany 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).

³ 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.

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 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁴

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.

⁴ 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).

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 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 his Notice of Intent to Revoke (NOIR) dated August 9, 2011 that the instant case might involve fraud and identified three issues with the previous submissions. Specifically, the NOIR noted a discrepancy in the dates of the beneficiary's employment with the petitioner. On the ETA 9089, the petitioner checked the box indicating that the beneficiary was not employed with the petitioner when the labor certification was filed, however, other evidence in the record indicated that the beneficiary was employed by the petitioner on the priority date. If the beneficiary were employed by the petitioner on the priority date, it needed to be disclosed to the Department of Labor (DOL) so that it could determine that a *bona fide* job offer was available to potential U.S. workers. The proffered wage listed on the labor certification differed from that listed on the Form I-140, so doubts were also raised as to whether the petitioner intended to employ the beneficiary in a full-time capacity.

Additionally, the NOIR noted that the petitioner would need to demonstrate that the beneficiary had the education required by the terms of the labor certification, specifically that the beneficiary held a Bachelor's degree in Business Management where the labor certification stated that a foreign degree equivalent would not be accepted. The NOIR noted that the letter submitted stating that the beneficiary was employed by [REDACTED] from 2000 to 2003 was not listed on Part K of the Form ETA 9089. The NOIR advised that *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), stated that the credibility of claimed employment is diminished when not listed on the labor certification by the beneficiary. The NOIR also requested evidence of the petitioner's ability to pay the proffered wage from 2006 onwards.

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 NOIR gave the petitioner notice of the derogatory information specific to the current proceeding. 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 NOIRs. *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 Bill of Sale from [REDACTED] the entity listed as the employer on the Form ETA 9089, to [REDACTED] the petitioner listed on Form I-140;
- A letter from the petitioner's former attorney listing job advertisements placed for the position;
- The beneficiary's Diploma of Higher Education in Business Management from [REDACTED] in Bulgaria and corresponding transcripts;
- An evaluation of the beneficiary's Diploma conducted by [REDACTED] vice president of Credential Evaluation Services, Foundation for International Services, dated June 8, 2007;
- A letter from [REDACTED] former owner of [REDACTED], stating that the beneficiary was employed by his company (the labor certificate applicant) in 2004 as a student and in 2005 under an H-1B visa;
- A letter from [REDACTED] of [REDACTED] stating that the beneficiary was employed at that establishment from May 1999 to January 2003 in a part-time capacity first as a cook's assistant, then as a head cook, then as a manager of the cooks;
- A letter dated September 2, 2011, from [REDACTED] President of [REDACTED] (the petitioner on the Form I-140), stating that the beneficiary began working for that establishment in 2008 and continues to be employed there;
- Internal Revenue Service (IRS) Forms W-2 issued by [REDACTED] to the beneficiary in 2008, 2009, and 2010;
- Paystubs issued by [REDACTED] to the beneficiary in 2011;
- IRS Forms 1120S for [REDACTED] for 2005 through 2010; and
- 2011 Profit and Loss statement for [REDACTED]

The director analyzed the documents submitted and determined that the documents satisfied the inquiry regarding whether the beneficiary was employed at the time the labor certification was filed so that no question exists as to whether a *bona fide* offer was made to U.S. workers. The director also accepted the evidence submitted to establish the ability to pay the proffered wage from the priority date onwards. The director, however, found that the evidence submitted by the petitioner did not establish that the beneficiary had the education required by the terms of the labor certification as of the priority date. Specifically, the director noted in the NOR that the labor certification states that a foreign educational equivalent would not be accepted in lieu of a U.S. bachelor's degree. The director acknowledged counsel's statement that the response to that question was made in error and that the beneficiary's foreign degree appeared on the labor certification when approved by DOL, but held that USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany 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). As a result, the director held that the original approval was made in error and therefore, revoked that approval.

On appeal to the AAO, counsel asserts that the director improperly revoked the petition's approval. The revocation, according to counsel, was based on a "non-material omission" of the petitioner checking the "no" box indicating it would not accept a foreign equivalency degree. Specifically, counsel states that the failure to check the "yes" box was immaterial to the review of the labor certification because qualified applicants would not have been dissuaded from applying for the position. Instead, applicants for the position would have viewed recruitment materials which did not state whether a foreign degree equivalent would be accepted or not and therefore, would not dissuade any qualified applicants from applying. Counsel relied upon *In Ben Pumo*, 2009-PER-040 (BALCA, Oct. 2009), in stating that errors made on ETA Form 9089 are not material where other information is provided on the labor certification. Counsel cited the following scenario from *Ben Pumo* as correlative to the instant case: the petitioner failed to check the box indicating that newspaper advertisements had been run, but the name of a prominent newspaper was included elsewhere as the source where advertisements were placed; the box indicating that Sunday newspaper advertisements had been run was not checked, but the dates provided for the advertisements were Sundays; and the box was not checked indicating that the employer completed the application, but the attorney indicated that she prepared the application at the direction of the employer. Counsel states that the scenarios discussed in *Ben Pumo* are analogous to the instant case where the labor certification stated that a foreign equivalent degree would not be accepted, but listed a foreign degree for the worker it proposed to sponsor. Counsel thus argues that the error was "harmless" as DOL would have been apprized as to the qualifications of the proposed worker and no potential U.S. workers would have failed to apply for the position.

The AAO disagrees. As stated above, 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 unrebutted 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.

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 9089 as certified by the DOL and submitted with the petition.

Here, the Form ETA 9089 was filed and accepted for processing by the DOL on October 26, 2005. The name of the job title or the position for which the petitioner seeks to hire is "food service supervisor." Under the job requirements, Part H, the labor certification required a Bachelor's degree in Business Management. Part H further indicated that no experience was required for the position, listed an alternate field of study as Business Management, stated that no alternate combination of

education and experience was acceptable, and stated that no foreign educational equivalent was acceptable.⁵

On the Form ETA 9089, part J, signed by the beneficiary on June 25, 2007, he represented that he holds a Bachelor's degree in Business Management from [REDACTED] completed in 2003. The evidence in the record establishes that this degree is a foreign equivalent to a U.S. bachelor's degree, however, the terms of the labor certification state that a foreign educational equivalent would not be accepted.

The Board of Alien Labor Certification Appeals (BALCA) in *Ben Pumo* considered whether a labor certification could be certified when incomplete. Specifically, the employer in that case had failed to check certain boxes indicating that it complied with the advertisement requirements and that the employer authorized the filing. Certain other information was provided, however, including the name of the newspaper in which the advertisements were placed, the dates of those advertisements that were Sundays a week apart, and the attorney's certification that the employer authorized the labor certification. In contrast, the petitioner here did not fail to check a box or otherwise fail to complete the Form ETA 9089. Instead, counsel urges a re-reading of the labor certification to nullify a box that was checked by accepting the beneficiary's foreign degree as proof that it meant to check the "yes" box instead of the "no" box.

Counsel provides no basis for allowing a re-defining of the requirements of the labor certification as certified by DOL. As stated above, 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 *Madany v. Smith*, 696 F.2d 1008; *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1; see also *Matter of Deloitte Consulting*, 2011-PER-00168 (February 1, 2012) (holding that the proffered position had not properly been advertised where the employer failed to include travel requirements in the job description); *Matter of Sun Microsystems*, 2011-PER-00501 (March 29, 2012) (holding that the job advertisements were insufficient where the labor certification stated Santa Clara or other locations but the job advertisement stated the position was in Santa Clara alone); *Matter of Pixar*, 2011-PER-00637, (March 29, 2012) (holding that the job advertisements were insufficient where they stated that a high school education was required when the labor certification required additional education). The beneficiary does not meet the terms of the labor certification in that he does not possess a U.S. bachelor's degree in Business Management. As a result, the petition is not approvable and the previous approval remains revoked.

⁵ It is noted that the labor certification provides for experience in the alternate position as manager, however, as the terms of the labor certification do not require experience for the position, it is unclear to what the experience as a manager would be an alternative.

Beyond the decision of the director, the petitioner also failed to establish that it is a successor-in-interest to the entity that filed the labor certification. The petitioner is a different entity from the employer listed on the labor certification. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The evidence in the record does not satisfy all three conditions described above because the Warranty Bill of Sale in the record states that the labor certification employer, [REDACTED] sold six individual locations to the employer listed as the petitioner on the Form I-140, [REDACTED]. The Bill of Sale, however, did not state that all or the relevant part of [REDACTED] as a corporation was sold to [REDACTED]. Accordingly, the petition would also be revocable because the petitioner has failed to establish that it is a successor-in-interest to the employer that filed the labor certification.

The petition will be denied 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.