

(b)(6)



U.S. Citizenship
and Immigration
Services

[Redacted]

Date: **SEP 13 2013**

Office: TEXAS SERVICE CENTER

[Redacted]

IN RE:

[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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: On December 5, 2012 the Administrative Appeals Office (AAO) issued a decision withdrawing the director's decision to revoke the approval of the employment-based immigrant visa petition and remanding the matter to the Director, Texas Service Center (the director), for further action and review in accordance with the AAO's decision. On March 18, 2013, the director, after sending the petitioner a Notice of Intent to Revoke (NOIR) and receiving no response, revoked the approval of the petition, invalidated the labor certification, and certified the decision to the AAO for review pursuant to 8 C.F.R. § 103.4(a). Upon review, the AAO will affirm the director's decision to revoke the approval of the petition.

The petitioner is a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook 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).¹ As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). The petition was initially approved on April 10, 2004, and the approval of the petition was later revoked by the director. The director's decision to revoke the petition's approval was subsequently withdrawn by the AAO. The labor certification was invalidated on March 18, 2013 after the petitioner failed to respond to the director's February 17, 2013 NOIR. In his March 18, 2013 decision, the director found fraud or willful misrepresentation involving the labor certification process and again revoked the petition's approval. Specifically, the director determined that the petitioner failed to demonstrate that it conducted good faith recruitment in accordance with the U.S. Department of Labor (DOL) recruitment procedures. Additionally, the director found that the petitioner failed to demonstrate the continuing ability to pay the proffered wage from the priority date and that the beneficiary did not have 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 considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The AAO notes that the director found fraud and/or willful misrepresentation involving the labor certification process, because the attorney who filed the Form ETA 750 and the Form I-140 petition [REDACTED] had been suspended from practicing law before the Board of Immigration Appeals (BIA), the Immigration Courts, and the Department of Homeland Security

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 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).

(DHS) for three years from March 1, 2012 under 8 C.F.R. § 292.3(b). The AAO also observes that the director revoked the approval of the petition, and invalidated the labor certification, because the person who signed the Form ETA 750 and Form I-140 petition, [REDACTED] was not authorized to file the applications, as he was not an officer of the petitioning corporation.³ In addition, the director found that the advertisements from the *Boston Herald* submitted to demonstrate that the petitioner complied with DOL's recruitment regulations did not conform to several DOL's requirements as prescribed at 20 C.F.R. § 656.21(g) (2001), including that the advertisements did not describe the job opportunity, did not state the rate of pay, nor did they state the minimum job requirements.

The AAO disagrees. Upon *de novo* review, the AAO finds that the evidence of record does not support the director's conclusion that there was fraud or willful misrepresentation involving the labor certification. There has been an insufficient development of the facts upon which the director can make a determination of fraud or willful misrepresentation in connection with the documentation submitted to support the beneficiary's qualifications based on the criteria of *Matter of S & B-C*, 9 I&N Dec. 436, 447 (A.G. 1961).

In accordance with 20 C.F.R. § 656.30(d), U.S. Citizenship and Immigration Service (USCIS) may invalidate the labor certification based on fraud or willful misrepresentation. The term "willfully" in the statute has been interpreted to mean "knowingly and intentionally," as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. See *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) ("knowledge of the falsity of the representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary"). Materiality is determined based on the substantive law under which the purported misrepresentation is made. See *Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); see also *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979).

In response to the director's NOIR dated March 6, 2009 and to demonstrate that the petitioner fully complied with the DOL recruitment requirements, counsel for the petitioner at the time [REDACTED] submitted the following evidence:

- Copies of the advertisements for the position of "Cook" published in the [REDACTED] from Sunday, February 4, 2002 through Sunday March 3, 2002;
- A copy of an advertising pricing sheet from the [REDACTED] stating that "All classified line ads appear daily on the Internet in combination with your classified advertisement, at a

³ In the Notice of Certification (NOC) and the Notice of Revocation (NOR), the director noted that only [REDACTED] were authorized to sign and file the Form ETA 750 and the Form I-140, as they were the only two members of the petitioning company whose names were listed on the petitioner's annual report that was filed with the Secretary of State of the Commonwealth of Massachusetts. The director found this information from the website of the Secretary of the Commonwealth of Massachusetts, Corporations Division (<http://corp.sec.state.ma.us/corp/corpsearch/corpsearchinput.asp>).

charge of 50 cents per day. Help Wanted display ads appear on the Internet at a flat rate of \$20.00 for 7 days”; and

- A letter from [REDACTED] dated March 27, 2009, stating “[t]he recruitment consisted of numerous advertisements in the newspaper in conjunction with an internet listing. The position was also posted at our place of business. We did not receive any qualified applicants.”

At the time the Form ETA 750 labor certification was filed on May 31, 2002, DOL accepted two types of recruitment procedures – the supervised recruitment process and the reduction in recruitment process. *See* 20 C.F.R. § 656.21 (2004). Under the supervised recruitment process an employer must first file a Form ETA 750 with the local office (State Workforce Agency), who then would: date stamp the Form ETA 750 and make sure that the Form ETA 750 was complete; calculate the prevailing wage for the job opportunity and put its finding into writing; and prepare and process and Employment Service job order and place the job order into the regular Employment Service recruitment system for a period of thirty (30) days. *See* 20 C.F.R. §§ 656.21(d)-(f) (2003).

The employer filing the Form ETA 750, in conjunction with the recruitment efforts conducted by the local office, should then: place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication and supply the local office with required documentation or requested information in a timely manner. *See* 20 C.F.R. §§ 656.21(g)-(h) (2003). Under the reduction in recruitment process, the employer could, before filing the Form ETA 750 with the local office, conduct all of the recruitment requirements including placing an advertisement in a newspaper of general circulation and posting a job notice in the employer’s place of business. *See* 20 C.F.R. §§ 656.21(i)-(k). Here the petitioner appears to have conducted recruitment under the reduction in recruitment process, placing advertisements and a job notice posting prior to the filing of the ETA 750 on May 31, 2002.

The AAO finds that the record does not contain any inconsistencies or anomalies in the recruitment process. We also note that at the time the petitioner filed the Form ETA 750 labor certification application with DOL for processing in May 2002, employers were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the DOL. *See* 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991.⁴ For these reasons, we do not find fraud or willful misrepresentation involving the labor certification.

Moreover, the AAO acknowledges [REDACTED] suspension from practicing law before the BIA, immigration courts, and DHS for three years from March 1, 2012. However, the record contains

⁴ Not until 2005, when the DOL switched from paper-based to electronic-based filing and processing of labor certifications, were employers required to maintain records and other supporting documentation, and even then employers were only required to keep their labor certification records for five years. *See* 69 Fed. Reg. 77386, Dec. 27, 2004 as amended at 71 Fed. Reg. 35523, June 21, 2006; *also see* 20 C.F.R. § 656.10(f) (2010).

no evidence implicating [REDACTED] involvement in the recruitment process or participation in interviewing or considering the job applicants in this case.

Finally, even though the director checked the record of the Secretary of the Commonwealth of Massachusetts and found that only [REDACTED] as officers of the petitioning corporation were authorized to sign the application, the AAO notes that the Form I-140 instructions state “[i]f the petitioner is a corporation or other legal entity, only an individual who is an officer or employee of the entity who has knowledge of the facts alleged in the petition, and who has authority to sign documents on behalf of the entity may sign the petition.” The record indicates that [REDACTED] was an employee of the petitioner and the record does not raise doubt that he was authorized to sign documents as the petitioner’s general manager. Thus, the director’s finding of fraud or willful misrepresentation is not substantiated by evidence of record and will be withdrawn. Further, the director’s decision to invalidate the certified Form ETA 750 will also be withdrawn. Nevertheless, the approval of the petition cannot be reinstated, because the petitioner failed to demonstrate the continuing ability to pay the proffered wage from the priority date and to establish that the beneficiary possessed the requisite work experience in the job offered before the priority date.

Concerning the petitioner’s ability to pay, the regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary’s proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As indicated above, the Form ETA 750 was accepted by the DOL for processing on May 31, 2002. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$12.65 per hour or \$23,023 per year (based on a 35-hour work per week).⁵ The director approved the petition on April 10, 2004. As of that date, the petitioner's 2003 tax return was not yet due.

The petitioner submitted a copy of its Internal Revenue Service (IRS) Form 1120S for 2001 to show that it has the continuing ability to pay the proffered wage from the priority date. However, we note that the priority date of the instant petition was in 2002, and the record does not contain any other evidence with regards to the petitioner's ability to pay despite both the director and the AAO having raised the issue in past decisions. Due to the lack of evidence, the AAO finds that the evidence submitted above, which predated the priority date, is not sufficient to demonstrate the petitioner's continuing ability to pay the proffered wage from the priority date onwards. As of the date of the petition's approval on April 10, 2004, the evidence in the record did not establish that the petitioner had the ability to pay the beneficiary the proffered wage in 2002 or in any subsequent year. Thus, while the director's decision was in part in error, the USCIS had good and sufficient cause to initiate revocation proceedings based on the petitioner's failure to establish its ability to pay the proffered wage from the priority date onward.

The record of proceeding also does not establish that the beneficiary qualified for the proffered position as of the priority date. With respect to the beneficiary's qualifications for the job offered, the petitioner must demonstrate, that on the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. 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, 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).

Here, as noted earlier the record shows that the petitioner filed the Form ETA 750 labor certification with DOL on May 31, 2002. The name of the job title or the position for which the petitioner seeks to hire is "cook." The job description under item 13 of the Form ETA 750, part A, is "[p]repare variety of meats, poultry [*sic*], and special orders." Under item 14 of the Form

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).

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 the beneficiary represented that he worked 40 hours a week as a cook at [REDACTED] from February 1997 to March 2000. The record contains an employment verification letter and translation dated November 8, 2000 from [REDACTED] managing partner of [REDACTED] stating that the beneficiary worked as a cook from February 1997 to March 2000. The letter also states that [REDACTED]. As noted in the director's decision, the [REDACTED] record for [REDACTED] states that the business was established on December 23, 1997, nine months after the beneficiary claims to have begun working there as a cook. This casts doubt on the beneficiary's claimed experience. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* The petitioner has failed to submit independent objective evidence resolving the inconsistencies in the record. As such, we agree with the director that the petitioner failed to establish that the beneficiary possessed the minimum qualifications as of the priority date.

The record also contains the following:

- An affidavit from the beneficiary dated March 17, 2009, stating that he was employed as a cook by [REDACTED] from February 1997 to March 2000;
- An affidavit from the beneficiary dated May 28, 2010, stating that he worked for [REDACTED] from January 1997 to March 2000;
- A letter from [REDACTED] dated May 25, 2010, stating that he was the landlord for the building in which [REDACTED] was located and that the beneficiary worked for that business from 1997 to 2000; and
- A letter from [REDACTED] stating that the beneficiary worked for the restaurant.

On appeal, counsel for the petitioner stated that the evidence submitted above corroborates the beneficiary's dates of employment with the company (from 1997 to 2000) as well as his occupation (cook).

⁶ Cadastro Nacional da Pessoa Juridica or CNPJ is a unique number given to every business registered with the Brazilian authority; it is similar to Employer Federal Identification Number (FEIN) in the United States. CNPJ database can be accessed online at: http://www.receita.fazenda.gov.br/PessoaJuridica/CNPJ/cnpjreva/Cnpjreva_Solicitacao.asp.

The original employment letter from [REDACTED] does not include a sufficient description of the experience or training of the beneficiary, in accordance with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B). The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) provides:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

Simply stating that the beneficiary worked as a cook is not a sufficient description of the beneficiary's training or experience. Additionally, the letters from [REDACTED] are not from the beneficiary's prior employer or trainer and are therefore insufficient to demonstrate that the beneficiary has the required work experience. See 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A). Nor did either of the declarants indicate that the beneficiary worked as a cook.

8 C.F.R. § 103.2(b)(2)(i) states that the petitioner must demonstrate the non-existence or unavailability of both the required document, and relevant secondary evidence, before submitting at least two affidavits, sworn to or affirmed by persons who are not parties to the petition and who have direct personal knowledge of that which must be proved. The petitioner has not demonstrated that secondary evidence, such as pay roll records, pay statements, or financial records, are unavailable. Therefore, as the petitioner has not established that initial evidence, or secondary evidence, is unavailable, the statements described above cannot be accepted in lieu of the regulatory required evidence.

Furthermore, the beneficiary's affidavits are self-serving and do not provide independent, objective evidence of his prior work experience. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). 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)).

In summary, the director's finding that there was fraud or willful misrepresentation involving the labor certification will be withdrawn. Similarly, the director's decision to invalidate the labor certification will be withdrawn. Nevertheless, the AAO finds that the director had good and sufficient cause to revoke the approval of the petition. The petitioner has failed to establish by a preponderance of the evidence that the beneficiary had the requisite work experience in the job offered prior to the priority date and that the petitioner has the continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 205 of the Act, 8 U.S.C. § 1155, states, "The Secretary 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. Such revocation shall be effective as of the date of

approval of any such petition.” 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).

Where the petitioner of an approved visa petition is not eligible for the classification sought, the director may seek to revoke the approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for good and sufficient cause. Notwithstanding the USCIS burden to show good and sufficient cause in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The revocation of the previously approved petition is affirmed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 to revoke the previously approved petition is affirmed.

FURTHER ORDER: The director’s finding of fraud involving the labor certification is withdrawn

FURTHER ORDER: The director’s decision to invalidate the alien employment certification, Form ETA 750, ETA case number [REDACTED] is withdrawn.