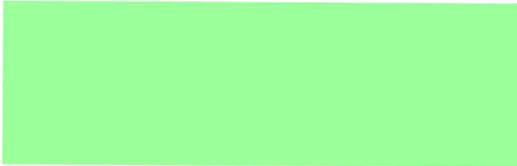




U.S. Citizenship
and Immigration
Services

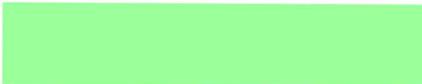
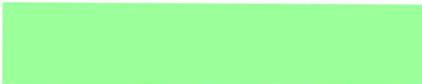
(b)(6)



DATE: **AUG 26 2014**

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)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (the director) revoked the approval of the employment-based immigrant visa petition and the petitioner appealed the director's decision to the Administrative Appeals Office (AAO). We dismissed the appeal and the matter is again before us as a Motion to Reopen and a Motion to Reconsider. The Motion to Reopen will be granted. Our prior decision will be affirmed in part and withdrawn in part. The petition's approval will remain revoked.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL). The priority date of the petition is April 6, 2001, which is the date the labor certification was accepted for processing by DOL. *See* 8 C.F.R. § 204.5(d).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted on motion.¹ An application or petition that fails to comply with the technical requirements of the law may be denied even if the director 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 D.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ, supra*.

On the Form I-290B, counsel² asserts that United States Citizenship and Immigration Services (USCIS) has "repeatedly moved the goalposts" in this matter, by requiring new and different documentation from the petitioner. He specifically contends that the petitioner's ability to pay the proffered wage was first raised in our dismissal of the appeal and that the petitioner was not provided with notice or an opportunity to respond to this issue. Counsel also indicates that the beneficiary, on motion, is presenting previously unavailable evidence of his employment experience that establishes his eligibility for the offered position.

Procedural History

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on November 13, 2001 and USCIS approved the petition on April 29, 2002. However, on March 9, 2009, the director issued a Notice of Intent to Revoke (NOIR) the petition's approval. The NOIR informed the petitioner that the case might involve fraud based on a DOL investigation of labor certifications filed by its former counsel, [REDACTED], and requested evidence of its compliance with DOL recruiting requirements,

¹ The submission of additional evidence on motion is allowed by the instructions to the Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1).

² Current counsel will be referred to as counsel throughout this decision. The petitioner's prior counsel, [REDACTED], will be referred to by name.

as well as the beneficiary's qualifications for the offered position.³ The director also asked the petitioner to submit a letter reaffirming its intent to employ the beneficiary as a cook.

On April 7, 2009, [REDACTED] responded to the NOIR for the petitioner, submitting a statement from an individual residing in the United States who identified himself as a former manager of the [REDACTED] Brazil, the restaurant where the beneficiary claims to have obtained his qualifying experience; a copy of [REDACTED] Brazilian business registration; and copies of the petitioner's advertisement for a cook in the March 25, 2001 [REDACTED] and a February 14, 2001 letter from the Classified Manager of the [REDACTED] regarding the placement of job announcements on the [REDACTED] on-line employment website.⁴

Following his review of the submitted evidence, the director revoked the approval of the petition on May 8, 2009, finding that the record did not establish the beneficiary's qualifications for the offered position or the petitioner's compliance with DOL recruitment procedures. The director also concluded that as the petitioner had failed to overcome the doubts created by its former counsel's involvement in the filing of the instant labor certification, it was reasonable to conclude that the labor certification filed by the petitioner had involved willful misrepresentation. On May 26, 2009, the petitioner appealed the director's decision to our office.

On December 5, 2012, we withdrew the director's decision in part as we did not find the record to contain sufficient evidence to determine that the petitioner had not complied with DOL recruitment requirements and had engaged in fraud or willful misrepresentation during the labor certification process. We affirmed the director's other grounds for revoking the petitioner's approval and dismissed the appeal as the evidence of record did not demonstrate either that the beneficiary had the two years of experience required by the labor certification or that the petitioner had the ability to pay the proffered wage.

On January 7, 2013, the petitioner filed the instant Motion to Reopen and Motion to Reconsider. On December 5, 2013, we issued a Request for Evidence and Notice of Derogatory Information (RFE/NDI) seeking evidence of the beneficiary's employment in Brazil and the petitioner's ability to pay the proffered wage. On January 6, 2014, the petitioner responded to the RFE/NDI. On May 23, 2014, we issued a Notice of Intent to Dismiss and Request for Evidence (NOID/RFE) to obtain further information regarding the beneficiary's qualifications and the petitioner's ability to pay. Having

³ Our December 5, 2012 decision dismissing the appeal found the NOIR to have been issued for "good and sufficient cause" pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). That discussion is incorporated herein by reference.

⁴ We note that the February 14, 2001 letter, which predates the petitioner's advertisement in the [REDACTED] is generic in nature, outlining the [REDACTED] practice with respect to all advertisements placed by Mr. [REDACTED]. It fails to reference the petitioner or the beneficiary, or the petitioner's advertisement and, therefore, does not constitute confirmation of the petitioner's online advertisements for the offered position.

received the petitioner's response to the NOID/RFE, we will now consider the Motion to Reopen and Motion to Reconsider.

Requirements for Motions to Reopen and Reconsider

The requirements for Motions to Reopen and Reconsider are found at 8 C.F.R. § 103.5(a):

(2) *Requirements for motion to reopen.* A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence

(3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Although we do not find the petitioner to have met the requirements for a Motion to Reconsider, the petitioner has stated new facts and submitted new evidence relating to the beneficiary's qualifying experience and its ability to pay the proffered wage. Accordingly, we will grant the Motion to Reopen and consider the record in light of this new information.

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.

A petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any subsequently filed immigrant visa petition, a petitioner must establish that the job offer is realistic as of the priority date and that the offer remains realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. A 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).

As discussed in our December 5, 2012 decision, the record on appeal did not establish the petitioner's ability to pay the proffered wage. However, on motion, the petitioner has submitted federal tax transcripts and Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, for the beneficiary that, by a preponderance of evidence, demonstrate its continuing ability to pay the beneficiary the proffered wage, beginning on the date of the petition's approval, April 29, 2002. Accordingly, we will withdraw our prior finding that the record does not establish the petitioner's ability to pay. However, the petition remains unapprovable as the petitioner has failed to establish the beneficiary's qualifications for the position offered.

Beneficiary Qualifications

The petitioner is seeking classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i). Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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.

To establish that a beneficiary is qualified to perform the duties of an offered position, a petitioner must demonstrate that the beneficiary has met all of the requirements set forth in the labor certification by the priority date of the petition, which is April 6, 2001. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

Part A.14. of the instant labor certification requires the beneficiary to have two years of experience as a cook. In Part B.15. of the labor certification, the beneficiary claims to have worked 40 hours a week as a cook for [REDACTED] Brazil from January 1995 until December 1998.

In our dismissal of the appeal on December 5, 2012, we found that the petitioner had failed to establish the beneficiary's qualifications for the offered position as it had submitted insufficient evidence to satisfy the employment verification requirements of the regulations at 8 C.F.R. §§ 204.5(g)(1), (1)(3)(ii)(A).

The regulation at 8 C.F.R. § 204.5 states:

(g) *Initial evidence* –

(1) *General*. [E]vidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation –*

(A) *General.* 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.

While the February 16, 2001 employment verification letter submitted with the visa petition stated that the beneficiary had been employed as a cook by [REDACTED] from January 1995 until December 1998 and was signed, it did not provide the name, title and address of its author, and it failed to list the specific duties performed by the beneficiary. An April 2, 2009 statement, written in English, from [REDACTED] submitted in response to the March 9, 2009 NOIR also failed to comply with regulatory requirements. Although Mr. [REDACTED] claimed to have been a manager for [REDACTED] and to have worked with the beneficiary, his statement did not provide a specific description of the beneficiary's duties or list the dates of the beneficiary's employment with [REDACTED]. We, therefore, determined that the evidence of record did not establish that the beneficiary had met the minimum requirements set forth in the labor certification.⁵

On motion, counsel contends that in finding the February 16, 2001 statement insufficient to establish the beneficiary's work experience, we imposed new evidentiary requirements on the petitioner as the director had indicated in the March 9, 2009 NOIR that the letter was adequate, once supplemented with proof of the restaurant's Brazilian business registration. Counsel's claim is not persuasive.

The NOIR does not indicate that the director found the February 16, 2001 statement to be sufficient to establish the beneficiary's [REDACTED] employment if supplemented with proof of [REDACTED] business registration. Although the director requested proof of [REDACTED]'s existence, he did not state that this proof, if provided, would also demonstrate the beneficiary's qualifications for the offered position. Moreover, even if the director had found the February 16, 2001 statement supplemented by documentary evidence of [REDACTED] Brazilian business registration to establish the beneficiary's qualifications for the offered position, our appellate review, as noted above, is conducted on a *de novo* basis and an application or petition that fails to comply with the technical requirements of the law may be denied even if these grounds are not identified in the initial decision. *See Soltane v. DOJ*, at 145; *see also Spencer Enterprises, Inc. v. United States*, at 1043. Therefore, as it lacks a description of the specific job duties performed by the beneficiary for [REDACTED] and does not comply with the other technical

⁵ Although not addressed in our December 5, 2012 decision, the statements of February 16, 2001 and of April 2, 2009 are also not supported by any evidence that establishes the authors' affiliation with [REDACTED]. Further, the individual who signed the February 16, 2001 statement and Mr. [REDACTED] do not identify themselves as the beneficiary's employer or trainer, as required by regulation. We further observe that the 2009 statement from Mr. [REDACTED] is not a sworn statement or an affidavit, and that Mr. [REDACTED] is residing in the United States. Finally, neither statement indicates that the beneficiary was employed on a full-time basis by [REDACTED].

requirements set forth at 8 C.F.R. §§ 204.5(g)(1) and (l)(3)(ii)(A), the February 16, 2001 verification letter is insufficient proof that the beneficiary has the experience required by the labor certification.

In filing the motion on January 7, 2013 and in response to the notices we issued on December 5, 2013 and May 23, 2014, the petitioner has submitted additional evidence in support of the employment claimed by the beneficiary. This additional evidence includes:

- A July 13, 2014 sworn statement from Mr. [REDACTED] written in Portuguese and translated into English, in which he asserts that he worked with the beneficiary in the “mid-nineties,” when he was the manager of [REDACTED], Brazil;
- Two [REDACTED] earnings statements for the beneficiary, issued in June 1996 and April 1997;
- A copy of a June 3, 1996 “Employment Contract for Training Period,” which indicates that it is valid for 45 days, may be automatically extended if the employee remains in the job for that period and becomes permanent after the end of the extension period;
- A copy of an “Option Affidavit,” dated June 3, 1996, which indicates that the beneficiary joined the Employer’s Dismissal Fund Program;
- A copy of a “Request for Transportation Stipend,” signed by the beneficiary on June 3, 1996, in connection with his [REDACTED] employment;
- Three affidavits from the beneficiary, dated December 20, 2012, December 26, 2012, and July 21, 2014, in which he states that he was employed by [REDACTED] as a cook from January 1995 until December 31, 1998;
- Two Cadastro Nacional de Pessoa Juridica (CNPJ)⁶ registrations for [REDACTED] that reflect the restaurant was operating at two locations in Brazil during the 1990s, in the town of [REDACTED] as of March 3, 1994 and in the town of [REDACTED] as of May 2, 1996;

⁶ The CNPJ is administered by the Brazilian Receita Federal. The CNPJ serves as a company’s identity card. It is only with a CNPJ that a company can hire employees, open bank accounts, buy and sell goods, etc. 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 work dates with a Brazilian-based company to that company’s registered creation date.

- Affidavits sworn by the beneficiary's mother, brother, aunt and a former coworker regarding his employment at [REDACTED] during the mid-1990s; and
- A copy of the beneficiary's Carteira de Trabalho e Previdencia Social (CTPS), his Brazilian work card, which reflects his employment with [REDACTED] in 1996 and 1997.

Counsel contends that the above evidence now establishes that the beneficiary had the two years of experience required by the labor certification as of the visa petition's priority date. For the reasons discussed below, we do not agree.

Employment Verification Letter

In the July 13, 2014 sworn statement submitted on motion, Mr. [REDACTED] asserts that he worked with the beneficiary while a manager at [REDACTED] during the mid-1990s, but that too many years have passed for him to remember the exact dates and details of the beneficiary's employment. He states that the beneficiary first worked for [REDACTED] in the town of [REDACTED] as a "cook in training for some time" and that when a second [REDACTED] was opened in the town of [REDACTED] the beneficiary moved there to work as a cook. Mr. [REDACTED] also describes the beneficiary's duties as including the creation of menus, daily specials and desserts, as well as the organization of buffets for which he created dishes and desserts requested by [REDACTED] clients.

However, Mr. [REDACTED]'s statement, like his 2009 letter, fails to indicate the specific dates of the beneficiary's [REDACTED] employment or that the beneficiary was employed on a full-time basis. Neither is his declaration accompanied by evidence that establishes him as a manager at [REDACTED] in the mid-1990s. Further, as previously indicated, Mr. [REDACTED]'s statement is not a statement from an employer or trainer, as required by 8 C.F.R. §§ 204.5(g)(1), (l)(3)(ii)(A), and the record does not demonstrate that such a statement cannot be made available. Although the beneficiary, as discussed below, asserts that [REDACTED] is no longer in business, CNPJ records indicate that it remains active, both in the town of [REDACTED] and the town of [REDACTED] and no evidence establishes that [REDACTED]'s owners are unwilling or unable to provide a letter regarding their employment of the beneficiary. Therefore, Mr. [REDACTED]'s 2014 statement, like those previously provided by the petitioner, does not satisfy the technical requirements at 8 C.F.R. §§ 204.5(g)(1), (l)(3)(ii)(A).

Additionally, Mr. [REDACTED]'s claim that the beneficiary moved to [REDACTED] in the town of [REDACTED] to work as a cook is contradicted by the employment contract in the beneficiary's CTPS, which, as discussed below, indicates that he was hired as a busboy by [REDACTED] in the town of Ipatinga on June 3, 1996. Doubt cast on any aspect of a petitioner's proof may 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, 591-92 (BIA 1988). Further, Mr. [REDACTED]'s July 13, 2014 statement, which indicates that the beneficiary was initially employed by [REDACTED] in [REDACTED] is inconsistent with the previously discussed February 16, 2001 experience letter submitted with the visa petition, which states that the beneficiary was continuously employed as a cook by [REDACTED] in the

town of Ipatinga from January 1995 until December 1998. This inconsistency raises doubts regarding the reliability of both statements. *Id.*

We also note that Mr. [REDACTED] 2009 and 2014 statements offer differing accounts of the beneficiary's employment history with [REDACTED]. While his assertion that he worked with the beneficiary at [REDACTED] in the town of [REDACTED] in his 2009 statement is not inconsistent with his account of the beneficiary's employment in his most recent statement, the fact that he failed to indicate the beneficiary's prior employment with [REDACTED] in the town of [REDACTED] in his 2009 letter nevertheless raises questions regarding the overall reliability of his testimony, a concern that is supported by Mr. [REDACTED] own admission that he is unable to remember the details of the beneficiary's [REDACTED] employment. Further, we note that his first letter was written in English, while his second letter is written in Portuguese and accompanied by an English-language translation, casting doubt on the credibility of both letters. *Matter of Ho*, at 591-92.

For all these reasons, Mr. [REDACTED] 2014 statement does not demonstrate that the beneficiary has the employment experience required by the labor certification.

Documentary Evidence

The documentary evidence submitted by the petitioner also fails to establish the nearly four years of employment as a cook claimed by the beneficiary on the labor certification.

In response to the March 9, 2009 NOIR, the petitioner submitted a single CNPJ record for [REDACTED] which indicated that it had begun business operations in [REDACTED] Brazil on February 5, 1996. Based on this evidence, we questioned the beneficiary's claim to have begun his employment with [REDACTED] in January 1995. On motion, the petitioner submits a July 21, 2014 statement from the beneficiary in which he asserts that his employment with [REDACTED] began in [REDACTED] in 1995 and that he worked for [REDACTED] in [REDACTED] until the restaurant opened an affiliate in the town of [REDACTED]. The beneficiary states that he has no documentation to submit in support of this claim, but is, instead, submitting affidavits from family members and a former coworker to prove that he worked for [REDACTED] in [REDACTED]. In support of the beneficiary's claim to have begun working for [REDACTED] in 1995, the petitioner provides two CNPJ registrations for [REDACTED] which establish that it began operations in the town of Governador [REDACTED] on March 7, 1994, and opened a second restaurant in the town of [REDACTED] on February 5, 1996.⁷

While the CNPJ registration for [REDACTED] in [REDACTED] indicates that the beneficiary's employment with [REDACTED] could have begun in January 1995, it does not establish that this is the case. Accordingly, it does not resolve the inconsistency between the beneficiary's claim on the labor

⁷ The registration for [REDACTED] in [REDACTED] indicates that it is the "matriz" business entity or headquarters; that for [REDACTED] in [REDACTED] lists it as "filial," a subsidiary. The CNPJ record provided by the petitioner in response to the March 9, 2009 NOIR also listed [REDACTED] as a subsidiary.

certification to have begun working for [REDACTED] in the town of [REDACTED] in 1995 and the February 5, 1996 date on which [REDACTED] opened for business in [REDACTED]. Inconsistencies must be resolved by the submission of “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.” *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, even if we were to find the beneficiary’s statement, when considered with the CNPJ registration, to establish his employment with [REDACTED] in [REDACTED] it would only serve to contradict the employment experience he claimed on the labor certification, which he signed on March 22, 2001, as being true and correct under penalty of perjury.

The independent, objective evidence of the beneficiary’s employment in the record – the two [REDACTED] earnings statements from 1996 and 1997; the June 3, 1996 “Employment Contract for Training Period;” the June 3, 1996 “Option Affidavit;” the “Request for Transportation Stipend,” signed by the beneficiary on June 3, 1996; and the copy of the beneficiary’s CTPS – establishes only that he worked for [REDACTED] in the town of [REDACTED] from June 3, 1996 to May 23, 1997.⁸ Further, the employment contract in the beneficiary’s CTPS does not support his claim in the labor certification to have been employed by [REDACTED] as a cook. Page 12 of the beneficiary’s workbook reflects that he was hired on June 3, 1996 by [REDACTED] as a “copeiro,” which is translated in the record as “busboy,” and no evidence in the record demonstrates that he was promoted to any other position at [REDACTED] during the period of his employment. Such evidence casts doubt not only the beneficiary’s claims in the labor certification, but also the claims made regarding the beneficiary’s employment as a cook in the experience letters submitted by the petitioner, including those made by Mr. [REDACTED] in his 2014 statement, where he asserts that the beneficiary transferred to [REDACTED] in the town of [REDACTED] as a cook, having been trained as a cook while employed by [REDACTED] in the town of [REDACTED]. Doubt cast on any aspect of a petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, at 591-92.

The documentary evidence submitted by the petitioner proves only that the beneficiary worked as a busboy for [REDACTED] in the town of [REDACTED] from June 3, 1996 to May 23, 1997. Accordingly, it also fails to establish that, as of the visa petition’s priority date, the beneficiary had the two years of experience as a cook required by the labor certification. Therefore, the documentary evidence submitted by the petitioner does not overcome this basis for the director’s May 8, 2009 revocation of the visa petition’s approval.

Secondary Evidence

The regulation at 8 C.F.R. § 103.2(b) states the following:

⁸ The July 3, 1996 hiring date reflected in the English-language translation of page 12 of the work card is incorrect. The date listed on page 12 of the Portuguese-language document is “03 de Junho” or June 3.

(2) *Submitting secondary evidence and affidavits – (i) General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

As previously discussed, the beneficiary, in a July 21, 2014 statement submitted in response to the May 23, 2014 NOID/RFE, acknowledges that he has no records or other documentary evidence to establish that he was employed by [REDACTED] from January 1995 until December 1998. He states that he began working for [REDACTED] in [REDACTED] shortly after it opened in September 1994,⁹ but that he was informally employed by [REDACTED] and, therefore, not listed on the restaurant's payroll. He also states that he asked [REDACTED] to sign his CTPS only when he transferred to the [REDACTED] affiliate in the town of [REDACTED] and that this is the reason that it does not reflect his employment in the town of [REDACTED]. The beneficiary further asserts that the reason his workbook does not reflect that he worked for [REDACTED] until December 1998 is because [REDACTED] ceased signing it after a 1997 break in his employment. In his earlier statements, dated December 20 and 26, 2012, the beneficiary also contends that he is unable to obtain his [REDACTED] employment records as the restaurant is no longer in business, having closed "many years ago." In the absence of documentary evidence, the beneficiary states that he has obtained affidavits from his mother, brother, aunt and a former coworker to establish his employment with [REDACTED].

We note the beneficiary's claims regarding the unavailability of documentation to establish his employment with [REDACTED] between January 1995 and December 1998, and the necessity of submitting affidavits to establish his experience. However, going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Therefore, in our May 23, 2014 NOID/RFE, we informed the petitioner that if it was unable to obtain objective, independent evidence of the beneficiary's [REDACTED] employment from January 1995 until December 1998, it must provide proof that it had attempted to obtain the requested information and submit reliable secondary evidence of the beneficiary's employment, as defined by the regulation at 8 C.F.R. 103.2(b)(2). The record, however, offers no evidence that the petitioner attempted to obtain documentary evidence of the beneficiary's employment by [REDACTED] although CNPJ records indicate that [REDACTED] is still active. We also note that while Mr. [REDACTED]'s July 13, 2014 statement reflects that he is the brother of [REDACTED]'s owners, the record does not reflect

⁹ As previously noted, the CNPJ record for [REDACTED] in [REDACTED] reflects that it opened for business on March 7, 1994.

that the petitioner sought his assistance in obtaining documentary evidence of the beneficiary's qualifying employment from his siblings. Further, no statement from Mr. [REDACTED] reports that his family's restaurants have been closed. The record also contains no secondary evidence of the beneficiary's employment with [REDACTED] nor any proof that the petitioner unsuccessfully sought such evidence.

Therefore, the petitioner has not satisfied the evidentiary requirements of 8 C.F.R. § 103.2(b)(2) as it has failed to demonstrate either that the documentary evidence requested by the May 23, 2014 NOID/RFE does not exist or cannot be obtained or that relevant secondary evidence of the beneficiary's employment with [REDACTED] does not exist or cannot be obtained. In the absence of such evidence, the affidavits from the beneficiary's family members and former colleague may not be relied upon to meet the evidentiary requirements at 8 C.F.R. § 103.2(b)(2)(i).

However, even if the petitioner had established that documentary evidence of the beneficiary's employment experience with [REDACTED] could not be provided, the affidavits submitted on motion would not establish the beneficiary's employment with the [REDACTED]

The record contains affidavits from the beneficiary's mother, brother and aunt, as well as an affidavit from a former coworker. In a June 17, 2014 statement, the beneficiary's mother declares that the beneficiary worked as a cook at [REDACTED] in the mid-1990s and that she went to the restaurant on various occasions during the time he worked there. The affidavit sworn by the beneficiary's brother, also dated June 17, 2014, states that the beneficiary worked as a cook at [REDACTED] in [REDACTED] during the mid-1990s and that the beneficiary's family frequented [REDACTED] on a weekly basis. The beneficiary's aunt, in another June 17, 2014 affidavit, states that the beneficiary worked as a cook at [REDACTED] during the mid-1990s and that while the beneficiary was there, she and her husband went frequently to [REDACTED]

The affidavits provided by beneficiary's family members do not, however, establish that the beneficiary's employment with [REDACTED] satisfies the requirements of the labor certification. None of the affidavits identify the specific time period during which the beneficiary worked for [REDACTED] stating only that he was employed during the mid-1990s. Further, although the beneficiary in his July 21, 2014 statement asserts that his family members' affidavits attest to his employment with [REDACTED] in the town of [REDACTED] they address only his employment with [REDACTED] in the town of [REDACTED] which did not begin until June 3, 1996. The affidavits' claims that [REDACTED] employed the beneficiary as a cook are also inconsistent with the information provided by the employment contract in the beneficiary's workbook, which as already noted, reflects that he worked for [REDACTED] in [REDACTED] as a busboy during the period June 3, 1996 to March 23, 1997. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, at 591-92. Moreover, the family members' visits to [REDACTED] during the beneficiary's employment, even if they occurred on a frequent basis, do not provide them with the "direct personal knowledge" of the beneficiary's employment required by the regulation at 8 C.F.R. § 103.2(b)(2). Accordingly, the affidavits from the

beneficiary's family members, do not, individually or collectively, establish that the beneficiary has the two years of experience as a cook required by the labor certification.

In the fourth affidavit, a former coworker of the beneficiary, [REDACTED] attests that he worked with the beneficiary at [REDACTED] in the town of Ipatinga in the mid-1990s and that the beneficiary was employed as a cook. The affidavit is supported by a copy of Mr. [REDACTED] which includes an employment contract that reflects that he was employed by [REDACTED] as a "garçon" or waiter from June 3, 1996 until December 30, 1996.¹⁰ As a result, Mr. [REDACTED] is able to attest to no more than seven months of the beneficiary's employment with [REDACTED] in the town of [REDACTED]. Further, his claim that the beneficiary was employed as a cook during the time they worked together is, like those of the beneficiary's family members, inconsistent with the employment information found in the employment contract in the beneficiary's CTPS, which identifies him as a busboy. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* Therefore, Mr. [REDACTED]'s affidavit also offers insufficient proof that the beneficiary was employed by [REDACTED] as a cook between January 1995 and December 1998.

Summary of Evidence

The labor certification in this matter requires the beneficiary to have two years of experience as a cook and, on the labor certification, the beneficiary claims employment as a cook with [REDACTED] in the town of Ipatinga from January 1995 until December 1998. To establish that the beneficiary has the experience required by the labor certification, the petitioner has submitted three letters of experience pursuant to the regulations at 8 C.F.R. §§ 204.5(g)(1), (l)(3)(ii)(A); documentary evidence of the

¹⁰ The English-language translation of Mr. [REDACTED]'s employment contract contains significant errors, reflecting the beneficiary's employment history rather than that of Mr. [REDACTED]. While the translated contract correctly reports Mr. [REDACTED]'s salary of 150 reais, it also states that he was employed as a busboy from June 3, 1996 until May, 23 1997, rather than as a waiter from June 3, 1996 until December 30, 1996. We further observe that the page number indicated on the top of the translation is "12," which is the CTPS page on which the beneficiary's employment contract is found.

Of further concern is the job contract number that appears on the top of page 15 in Mr. [REDACTED]. This number, [REDACTED] is the same job contract number that is reflected on page 12 of the beneficiary's CTPS. The presence of the same job contract number in both workbooks, without explanation, raises doubt regarding the reliability of the information reflected in the beneficiary's CTPS. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, at 591-92. In any future proceedings, the petitioner must explain and document how both the beneficiary and Mr. [REDACTED] were hired by [REDACTED] under the same job contract.

beneficiary's experience, including his CTPS workbook, which includes his employment contract with [REDACTED] and affidavits attesting to the beneficiary's [REDACTED] employment from members of the beneficiary's family and one of his former coworkers. The evidence, however, is not sufficient to overcome the director's finding that the record does not establish that the beneficiary is qualified for the offered position.

None of the experience statements satisfies the technical requirements of the regulations at 8 C.F.R. §§ 204.5(g)(1), (1)(3)(ii)(A). The February 16, 2001 "Reference Letter" submitted with the visa fails to describe the beneficiary's duties or to provide the name, title and address of the author. The April 2, 2009 and July 13, 2014 statements from [REDACTED] do not provide the dates of the beneficiary's employment with [REDACTED] and are not provided by an individual who employed or trained the beneficiary. Further, the February 16, 2001 letter, which indicates that the beneficiary was employed by [REDACTED] in the town of Ipatinga as a cook from January 1995 until December 1998, is contradicted by Mr. [REDACTED]'s July 13, 2014 statement, which indicates that the beneficiary was first employed by [REDACTED] in the town of Governador [REDACTED] as a cook in training, prior to being transferred to the [REDACTED] affiliate in the town of Ipatinga, raising questions about the reliability of both statements. Moreover, Mr. [REDACTED]'s 2009 and 2014 statements offer different employment histories for the beneficiary, creating doubts regarding the reliability of the information he provides. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, at 591-92.

Submitted documentary evidence establishes only that the beneficiary was employed by [REDACTED] in the town of [REDACTED] as a busboy during the period June 3, 1996 to May 23, 1997 and contradicts the beneficiary's claim on the labor certification to have been continuously employed as a cook in [REDACTED] from January 1995 to December 1998. It also casts serious doubt on the assertions made by the authors of the above experience statements, who both assert that the beneficiary was employed only as a cook by [REDACTED] in the town of [REDACTED]. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

The affidavits sworn by the beneficiary's family members and a former coworker also fail to establish that the beneficiary's employment experience with [REDACTED] meets the requirements of the labor certification. The petitioner has submitted the affidavits in the absence of proof that the documentary evidence requested by the May 23, 2014 NOID/RFE does not exist or cannot be obtained, or that relevant secondary evidence of the beneficiary's employment with [REDACTED] does not exist or cannot be obtained. In the absence of such evidence, the affidavits from the beneficiary's family members and former colleague do not satisfy the evidentiary requirements at 8 C.F.R. § 103.2(b)(2)(i).

However, even if we were to accept these affidavits, they would not provide sufficient evidence to demonstrate the beneficiary's employment experience. None of the affidavits identify the specific time period during which the beneficiary was employed by [REDACTED]. Their claims that the beneficiary was employed as a cook by [REDACTED] are also inconsistent with the information provided by the

beneficiary's employment contract with [REDACTED]. Moreover, the record does not establish that the beneficiary's family members have the direct personal knowledge of the beneficiary's employment required by regulation. The evidence submitted with the affidavit sworn by the beneficiary's former coworker also indicates that he and the beneficiary worked together from June 3, 1996 until December 30, 1996 and, therefore, that he can attest to no more than seven months of the beneficiary's employment by [REDACTED] in the town of [REDACTED].

For the reasons just noted, the record does not establish that the beneficiary has the two years of experience as a cook required by the labor certification. On appeal and on motion, the petitioner has not overcome this ground for the director's revocation of the petition's approval. Therefore, we find that the beneficiary was not eligible for classification as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act as of the visa petition's priority date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, at 159; *Matter of Katigbak*, at 49. Accordingly, the visa petition was approved in error on April 29, 2002 and is properly revoked for good and sufficient cause under section 205 of the Act. *See Matter of Ho*, at 582.

In that the visa petition was approved in error and is properly revoked pursuant to section 205 of the Act, we will affirm our December 5, 2012 decision, based on the petitioner's failure to establish that the beneficiary is qualified for the offered position. However, we will withdraw our prior determination that the record does not establish the petitioner's ability to pay the proffered wage as the petitioner has provided sufficient evidence on motion to overcome this finding. The approval of the visa petition will remain revoked.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The Motion to Reopen is granted. Our prior decision is affirmed in part and withdrawn in part. The approval of the petition remains revoked.