



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: DEC 30 2014

OFFICE: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE:

Petitioner:

Beneficiary:

[Redacted]

PETITION: Immigrant Petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(iii)

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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director) revoked the approval of the visa petition and the Administrative Appeals Office (AAO) rejected a subsequent appeal. The matter is again before us as a Motion to Reopen and Reconsider. The motion is granted. We will withdraw the director's revocation of the petition's approval and remand the matter to the director for further action consistent with this decision.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a prep cook pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL).

We conduct 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

The regulation at 8 C.F.R. § 103.3(a)(1) allows for the appeal of an unfavorable United States Citizenship and Immigration Services (USCIS) decision by an "affected party" in the proceeding. Affected party is defined by 8 C.F.R. § 103.3(a)(1)(iii)(B), as follows:

(B) *Meaning of affected party.* For purposes of this section and §§ 103.4 and 103.5 of this part, *affected party* (in addition to the Service) means the person or entity with legal standing in a proceeding. **It does not include the beneficiary of a visa petition [emphasis added].** An affected party may be represented by an attorney or representative

The regulation at 8 C.F.R. § 292.4(a) also provides that:

An appearance shall be filed on the appropriate form by the attorney or representative appearing in each case. . . . A notice of appearance entered in application or petition proceedings must be signed by the applicant or petitioner to authorize representation in order for the appearance to be recognized by the Service [USCIS].

The Form I-290B, Notice of Appeal or Motion, submitted on appeal was signed by counsel, who stated that a Form G-28, Notice of Entry of Appearance as Attorney or Representative, signed by the petitioner's owner could not be provided as the company was no longer in business. Instead, counsel provided a Form G-28, Notice of Appearance as Attorney or Representative, signed by the beneficiary, asserting that under the American Competitiveness in the Twentieth-First Century Act (AC21), the beneficiary had the right to appeal the director's decision. Finding counsel's claim regarding the beneficiary's standing to be unpersuasive, we rejected the appeal on March 29, 2011 as improperly filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(I), which states:

¹ The submission of additional evidence on appeal or 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).

Improperly filed appeal – (A) Appeal filed by person or entity not entitled to file it – (1) Rejection without refund of filing fee. An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

On motion, counsel asserts that while the petitioner did not sign a Form G-28 authorizing the appeal, our finding that no evidence in the record indicated that “the petitioner consented to the filing of the appeal,” is not accurate. In support of her assertion, counsel submits an undated statement from the petitioner’s owner in which he maintains that he had knowledge of the appeal and consented to its filing and that “[f]or each step in this process, [he has] provided documents or authorized the issuance of documents . . . in an effort to respond to the concerns raised by . . . [USCIS].” As further proof of the continuing interest of the petitioner’s owner in the beneficiary’s case, counsel notes that the owner first hired the beneficiary at the petitioning business entity and, thereafter, employed him at another restaurant. Such actions, counsel asserts, “indicate an ongoing interest in pursuit of the instant petition on behalf of the beneficiary.” She further contends that, as our decision was based on the absence of a properly filed Form G-28, a deficiency that has now been corrected, we should proceed with a consideration of the petitioner’s appeal.

We note that the petitioner’s owner’s statement regarding his consent to the filing of the appeal does not satisfy the regulatory requirement at 8 C.F.R. § 292.4(a) for a Form G-28 signed by the petitioner. Further, the submission of a properly executed Form G-28 on motion does not cure the deficiency in the filing of the appeal, as it does not change the fact that the appeal was filed by counsel, without a Form G-28 signed by the petitioner, as required by regulation.

Nevertheless, having reopened this matter, our review of the record, including the additional evidence submitted by the petitioner on motion, does not find it to demonstrate that the approval of the instant visa petition on June 9, 2004 was in error. As such, the issue of the petitioner’s G-28 on appeal, which may be a procedural issue only in this matter, fails to overshadow deficiencies in the record that existed prior to the time of appeal. The record fails to establish that the director issued the Notice of Intent to Revoke (NOIR) in this matter for “good and sufficient cause.” See *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987).

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 he deems to be good and sufficient cause, revoke the approval of any petition approved by him 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). Prior to revoking the approval of a petitioner, USCIS must give notice to the petitioner of the grounds for revocation. 8 C.F.R. § 205.2; cf. 8 C.F.R. § 205.1 (sating that notice is not required if the petition is automatically revoked).

A notice of intent to revoke 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. See *Matter of*

Arias, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987).

Although the NOIR issued by the director on February 12, 2009 notified the petitioner that a DOL investigation of its former counsel, [REDACTED] in similar cases raised suspicions concerning its compliance with DOL recruitment requirements, no evidence in the record provides a basis for the director's finding in this specific matter. Further, while the NOIR indicated that inconsistencies in the employment experience claimed by the beneficiary created doubt regarding his eligibility for the offered position, the job offered by the petitioner in this matter required no employment experience on the part of the beneficiary, rendering such inconsistencies immaterial to the approval of the visa petition.² The inconsistencies were not raised by the director in his revocation of the petition's approval.

As the record does not contain evidence that "if unexplained and un rebutted, would warrant a denial" of the visa petition, the NOIR does not appear to have been issued for good and sufficient cause. *See Matter of Estime*, at 450; *see also Matter of Arias*, at 568. "Where a [NOIR] is based upon an unsupported statement . . . revocation of the visa petition cannot be sustained." *Id.* Therefore, the director's revocation of the visa petition's approval will be withdrawn and the matter remanded to the director for further action, including the issuance of a new decision. Should the new decision be unfavorable to the petitioner, it shall be certified to this office for review.

ORDER: The motion is granted.

FURTHER ORDER: The director's June 1, 2009 revocation of the petition is withdrawn. The matter is remanded for further review by the director and the issuance of a new decision.

² We do not, however, reach any conclusions as to whether such inconsistencies may constitute fraud and/or the willful misrepresentation of a material fact and bar the beneficiary's admission to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). Form I-140 petition proceedings are not the appropriate forum for finding an alien inadmissible to the United States. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959). However, where fraud or willful misrepresentation is found against the beneficiary of a Form I-140 petition, the alien may be found inadmissible at a later date when he or she applies for admission to the United States or applies for adjustment of status. *See* sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a).