



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: JUN 06 2014

OFFICE: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE:

Petitioner:

Beneficiary:

[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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director) revoked the approval of the employment-based immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. In response to a motion to reconsider filed by the petitioner, the AAO affirmed its prior decision. The petitioner has again filed a motion to reconsider. The motion will be granted. The prior decision of the AAO will be withdrawn. The approval of the petition will be reinstated.

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) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). The director revoked the approval of the petition after determining that the record did not establish the beneficiary's qualifications for the offered position and that the petitioner had not established a good faith effort to recruit U.S. workers for the offered position. The director found that the petitioner engaged in fraud and/or willful misrepresentation of a material fact in the labor certification process.

On appeal, the AAO withdrew the director's findings of fraud, but, nevertheless, affirmed the revocation of the petition's approval as the record failed to demonstrate the petitioner's ability to pay the proffered wage to the beneficiary. On March 27, 2013, in response to a subsequent motion, the AAO again affirmed the revocation of the approval of the petition, finding that the petitioner had failed to establish either the beneficiary's qualifications for the offered position or its ability to pay.

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 on appeal.¹ The record shows that the motion is properly filed and timely.²

The issue before the AAO in this proceeding is whether the approval of the visa petition on August 11, 2003 was in error and, therefore, appropriately revoked by the director on June 30, 2009 for good and sufficient cause.³ As noted above, on March 27, 2013, the AAO concluded that the evidence of record established neither the beneficiary's qualifications for the offered position, nor the

¹ The submission of additional evidence on appeal 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 Although the box checked by counsel on the Form I-290B, Notice of Appeal or Motion, indicates that the petitioner is appealing the AAO's March 27, 2013 decision, counsel's brief indicates that the petitioner has filed a motion to reconsider. The AAO finds the petitioner's filing to meet the requirements of a motion to reconsider pursuant to the regulation at 8 C.F.R. 103.5(a).

³ 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 Board of Immigration Appeals (BIA) in *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988) held that the realization that a petition was approved in error may "in and of itself" be good and sufficient cause for revoking the approval of that petition, "provided the . . . revised opinion is supported by the record." *Id.*

petitioner's ability to pay the beneficiary the proffered wage as of the visa petition's June 22, 2001 priority date, the date on which DOL accepted the labor certification in this matter for processing.

Upon review of the entire record, including the additional evidence submitted by the petitioner in support of its most recent motion, the AAO finds the petitioner to have resolved the inconsistencies in the beneficiary's employment history. The AAO also finds that the petitioner has established that, as of the petition's August 11, 2003 approval date, it had the continuing ability to pay the proffered wage. The AAO therefore finds that the visa petition's approval was not revoked for good and sufficient cause, as required by section 205 of the Act. Accordingly, the AAO's prior decisions of May 3, 2011 and March 27, 2013 will be withdrawn and the petition's approval will be reinstated.

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, the petitioner has met that burden.

ORDER: The motion is granted. The approval of the petition is reinstated.