

(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

[Redacted]

DATE: AUG 27 2015

[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 is the non-precedent decision of the Administrative Appeals Office (AAO) for your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Thank you.

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

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the Director, Nebraska Service Center. The director served the petitioner with a notice of intent to revoke the approval of the petition (NOIR) and on November 5, 2014, the director revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director in accordance with the following.

The petitioner is a Chinese restaurant. It seeks to permanently employ the beneficiary in the United States as a cook. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).<sup>1</sup>

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is November 29, 2006. See 8 C.F.R. § 204.5(d).

The director's decision revoking the approval of the petition concludes that the evidence in the record did not establish that the beneficiary possessed the minimum 24 months of experience required to perform the offered position by the priority date.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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 upon appeal.<sup>2</sup>

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 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). In this case, the labor certification requires 24 months of experience in the job offered as a cook.

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

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<sup>1</sup> 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1).

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).

The director’s NOIR was issued on August 15, 2014 and stated the following:

Information available to the Service states that in a recent immigration interview the beneficiary had great difficulty describing cooking techniques that he used and could not elaborate on details of his skills and cooking methods. The beneficiary was also confused on his previous and current employment.

As the beneficiary’s answers in this interview raised an issue of the credibility of his experience, the director issued the petitioner a NOIR and requested that the petitioner provide evidence to establish the beneficiary’s 24 months of experience as required by the labor certification. Doubt cast on any aspect of the petitioner’s evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591-592. It is incumbent upon 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 responded to the NOIR on September 17, 2014 and submitted a notarial certificate from the [REDACTED] Notary Public Office attesting to the beneficiary’s employment as a cook at [REDACTED] China, from November 1988 to November 2003; as a cook at [REDACTED] from December 2003 to April 2008; and as a cook at [REDACTED] since May 2008.

We note that the director did not reference the notarial certificates submitted in response to the NOIR. The petitioner also submitted an affidavit from the beneficiary in response to the NOIR in which he provides the questions and his answers according to his memory of the interview at the [REDACTED] China. The petitioner asserts that the beneficiary sufficiently answered the questions according to what was translated to him. Because the director’s decision does not clearly address the notarial certificates, and whether or not those are sufficient to overcome the identified credibility issues, the matter will be remanded to the director.

In addition, on remand, the director should consider the petitioner’s ability to pay the beneficiary’s proffered wage of \$10.86 per hour (\$22,588.80 per year). The record does not demonstrate whether the petitioner has the ability to pay the proffered wage as of November 29, 2006, the priority date, and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). We also note that the petitioner filed a Form I-140 petition for another beneficiary with a priority date of July 9, 2008. The petitioner must also establish that it has had the ability to pay the proffered wage of its other sponsored workers from the priority date of the instant petition. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg’l Comm’r 1977).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary and its other sponsored workers the full proffered wage each year from the priority date. If the petitioner has not paid the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>3</sup> If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage to the beneficiary and its other sponsored workers, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." The record contains the petitioner's federal tax return for 2005 which precedes the November 29, 2006 priority date.<sup>4</sup> Therefore, the matter will be remanded to the director to provide the petitioner an opportunity to establish its ability to pay the proffered wages of the beneficiary and its other sponsored workers.

In view of the foregoing, the petition will be remanded to the director for further consideration of the notarial certificates submitted. In addition, the petition is remanded to the director for consideration of whether the petitioner has the ability to pay the proffered wage. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

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). The petitioner has not met that burden.

**ORDER:** The director's decision of November 5, 2014 is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision.

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<sup>3</sup> See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

<sup>4</sup> We also note that the petitioner's tax return for 2005 does not state any salaries or wages paid and fairly low amounts of costs of labor, but the Form I-140 and the ETA Form 9089 state that the petitioner has nine employees.