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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

DATE: **MAY 22 2015**

PETITION RECEIPT #: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: IMMIGRANT PETITION FOR ALIEN WORKER AS A SKILLED WORKER OR PROFESSIONAL UNDER SECTION 203(b)(3)(A) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. § 1153(b)(3)(A)

ON BEHALF OF PETITIONER:

[REDACTED]

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,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center (Director), approved the immigrant visa petition on February 28, 2009. However, on December 30, 2014, he revoked its approval. The matter is now before the Administrative Appeals Office on the petitioner's appeal from the revocation. The revocation will be withdrawn, and the petition will be remanded for further proceedings consistent with this decision.

The petitioner provides janitorial services and seeks to permanently employ the beneficiary in the United States as a janitorial supervisor. The petition requests classification of the beneficiary as a skilled worker or professional under section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A). An ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), accompanies the petition.

U.S. Citizenship and Immigration Services (USCIS) may revoke a petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. A director's realization that a petition was erroneously approved may constitute good and sufficient cause for revocation if supported by the record. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Based on a memorandum from an official at the U.S. Consulate in [REDACTED] Ecuador, the Director concluded that he erroneously approved the petition. He found that the record did not establish the beneficiary's qualifying experience for the offered position. The Director also found that the beneficiary willfully misrepresented her employment experience.<sup>1</sup>

On appeal, the petitioner asserts that the Director lacked good and sufficient cause to revoke the petition's approval and substantiation to conclude that the beneficiary willfully misrepresented a material fact.

The record indicates that the appeal is properly filed and alleges errors in fact and law. See 8 C.F.R. § 103.3(a)(1)(v). The record documents the case's procedural history, which is incorporated into the decision. We will elaborate on the procedural history only as necessary.

We exercise *de novo* review on appeal. See, e.g., *Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence, including new evidence properly submitted upon appeal.<sup>2</sup>

<sup>1</sup> The Director did not invalidate the accompanying labor certification. See 20 C.F.R. § 656.30(d) (authorizing USCIS to invalidate a labor certification after its issuance upon a finding that it involved fraud or a willful misrepresentation of a material fact).

<sup>2</sup> The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow the submission of additional evidence on appeal. The instant record provides no reason to preclude consideration of any documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

### **The Notice of Intent to Revoke**

Before revoking a petition's approval based on a beneficiary's lack of qualifying experience, USCIS must notify the petitioner of the revocation ground and afford it an opportunity to respond. 8 C.F.R. § 205.2(a)(2). USCIS properly issues a notice of intent to revoke if the record at the time of the notice's issuance, if unexplained or un rebutted, would warrant the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987).

We cannot sustain a revocation "where a notice of intention to revoke is based upon an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence." *Estime*, 19 I&N Dec. at 452. Conclusory, speculative, equivocal, or irrelevant observations by a consular officer do not provide good and sufficient cause to issue a notice of intent to revoke. *Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988).

In the instant case, the labor certification states that the offered position of janitorial supervisor requires 24 months of experience in the job offered. The beneficiary attested that she worked full-time as a cleaning supervisor for [REDACTED] in Ecuador from February 5, 2001 to October 31, 2003. The record contains copies of employment certificates and verifications from the beneficiary's purported former employer supporting the beneficiary's claim.<sup>3</sup> See 8 C.F.R. § 204.5(l)(3)(ii) (requiring a petitioner to support a beneficiary's claimed qualifying experience with a letter from an employer giving the name, address, and title of the employer and a description of the experience).

As in *Arias*, the Director based his Notice of Intent to Revoke (NOIR), dated November 4, 2014, on a memo by a consular officer who did not personally participate in the consulate's investigation. *Arias*, 19 I&N Dec. at 570 (stating that "[t]he observations are those of the consular officer, not the words of the person who conducted the actual investigation"). The NOIR, repeating the January 10, 2014 consular memo, states that, at the beneficiary's visa interview on September 12, 2012, she exhibited a "complete lack of knowledge" about the offered position. The beneficiary reportedly stated that she received the job offer in 2003, met the petitioner's president, spoke with him on the phone, and received a letter from him confirming the job offer less than a week before the interview. However, the NOIR and the consular memo assert that "the beneficiary could not provide basic information regarding her job offer in the United States."

The record contains a copy of a "Fraud Assessment Detail" by the consular officer who interviewed the beneficiary. A "case memo" portion of the document, dated the same day as the visa interview, indicates that the beneficiary did not know for which client she would work, the identity of her manager in the United States, or how many other janitorial supervisors the petitioner employed. However, the memo states: "Asked about her duties for work[,] she is very precise and can tell me what exactly she will do for her work. Knows exactly the hourly wage of her work." The case

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<sup>3</sup> A September 5, 2012 certification from the beneficiary's purported former employer is signed. Although an August 15, 2006 verification contains the purported employer's stamp, the document is unsigned.

memo also indicates that the beneficiary knew that the petitioner had service contracts with U.S. government entities.

Thus, the record does not support the statements in the NOIR and consular memo that the beneficiary had a “complete lack of knowledge” about the offered position and could not provide basic information about the job. Pursuant to *Estime* and *Arias*, we cannot sustain the petition’s revocation based on these factual allegations in the NOIR and consular memo, as they are contradicted by other evidence of record created immediately after the beneficiary’s interview.

The NOIR and consular memo also state that the beneficiary’s former employer told consular officials that the beneficiary worked for only one year as a cleaning supervisor on a part-time basis. The employer also reportedly stated that she owned the business for only one year and could not provide details of the beneficiary’s duties.

However, the record lacks evidence to support these statements. The record does not contain a report from a consular official who spoke to the employer. The record does not contain documentary evidence to corroborate the employer’s purported statements. Neither the NOIR nor the consular memo states when or how consular officials contacted the employer. Because of the previously discussed discrepancies between the consular memo and the case memo by the interviewing officer, the record does not establish that the consular memo accurately represents the purported statements of the beneficiary’s former employer. See *Anim v. Mukasey*, 535 F.3d 243, 256-58 (4th Cir. 2008) (concluding in an asylum case that a U.S. State Department letter contained insufficient indicia of reliability where the author did not participate in the underlying investigation, describe its conduct, or identify the investigator or the investigator’s qualifications). The case memo also indicates that the beneficiary told the interviewing officer that she worked days and attended classes beginning at 5 P.M., suggesting that she worked full-time while studying. Therefore, we cannot sustain the petition’s revocation based on the unsupported statements that the beneficiary worked only one year on a part-time basis.

In addition, the NOIR paraphrases the consular memo by stating that evidence from the visa interview and the later consular investigation indicated “that the beneficiary has no janitorial experience and that she is actually a school teacher.” As the petitioner argues, the statement that the beneficiary “has no janitorial experience” conflicts with the assertions in the NOIR and consular memo that the beneficiary has one year of part-time janitorial experience. The petitioner argues that the beneficiary’s experience as a teacher is irrelevant if she otherwise possesses the qualifying experience for the offered position. The Director and consular officials apparently found the beneficiary’s teaching experience an indication of an unlikelihood that she would work in the offered position. However, that indication alone, even if unrebutted or unexplained, would not warrant revocation of the petition’s approval.

The NOIR also “concluded that the beneficiary used a fabricated work experience letter in order to qualify for the position” and “willfully misrepresented a material fact in order to procure a visa and/or admission into the United States.” However, these are conclusory statements. A notice of intent to revoke should state facts and evidence underlying the proposed revocation. *Estime*, at 451-

52. A director should not draw any conclusions until considering a petitioner's submissions in response to the NOIR. *Id.* at 452.<sup>4</sup>

For the foregoing reasons, the record at the time of the NOIR's issuance would not have warranted the petition's denial. The revocation decision will therefore be withdrawn.

### **The Petitioner's Ability to Pay the Proffered Wage**

Although we will not affirm the Director's revocation decision, the record at the time of the NOIR's issuance indicates another potential revocation ground. The record would not have established the petitioner's continuing ability to pay the proffered wage.<sup>5</sup>

A petitioner must demonstrate its ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In determining a petitioner's ability to pay, we first examine whether the petitioner paid a beneficiary the full proffered wage each year from the priority date. If a petitioner did not annually pay a beneficiary the full proffered wage, we next examine whether the petitioner generated sufficient annual net income or net current asset amounts to pay the difference between the wage paid, if any, and the proffered wage.<sup>6</sup> If a petitioner's net income or net current assets is insufficient to demonstrate its ability to pay, we may also consider the overall magnitude of its business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In the instant case, the petition's priority date is September 19, 2006, the date the DOL received the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d). The labor certification states the proffered wage for the offered position as \$13.05 per hour (or \$27,102.90 per year for a 40-hour work week).<sup>7</sup>

<sup>4</sup> The Director also based the revocation in part on evidence of which the petitioner was not advised. *See Arias*, 19 I&N Dec. at 570 (stating that a revocation can only be grounded upon the factual allegations stated in a notice of intent to revoke). The revocation decision states that "[i]nformation provided by the employer to the consulate initially stated the beneficiary was employed on a part-time basis." Neither the NOIR nor the decision identifies the referenced information provided by the employer to the consulate. The decision also states that USCIS investigated the petitioner "and found a history of fabricated work experience letters," an allegation that was not included in the NOIR.

<sup>5</sup> We may consider additional revocation grounds not identified by the Director. *See* 5 U.S.C. § 557(b) (stating that a federal agency possesses all the powers on review that it had in making an initial decision, except as it may limit the issues on notice or by rule).

<sup>6</sup> Federal courts have upheld our method of determining a petitioner's ability to pay. *See River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 884-85 (S.D. Tex. 2014); *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 373-76 (S.D.N.Y. 2012). *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011).

<sup>7</sup> In response to the Director's Request for Evidence, dated February 5, 2009, the petitioner asserted that it need only pay

The record contains copies of the petitioner’s federal tax transcript for 2006 and federal tax return for 2007. These records appear to indicate sufficient net income amounts to pay the beneficiary’s proffered wage in those years.

However, USCIS records indicate that the petitioner filed 23 Forms I-140, Petitions for Alien Workers, for other beneficiaries that remained pending after the instant petition’s priority date. A petitioner must demonstrate its continuing ability to pay the proffered wage of each petition it files. See 8 C.F.R. § 204.5(g)(2). Therefore, the instant petitioner must demonstrate its ability to pay the combined proffered wages of the instant beneficiary and the other beneficiaries whose petitions remained pending after the instant petition’s priority date. The petitioner must establish its ability to pay from the instant petition’s priority date until the other petitions were denied, withdrawn, or revoked, or until the other beneficiaries obtained lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg’l Comm’r 1977); *Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our revocation of a petition’s approval because the petitioner did not demonstrate its ability to pay the proffered wages of multiple beneficiaries).

According to USCIS records, the following table indicates the receipt dates and numbers of the petitioner’s other I-140 petitions that remained pending beyond the instant petition’s priority date of September 19, 2006.

Petition Receipt Date	Petition Receipt Number
December 10, 2007	
December 10, 2007	
July 28, 2007	
June 26, 2007	
April 9, 2007	
March 21, 2007	
February 26, 2007	
January 8, 2007	
November 6, 2006	
May 18, 2006	
May 15, 2006	
May 15, 2006	
March 28, 2006	
June 7, 2005	
January 21, 2005	
April 26, 2004	

the prevailing wage rate of \$13.03 per hour. However, the petitioner attested on the accompanying labor certification that it would pay the beneficiary \$13.05 per hour. See 20 C.F.R. § 656.10(c)(1) (requiring a labor certification employer to certify that the proffered wage equals or exceeds the prevailing wage) (emphasis added). The record therefore establishes the proffered wage as \$13.05 per hour.

April 13, 2004  
March 1, 2004  
November 4, 2003  
September 8, 2003  
September 2, 2003  
August 29, 2003  
September 16, 2002

[Redacted]

The record does not indicate the priority dates or proffered wages of the petitioner's other petitions. The record also does not indicate whether: any of the other petitions were withdrawn, revoked, or denied; the petitioner paid wages to any of the other beneficiaries; or the other beneficiaries obtained lawful permanent residence. Thus, the record at the time of the NOIR's issuance did not establish the petitioner's continuing ability to pay the combined proffered wages of the instant beneficiary and the beneficiaries of its other pending petitions.

Because the record did not demonstrate the petitioner's ability to pay, we will remand this matter to the Director. The Director should issue a new NOIR, advising the petitioner of the derogatory information regarding its ability to pay the combined proffered wages of all of its beneficiaries with petitions pending after the instant petition's priority date. *See* 8 C.F.R. § 205.2(a)(2). The new NOIR should also afford the petitioner an opportunity to submit additional evidence in support of its ability to pay the combined proffered wages of the relevant beneficiaries. *Id.* Pursuant to *Sonegawa*, the petitioner may also submit evidence of: how many years it has conducted business; its number of employees; the growth of its business; uncharacteristic losses or expenses; its reputation in its industry; the beneficiary's replacement of employees or outsourced services; or other evidence of its ability to pay. Upon receipt of all the evidence, the Director should review the entire record and enter a new decision.

The Director may also advise the petitioner of any additional revocation grounds he may find, including the original proposed revocation ground: the petitioner's alleged failure to demonstrate the beneficiary's qualifying experience. However, the new NOIR must allege facts supported by the record and must not contain conclusory, speculative, equivocal, or irrelevant observations by a consular officer. *See Arias*, 19 I&N Dec. at 570.

**Conclusion**

The record at the time of the NOIR's issuance would not have warranted revocation of the petition's approval based on lack of evidence of the beneficiary's qualifying experience. We will therefore withdraw the Director's revocation decision. However, because the record would not have established the petitioner's continuing ability to pay the combined proffered wages of its beneficiaries with petitions pending after the instant petition's priority date, we will remand the matter for further revocation proceedings.

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*NON-PRECEDENT DECISION*

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**ORDER:** The Director's decision of December 30, 2014 is withdrawn. The petition is remanded for further action and the entry of a new decision pursuant to the foregoing.