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**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF L-, INC.

DATE: FEB. 26, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a [REDACTED] sandwich and submarine franchise, seeks to employ the Beneficiary permanently in the United States as a baker under classification as a skilled worker. *See* section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).

The Form I-140 petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), which has been approved by the U.S. Department of Labor (DOL). The priority date of the visa petition is December 8, 2004, which is the date that DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

The Petitioner checked box e. in Part 2. of the visa petition, indicating that it seeks to classify the Beneficiary as a professional or skilled worker under section 203(b)(3) of the Act. In that the labor certification reflects that the requirements for the offered position are a high school diploma and two years of employment experience, the Petitioner is seeking classification of the Beneficiary as a skilled worker, which, at a minimum requires two years of qualifying training or experience. *See* 8 C.F.R. § 204.5(1)(2).

Although the Director, Nebraska Service Center, initially approved the petition, he revoked that approval on June 29, 2015. The Director found the Petitioner to have misrepresented the nature of the Beneficiary's qualifying employment experience on the labor certification. Specifically, the Director found that the record did not establish that, at the time the Petitioner filed the visa petition, the Beneficiary had the required two years of experience as a baker. He revoked the visa petition's approval on this basis.

The matter is now before us on appeal. On appeal, the Petitioner contends that the Director erred in finding that the Beneficiary does not have the experience required for the offered position. It submits statements from the Director of Operations and the owner of the store where the Petitioner asserts that the Beneficiary gained his qualifying experience. Upon *de novo* review, we will withdraw the Director's decision and remand the matter to the Director for further review and the entry of a new decision.

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I. PROCEDURAL HISTORY

On March 23, 2007, the Petitioner filed the visa petition, which was approved by U.S. Citizenship and Immigration Services (USCIS) on March 29, 2007. On December 6, 2013, the Director issued a Notice of Intent to Revoke (NOIR) to the Petitioner, requesting additional evidence of the Beneficiary's qualifying employment with [REDACTED] as information received by USCIS indicated that [REDACTED] stores had neither the gas lines nor the equipment required to make bakery goods. On March 4, 2014, finding that the Petitioner had not responded to the NOIR, the Director revoked the visa petition's approval.

The Petitioner appealed the Director's decision to this office on April 8, 2014. On July 25, 2014, we withdrew the Director's decision, as the record did not establish that either the Petitioner or its counsel had received the NOIR, and remanded the petition for the entry of a new decision. On September 2, 2014, the Director issued a second NOIR to the Petitioner, which, again, asked the Petitioner for additional evidence establishing that the Beneficiary's employment with [REDACTED] was as a baker. On October 24, 2014,¹ the Director revoked the visa petition's approval a second time, again finding that the Petitioner had not responded to the NOIR within the required time period. The Petitioner appealed the Director's decision on November 25, 2014.

On March 10, 2015, we found the Petitioner's appeal to be untimely filed, but returned it to the Director for consideration as a motion to reopen or a motion to reconsider. The Director accepted the Petitioner's appeal as a motion to reopen and, on May 13, 2015, issued a third NOIR to the Petitioner. The notice once more informed the Petitioner of the need to submit evidence to overcome information that indicated the Beneficiary could not have gained experience as a baker with [REDACTED] as claimed on the labor certification. The Director also noted that the Beneficiary had claimed on the Form G-325A, Biographic Information, submitted in support of his adjustment of status application, to have worked as a baker for the Petitioner since March 2002, even though [REDACTED] restaurants do not make their own bread or cookies. The Director gave the Petitioner 30 days in which to submit evidence to overcome the preceding derogatory information.

The Petitioner responded to Director's NOIR on June 4, 2015, submitting a May 27, 2015, letter from its President; copies of the Form ETA 750 and Chapter 10 of a January 1, 2014 [REDACTED] Food Preparation manual; and a copy of an October 16, 2014, statement from [REDACTED] Director of Operations, [REDACTED]. On June 29, 2015, the Director revoked the visa petition's approval for the reasons previously noted. On July 15, 2015, the Petitioner appealed the Director's decision.

¹ We note that the record reflects the Director's decision may not have been mailed to the Petitioner until November 10, 2014.

II. SUFFICIENCY OF NOTICE

The threshold issue in the present case is whether the Director adequately advised the Petitioner of the basis for his revocation of the visa petition's approval, as required by the regulation at 8 C.F.R. § 205.2, which reads:

- (a) *General.* Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS].
- (b) *Notice of intent.* Revocation of the approval of a petition . . . under paragraph (a) of this section will be made only on notice to the petitioner The petitioner . . . must be given the opportunity to offer evidence in support of the petition . . . and in opposition to the grounds alleged for revocation of the approval.

The regulation at 8 C.F.R. § 103.2(b)(16) further requires:

- (i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

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

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

The NOIR, issued by the Director on May 13, 2015, informed the Petitioner of derogatory information that he found to demonstrate that the Beneficiary did not have the two years of baking experience required by the labor certification and, further, would not be employed by the Petitioner in the occupation of baker. For the reasons discussed below, the evidence of record does not support these findings and, therefore, we find the May 13, 2015, notice was not issued for good and sufficient cause.

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In the NOIR, the Director stated that the “definition [of] a baker is to ‘mix and bake ingredients to produce breads, rolls, cookies, cakes, pieces, pastries, and other baked goods.’” He noted that although the Petitioner had petitioned for the Beneficiary as a baker, no [REDACTED] restaurant made its own bread or cookies, but bought them frozen, as indicated by the instructions in the submitted Food Preparation manual. In that the offered position did not require the Beneficiary to mix the ingredients for the bread and cookies sold by the Petitioner, the Director questioned whether the job opportunity certified by DOL was actually that of a baker. Accordingly, he requested evidence from the Petitioner of the actual duties being performed by the Beneficiary at its restaurant, noting that the Beneficiary had stated on a Form G-325A, Biographic Information, submitted in support of his adjustment of status application, that he had been employed by the Petitioner as a baker since March 2002.

The Director further indicated that he also questioned the qualifying employment experience that had been claimed by the Beneficiary on the labor certification. While the Director acknowledged that the Petitioner had submitted letters to establish that the Beneficiary had worked as a baker for [REDACTED] at [REDACTED] in [REDACTED] from June 1998 to February 2000, he indicated that such evidence was contradicted by information that indicated the [REDACTED] store at this location did not have the gas lines and equipment necessary to make bakery products. The Director, therefore, asked the Petitioner for evidence establishing that the Beneficiary had “actually performed as a baker” while employed by the [REDACTED] store at [REDACTED]

We note that the Director’s determination that the occupation of baker requires the mixing of dough appears to have been based on the definition that DOL’s Dictionary of Occupational Titles (DOT) provides for “Baker (bakery products),” 526.381-010, which, in part, states:

Mixes and bakes ingredients according to recipes to produce breads, pastries, and other baked goods: Measures flour, sugar, shortening, and other ingredients to prepare batters, dough, fillings, and icings Rolls, cuts, and shapes dough to form sweet rolls, piecrust, tarts, cookies, and related products preparatory to baking. Places dough in pans, molds, or on sheets and bakes in oven or on grill. Observes color of products being baked and turns thermostat or other controls to adjust oven temperature. Applies glaze, icing, or other topping to baked goods, using spatula or brush

However, the definition of baker provided by the DOT does not provide a basis on which the Director may question DOL’s classification of the job opportunity as that of a baker.

Part A.13. of the Form ETA 750 describes the duties of the offered position as “Prepare ROLLS AND COOKIES FROM INSTRUCTIONS,” and the Petitioner claims that, as was “customary” with pre-PERM labor certifications, it submitted a copy of [REDACTED] Food Preparation manual, explaining the various processes and procedures involved in the baking of its various breads, at the

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time it filed the labor certification. The Petitioner has provided no documentary evidence in support of this claim, although we acknowledge its submission of its 2014 Food Preparation manual.²

However, we find no evidence in the record that contradicts the Petitioner's claim to have submitted a copy of an earlier Food Preparation manual with its filing of the labor certification. Neither has the Petitioner been asked to submit such evidence and failed to do so. Therefore, we find the record to indicate that, at the time that DOL approved the labor certification for a baker, it was aware that the duties of the offered position would not include mixing the dough for the Petitioner's rolls and cookies, and that it, nevertheless, classified the job opportunity as a baker (Standard Occupational Classification (SOC) 51-3011). Accordingly, the Director's finding that [REDACTED] restaurants do not make their own bread and cookie dough does not establish that the offered position is not that of a baker. It is not evidence that, "if unexplained and un rebutted, would warrant a denial of the visa petition," and, therefore, does not provide good and sufficient cause for the issuance of the NOIR.

The Director also indicated in the NOIR that information received by USCIS, contradicted the Beneficiary's claim to have been employed as a baker by the [REDACTED] store at [REDACTED] from June 1998 to February 2000. He stated that this information had established that [REDACTED] stores lacked the gas lines and the equipment needed to make bakery products. Further, when he revoked the visa petition's approval on June 29, 2015, the Director additionally informed the Petitioner that the manager of the [REDACTED] at [REDACTED] had reported that the Beneficiary had never been employed as a baker, but had worked as a food cooking machine operator and tender. The Director further stated that the Beneficiary had, himself, testified that he had never worked as a baker at the [REDACTED] store.

The Director's findings regarding the Beneficiary's employment with [REDACTED] from June 1998 until February 2000 do not, however, accurately represent the evidence on which they are based.

The record contains information from a USCIS site visit to the [REDACTED] store at [REDACTED] which was conducted on September 5, 2013. This information reflects that USCIS officers interviewed the "company Controller" regarding the restaurant's food processing capability and learned that, until April 2013, it had had the capability of mixing ingredients in commercial mixers, frying donuts and baking other dough-based foods. No other information generated by this site visit is provided by the record. Accordingly, we find that, contrary to what was stated by the Director in the NOIR, the [REDACTED] store at [REDACTED] did have the gas lines and equipment needed to make bakery goods during the period of the Beneficiary's employment. Moreover, we note that the record does not establish that the individual interviewed by USCIS on September 5, 2013, at [REDACTED] was the store's manager during the time of the

² In any future request for evidence (RFE) or NOIR issued to the Petitioner, the Director should request a copy of the materials that accompanied the labor certification at the time it was filed with DOL, including the [REDACTED] Food Preparation manual. If these materials are not available, a copy of [REDACTED] Food Preparation manual from 2004 should be requested.

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Beneficiary's employment. Neither does the record reflect that this individual stated that the Beneficiary had never been employed as a baker at the [REDACTED] store, but had worked as a food cooking machine operator and tender. It also does not indicate that the Beneficiary was questioned by USCIS regarding his employment at [REDACTED]

We further note that the information provided by USCIS' site visit to [REDACTED] appears consistent with that provided in the above-noted October 16, 2014, statement from [REDACTED] Director of Operations, [REDACTED] who states that the [REDACTED] store at [REDACTED] previously had gas lines and bakery equipment as it served as a central kitchen, supplying other [REDACTED] stores with bakery products. He states that the Beneficiary's duties consisted of "mixing dough, shaping dough and adjusting oven temperature to bake Cookies, Donuts, Croissants, Muffins and Bagels." The information generated by the September 5, 2013, site visit to [REDACTED] is also in line with the July 6, 2015, letter from [REDACTED] which was submitted by the Petitioner on appeal. [REDACTED] states that he is the current owner of the [REDACTED] store at [REDACTED] and that from 1994 until 2013, it served as a central kitchen for other [REDACTED]. He asserts that the Beneficiary worked as a baker from June 1998 until February 2000, and that his duties included mixing ingredients such as "flour, water, sugar, etc."

The record does indicate that, on September 5, 2013, USCIS officers also visited the Petitioner's restaurant at [REDACTED] in [REDACTED] Illinois, where they interviewed the Beneficiary about his employment with the Petitioner. As reported, the Beneficiary stated that he had worked for the Petitioner since 2002 as a "[REDACTED]" rather than as a baker, as he indicated on the Form G-325A referenced by the Director in the NOIR. However, the nature of the Beneficiary's employment with the Petitioner, which is not claimed on the labor certification as qualifying employment, is not at issue here. Questions raised by information the Beneficiary has provided on the Form G-325A he filed in connection with his adjustment of status application are appropriately resolved in the adjustment of status process.

Therefore, for the reasons just discussed, the evidence of record does not support the Director's finding that the information gained by USCIS from its September 5, 2013, site visit to [REDACTED] contradicts the Beneficiary's claim of having been employed as a baker at this location during the period June 1998 to February 2000.

In that the record does not support the bases on which the Director issued the NOIR, it was not issued for good and sufficient cause. Accordingly, we will withdraw the Director's June 29, 2015, revocation of the visa petition's approval.

We will not, however, reinstate the approval of the visa petition, as the record does not establish that the Beneficiary has the two years of qualifying experience required by the labor certification and for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act.

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III. BENEFICIARY QUALIFICATIONS

The regulation at 8 C.F.R. § 204.5(l)(2) provides the following definition of skilled worker:

Skilled worker means an alien who is capable, at the time of petitioning for this classification of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

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.

A petitioner must also demonstrate that, as of the priority date of the visa petition, a beneficiary has the qualifications required by the labor certification application, as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). In the present case, Part A.14. of the labor certification requires the Beneficiary to have two years of experience as a baker or in a related occupation. However, in Part B. 15. of the labor certification, which asked the Beneficiary to list all jobs held during the preceding three years, as well as any other jobs related to the job opportunity, the Beneficiary listed only his employment with the [REDACTED] store at [REDACTED] in [REDACTED] which began in June 1998 and ended on February 2000. In that the period of qualifying experience claimed by the Beneficiary is less than two years, it is insufficient to establish that he is qualified for the offered position.

The record contains a December 1, 1996, statement from the Proprietor of the [REDACTED] in [REDACTED] India, which indicates that the Beneficiary worked there as a baker from November 7, 1993 until November 20, 1996. The December 1, 1996, letter does not, however, demonstrate that the Beneficiary has an additional three years of baking experience as this employment was not listed by the Beneficiary on the labor certification. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976)(a claim to possess experience that is not listed on the labor certification is less credible). Further, an experience letter from an employer not listed on the labor certification is not only less credible pursuant to *Matter of Leung*, but also creates an inconsistency in the record of proceeding. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the true lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, the record contains no independent, objective evidence to establish the Beneficiary's employment with the [REDACTED]. We also note that the statement from the [REDACTED] does not provide a specific description of the Beneficiary's duties during the period of his employment, as required by the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A).

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For the above reasons, the record does not establish that the Beneficiary was qualified for the offered position as of the visa petition's priority date or that he is eligible for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act.

IV. CONCLUSION

In the present case, the findings in the NOIR issued by the Director on May 13, 2015, are not supported by the record. Accordingly, we do not find the NOIR to have been issued for good and sufficient cause and will withdraw the Director's June 29, 2015, revocation of the visa petition's approval on this basis. The approval of the visa petition may not, however, be reinstated as the record does not establish that the Beneficiary had the two years of experience required by the labor certification as of the visa petition's priority date. In visa 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). This case will, therefore, be remanded to the Director for further consideration, consistent with the above discussion, and the issuance of a new decision.

ORDER: The decision of the Director, Nebraska Service Center, is withdrawn. The matter is remanded to the Director, Nebraska Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of L-, Inc.*, ID# 15807 (AAO Feb. 26, 2016)