



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted]
WAC 03 147 52533

Office: CALIFORNIA SERVICE CENTER

Date: JUN 12 2007

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director, California Service Center, initially approved the employment based preference visa petition. Subsequently, the director issued a notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Secretary 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.”

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, 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. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)). Finally, the realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Id.*

The petitioner is a disposal services company. It seeks to employ the beneficiary permanently in the United States as a mechanic, industrial truck. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position which requires three years of qualifying employment experience. The director also determined that fraud or willful misrepresentation of a material fact was involved in the Alien Employment Application, and, that therefore, the labor certification submitted in support of the employment-based immigrant petition is invalidated. The director revoked the petition accordingly.

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

¹ The chronological progression of this case is as follows: the Form ETA 750 Application for Alien Employment Certification, was accepted for processing on October 1, 1999; the I-140 petition was filed on April 11, 2003; the director issued a request for evidence dated July 17, 2003, and the petitioner responded to the request on October 7, 2003; the director issued a request for evidence dated October 16, 2003, and the petitioner responded to the request December 12, 2003; the director approve the petition on September 1, 2004; the director issued an intent to revoke processing on May 21, 2005, and the petitioner responded to the intent to revoke processing on June 20, 2005; and, finally, the director issued a notice of revocation dated July 9, 2005; and the petitioner appealed the notice of revocation on July 27, 2005.

As set forth in the director's revocation, an issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The director noted inconsistencies in information pertaining to the beneficiary's employment experience and found that the beneficiary did not have three years of qualifying employment experience.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, 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.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on October 1, 1999.

The AAO takes a *de novo* look at issues raised in the revocation of approval of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

On appeal, counsel submits an explanatory letter dated July 25, 2005; a letter dated July 23, 2005 from Jose Gonzalez Torres; a letter from the petitioner dated June 17, 2005; and a statement from the beneficiary dated June 17, 2005.

Other evidence in the record includes following documents: the director's notice of revocation dated July 9, 2005; the director's intent to revoke the approval of the petition on May 21, 2005; an explanatory letter from counsel dated June 17, 2005; letters from the petitioner dated April 5, 2000, December 3, 2003, and, June 17, 2005; a statement from the beneficiary dated June 17, 2005; the beneficiary's Wage and Tax Statements (W-2) for years 1988, 1989, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003 and 2004; the director's request for evidence dated October 16, 2003; cover letters by prior counsel dated July 25, 2002, March 15, 2003, April 5, 2003, and December 2, 2003; three of the beneficiary's pay statements from the petitioner for the period from November 9, 2003 to November 23, 2003; the petitioner's consolidated financial statements for years ending June 30, 1999, June 30, 2000, June 30, 2001, June 30, 2002 and June 30, 2003; the director's request for evidence dated July 17, 2003; the beneficiary's birth certificate stating that he was born on March 3, 1969; employment reference letters from [REDACTED] Repairs of La Piedad, Mexico by [REDACTED] dated June 2, 2001 and September 17, 2003; the beneficiary's technical high school completion certificates issued by the State of Michoacan, Mexico; and, the beneficiary's California State driver's license, Class C; and the petitioner's business license.

On appeal, counsel asserts in his explanatory letter dated July 25, 2005, that the letter dated July 23, 2005 from [REDACTED] of [REDACTED] Repairs of La Piedad, Mexico corrects and explains in the beneficiary's favor inconsistencies and adverse statements made by [REDACTED] in prior letters and to U.S. consular investigators.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Further, counsel opines “that people in Mexico start working at a very young age.” Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary’s qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of mechanic, industrial truck. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	<u>6</u>
	High School	<u>2</u>
	College	Blank
	College Degree Required	Blank

The applicant must also have three years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A requires that an applicant have a California driver’s license, and the employer declared that it will “compensate in accordance with California law and regulations.”

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury.

On Form ETA-750, Part B, Section 11, the beneficiary stated that the attended elementary and high school from September 1977 to June 1986.

On Part 15, eliciting information of the beneficiary’s work experience, the beneficiary represented that he worked as a mechanic, industrial truck, at Taller De Servicios [REDACTED], La Piedad, Michoacan, C.P. 59300 from June 1995 to present (i.e. September 17, 1999). The beneficiary does not provide any additional information concerning his employment background on that form. There is no job reference letter in the record of proceeding from Taller De Servicios

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(A) *General.* 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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

There are three employment reference letters from [REDACTED] Repairs of La Piedad, Mexico made by [REDACTED] dated June 2, 2001, September 17, 2003 and July 23, 2005.

According to the letter dated June 2, 2001, from [REDACTED] the beneficiary worked as a mechanic of industrial trucks with fuel injection systems for [REDACTED] Repairs of La Piedad, Mexico, from May 1984 to May 1987. According to a second letter from [REDACTED] dated September 17, 2003, the beneficiary worked as a mechanic of trucks for [REDACTED] Repairs of La Piedad, Mexico, from May 2, 1984 until May 15, 1987, working 40 hours each seven day work week. The second letter stated that the beneficiary was paid in cash, and, in summary, there are no records of his employment.

Based upon the beneficiary's birth date in 1969, according to the letters submitted for the beneficiary, the beneficiary worked at [REDACTED] Repairs between the ages of 15 to 18 years old, and, for the first two years of employment, while the beneficiary also attended technical high school.

In the third letter from [REDACTED] dated July 23, 2005, he additionally stated the beneficiary started as an apprentice working for [REDACTED] Repairs of La Piedad, Mexico, in the morning the first few months of the beneficiary's employment, (i.e. from May, 1984), and the beneficiary attended school in the afternoon.

Counsel has submitted a statement from the beneficiary dated June 17, 2005, to explain how the beneficiary could attend technical high school and also work full time for [REDACTED] Repairs. In summary, the beneficiary stated that he attended the technical high school from 2:00 PM until 8:00 PM each week day. There is no substantiation in the record for this claim. The beneficiary's statement is not credible based upon [REDACTED] statements to the investigator set forth below.

The director requested that the American Embassy, Mexico City, Mexico, investigate the beneficiary's claims of job experience. In summary, according to the investigative report, [REDACTED] stated that the beneficiary worked at [REDACTED] Repairs as an apprentice for approximately one year, that he could not be specific about the dates, and, that the job reference letters he produced were completed as a "special favor." [REDACTED] in his third letter dated July 23, 2005, admitted to the statement that the job references were made as a special favor "in gratitude for the excellent responsible work done by" the beneficiary.

The problem that arises in this case is the multiple inconsistencies in information provided by the beneficiary, and, the lack of credible evidence of the occupation from two prior employers. In summary, [REDACTED] recollection changed as is evident from his above letter statements, and, they are refuted by his own statement to the investigator that the beneficiary worked at [REDACTED] Repairs as an apprentice for approximately one year. [REDACTED] in his third letter did not attempt to reconcile what he said in the first two letters with what he said to the investigator.

Although the beneficiary stated that he had job experience with Taller De Servicios "██████████" as his sole job experience in the labor certification, no job letter or substantiation was submitted for this statement made in the labor certification.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. at 591-592 also states: "It is incumbent on 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." The petitioner has not resolved these inconsistencies.

Even if the record of proceeding did not contain multiple inconsistencies, the AAO concurs with the director's determination that no independent, objective evidence establishes that the beneficiary has three years of experience as a mechanic, industrial truck. No trainers or employers affidavit, document, or pay stub contained in the record of proceeding establishes that the beneficiary was employed for three years in an employment capacity with duties similar to the duties of the proffered position. Since the letters and the statement given to the investigator were inconsistent and therefore not credible, the letters submitted by Mr. Torres are not sufficient to document the beneficiary's employment experience.

In addition to revoking the approval of the visa petition, the director invalidated the labor certification application. The regulation at 20 C.F.R. § 656.30(d) governs the authority of CIS to invalidate labor certification applications and in pertinent part states the following:

After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a RA or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

The director invalidated the labor certification based on inconsistencies in the employment history representations leading the director to conclude that fraud or willful misrepresentation of a material fact (the beneficiary's qualifications for the proffered position) was involved in the labor certification application. The AAO agrees with the director.

The AAO thus affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired three years of experience a mechanic, industrial truck from the evidence submitted into this record of proceeding and thus the petitioner has not demonstrated that he is qualified to perform the duties of the proffered position. We also find that according to the discussion above and the evidence submitted in this matter, fraud or willful misrepresentation of a material fact was involved in the Alien Employment Application.

ORDER: The appeal is dismissed.