

identifying data deleted to
prevent classify unwarranted
invasion of personal privacy

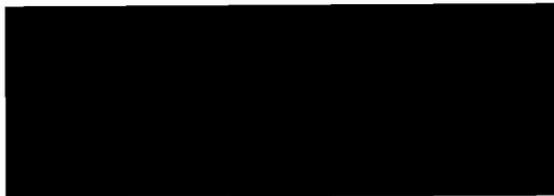
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B 6



FILE:



Office: TEXAS SERVICE CENTER

Date: NOV 28 2007

SRC 05 157 51607

IN RE:

Petitioner:



Beneficiary:

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:



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, Texas Service Center, denied the employment-based visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a carpet and tile contractor. It seeks to employ the beneficiary permanently in the United States as a tile setter. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition and denied the petition accordingly.

The record shows that the appeal was properly and timely filed¹ and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the beneficiary is qualified for the proffered position pursuant to the terms of the approved labor certification.

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 or seasonal nature, for which qualified workers are unavailable in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(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.

Eligibility in this matter hinges on the petitioner demonstrating 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

¹ The petition was denied on September 21, 2005. The appeal in this matter was initially submitted on October 24, 2005, the 33rd day after the decision of denial, on the March 4, 2005 version of the Form I-290B Notice of Appeal. The service center returned that appeal and asked that the appeal be submitted on the October 26, 2005 version of Form I-290B. The appeal was resubmitted on November 4, 2005. This office will not dwell on why the service center required use of the October 26, 2005 version prior to October 26, 2005, but finds that the initial filing was satisfactory and effective.

U.S. Department of Labor and submitted with the instant petition.² *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on April 26, 2001. The labor certification states that the position requires two years of experience in the job offered, tile setter.

On the Form ETA 750, Part B the beneficiary, who signed that form on April 15, 2005, stated that he had worked (1) 40 hours per week from March 1995 to December 2001 installing wallpaper for ██████████ in Deerfield Beach, Florida, and (2) from December 2002 until the date he signed that form as a tile setter for Carvalho Flooring in Coral Spring, Florida. The beneficiary did not claim to have worked for the petitioner.

The instructions to the Form ETA 750B require that the beneficiary "List all jobs held during the past three (3) years [and] any other jobs related to the occupation for which the [beneficiary] is seeking certification" The beneficiary listed no other experience on that form.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO considers all evidence properly in the record including evidence properly submitted on appeal.³ In the instant case the record contains (1) a G-325A Biographic Information form executed by the beneficiary on March 12, 2002, (2) a G-325A Biographic Information form executed by the beneficiary on March 28, 2005, (3) an employment verification letter from ██████████ dated April 9, 2005, (4) a notarized employment verification letter from ██████████ of Boca Raton, Florida dated April 10, 2001, (5) a letter dated July 3, 1996 from ██████████ Carpet and Interior Service, (6) an undated employment verification letter from ██████████ (7) a letter dated October 15, 2005 on the letterhead of ██████████ of Pompano Beach, Florida purporting to have been signed by her, (8) an undated letter from ██████████ purporting to be notarized, but not on letterhead, (9) an undated letter from ██████████ of Lake Worth, Florida, (10) an undated letter from Carpet Restorations Incorporated in Pompano Beach, Florida, (11) 1994 and 1995 Form 1099 Miscellaneous Income statements issued to Arnold's Wallpapering and Painting by Carpet Restorations of Pompano Beach, Florida, (12) two copies of a monthly statement, dated August 31,

² To determine whether a beneficiary is eligible for a third preference immigrant visa, Citizenship and Immigration Services (CIS) must ascertain whether the alien is in fact qualified for the certified job. 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 Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

1994, pertinent to the bank account of Arnold's Wallpapering, and (13) two letters that purport to be from [REDACTED] Incorporated of Boca Raton, Florida, one dated October 9, 2005 and the other undated. The record does not contain any other evidence relevant to the beneficiary's claim of qualifying employment experience.

The G-325A Biographic Information form requires the applicant to list his employment during the previous five years. The form dated March 12, 2002 states, consistent with the information on the Form ETA 750B, that the beneficiary began working for [REDACTED] during March of 1995 and continued to work for him on the date he executed that form. That form does not mention employment for Carvalho Flooring.

On the G-325A Biographic Information form dated March 28, 2005 the beneficiary stated that he worked for [REDACTED] Wallpapering from March 2000 to December 2001 as a paper hanger. This office notes that the beneficiary's history of employment as stated on that Form G-325A conflicts with the version he presented on the Form ETA 750B, on which he stated that he began to work for Arnoldo Wallpapering during March of 1995.

The beneficiary further stated on the March 28, 2005 Form G-325A that he began working for [REDACTED] Flooring during April of 2001 and continued to work for that company on the date he signed the form. This office notes that this claim of employment also conflicts with the claim stated on the Form ETA 750B, that he began working for [REDACTED] during December 2002. It also conflicts with the implication, by omission, that the beneficiary had not begun to work for Carvalho on March 12, 2002, when he executed the previous Form G-325A.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The April 9, 2005 employment verification letter from [REDACTED] affirms the beneficiary's employment with that company as a tile setter from December 2002 until the date of that letter.

The April 10, 2001 employment verification letter from [REDACTED], Florida states that the beneficiary worked for him as a tile setter from February 27, 1996 to November 13, 1998. This office notes that this employment claim is for a period during which the beneficiary claimed, on the Form ETA 750B, to have been working for [REDACTED] in Deerfield Beach, Florida. Further, the beneficiary did not list this claim of qualifying experience on the Form ETA 750B, notwithstanding that he was required to list all experience related to the job offered on that form.

Again, as per *Matter of Ho, Id.* discrepancies must be resolved with independent objective evidence. Merely posing a feasible reconciliation will not suffice.

⁴ This office notes that the beneficiary has referred to that company both as [REDACTED] Wallpapering and Arnold's Wallpapering, but finds that very minor discrepancy to be inconsequential.

The undated employment verification letter from [REDACTED] states that the beneficiary worked with him at [REDACTED] from March 1998 to February 2001 as a master tile setter. This employment claim conflicts with the beneficiary's assertion, on the March 12, 2002 Form G-325A that he worked for [REDACTED] beginning during March of 1995 and continuing until at least March 12, 2002. It further conflicts with the employment history stated on the March 28, 2005 G-325A, which states that the beneficiary worked for [REDACTED] from March 2000 to December 2001.

Further, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states that,

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.

The undated employment letter is not on letterhead, and did not come from [REDACTED]. It does not identify the affiant's position with that company, as required by the regulation, and indicates that, contrary to the governing regulation, the affiant confirming the employment is an alleged coworker, rather than the alleged employer.

The October 15, 2005 letter from [REDACTED] states that the beneficiary laid tile in her house during 2000 as a subcontractor for Brito Tile. The undated letter purports to be from [REDACTED] (sic) of the same address in Pompano Beach. It also states that the beneficiary installed tile there for [REDACTED] (sic). It bears a notary's stamp, the attestation, "Sworn before me this 19th day of October 2005" and the notary's signature. It was not, however, signed by the affiant.

The undated letter from [REDACTED] of Lake Worth, Florida is not on letterhead. It states that the beneficiary laid tile in her home in Coral Springs during August 2000. That letter identifies [REDACTED] as "Office Manager," but makes no other reference to any business.

The undated letter from Carpet Restorations Incorporated indicates that the beneficiary worked for that company as a tile setter from 1993 to 1995. That letter is signed by [REDACTED] as office manager.

The two Form 1099 Miscellaneous Income statements show that Carpet Restorations paid non-wage compensation of \$11,949 and \$29,044.46 during 1994 and 1995, respectively.

The July 3, 1996 letter from [REDACTED] states that the beneficiary, [REDACTED] of [REDACTED] Wallpapering, had then worked for [REDACTED] for over four years. It does not state in what capacity [REDACTED] Carpet employed the beneficiary. That letter is signed by [REDACTED] office manager.

The beneficiary's October 19, 2005 letter is on the letterhead of [REDACTED] and Painting Incorporated of [REDACTED] in Pompano Beach and states that he owns that company. That address is the same one the beneficiary gave as his own on the Form I-140 visa petition. On the March 12, 2002 and March 29, 2005 G-325A Biographic Information forms the beneficiary claimed to have lived there beginning

in April 2001. In that letter the beneficiary refers to the notarized statement of "[REDACTED]." That misspelling is the same that occurred in one of the letters purportedly from [REDACTED]

[REDACTED] August 31, 1994 bank statement shows a mailing address of [REDACTED] Pompano Beach, Florida. This office notes that the beneficiary's March 28, 2005 Form G-325A states that he lived at [REDACTED] in Deerfield Beach from April January 1997 to March 2001, and his March 12, 2002 Form G-325A indicates that he lived at that 20th Avenue address from July 1996 until March 2001. Neither of those Biographic Information forms shows that he has ever lived at the address shown on the bank statements.

One of the letters from [REDACTED] Tile Incorporated states that the beneficiary worked for that company from March 1998 to February 2001 as a tile setter. That letter bears a notary's stamp and the attestation, "Sworn before me this 19th day of October 2005" indicating that [REDACTED] president of [REDACTED] affirmed the truth of the statements in the letter before the notary. That letter does not bear [REDACTED] signature. The other undated letter from [REDACTED] Tile asserts the same period of employment and purports to bear [REDACTED] signature.

On June 11, 2005 the service center issued a request for evidence, noting that the only evidence pertinent to employment as a tile setter was that for [REDACTED] beginning in December 2002, and that to qualify the beneficiary must have received two years of experience as a tile setter prior to the April 26, 2001 priority date. In response, counsel submitted the various documents pertinent to previous experience as a tile setter.

The director denied the petition on September 21, 2005, noting that the time frame of the beneficiary's claim of employment as a tile setter for [REDACTED] is entirely overlapped by the period during which he claimed to work for [REDACTED]

On appeal, counsel asserted that the beneficiary is the owner of [REDACTED] and that, contemporaneously with his full-time self-employment, the beneficiary laid tile as an independent contractor for [REDACTED] other companies, and for individuals. Counsel stated that the evidence is not, therefore, in conflict. Counsel argued that the evidence now in the record demonstrates that the beneficiary has the requisite two years of experience as a tile setter before the priority date.

As to the beneficiary's failure to list any tile setting experience before to the priority date on the Form ETA 750B, counsel stated,

[The beneficiary] signed the ETA 750B and the Biographic Forms G-325A, which were prepared by this office, because they contained truthful statements, though partial. In retrospect, the statements could have been more comprehensive. Not having provided a more complete explanation was an apparent oversight that we attribute to scrivener's error.

With the visa petition, the petitioner submitted only the documentation of the beneficiary's claim of employment with [REDACTED] The beneficiary did not, at that point, claim any other qualifying employment, that is; he claimed no other experience in tile setting, notwithstanding that the instructions to the Form ETA 750B required him to list all employment related to the job offered, tile setter. After being placed

on notice that his sole claim of employment as a tile setter was non-qualifying because it began after the priority date, the beneficiary presented other claims of employment as a tile setter, never before mentioned, all predating the priority date.

A petitioner raises serious questions of credibility when asserting a new employment claim after his initial claim is found to be non-qualifying. The regulation at 8 CFR § 204.5(l)(3)(ii) does not encourage petitioners to hold evidence in abeyance and submit it later. Rather, it clearly states that evidence of the beneficiary's experience **must accompany** the petition.

The only explanation of the beneficiary's failure to claim employment for [REDACTED] Tile on the Form ETA 750B and the G-325A is counsel's attribution of that omission to "scrivener's error." Counsel asserts that both forms were prepared by his office, thus shouldering some of the responsibility for the omission.

The March 28, 2005 Form G-325A Biographic Information form does, in fact, appear to have been prepared by counsel's office. The March 12, 2002 Form G-325A, however, does not appear to have been prepared in counsel's office and was presumably, therefore, not prepared by the same "scrivener."

Counsel is correct that the subsequent claim of employment for [REDACTED] and others is not necessarily bogus merely because the beneficiary claimed to be working full-time for his own company during the same period. That overlap is, however, a factor to be considered.

Further, the various versions of the beneficiary's employment history contain at least minor contradictions. Which of those histories is correct, if any, is unknown to this office.

Further still, pursuant to *Matter of Ho*, 19 I&N Dec. 582, the petitioner is obliged to provide independent objective evidence to overcome apparent discrepancies. Explanations and additional affidavits prepared in response to a notice of the adverse evidence do not constitute independent objective evidence within the meaning of *Matter of Ho*.

Yet further, in one of those affidavits the affiant appears to have misspelled her own name, which renders the provenance of that letter questionable. In others, notaries claim to have sworn the affiants, and presumably satisfactorily identified them, but then neglected to have them sign the documents they were affirming. This renders doubtful the assertion that they were actually attested to before a competent notary, supports the conclusion that the evidence may have been fabricated, and renders the veracity of the employment claims asserted in those documents very questionable.

The initial claim of employment for [REDACTED] is not qualifying because it occurred after the priority date. The subsequent claims of employment lack credibility for the various reasons listed above. In sum, the evidence in the record does not demonstrate credibly that the beneficiary has the requisite two years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position. The petition was correctly denied on this ground, which ground has not been overcome on appeal.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.