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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: JUN 04 2013 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth M'Cormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The appeal will be dismissed.

The petitioner is a jewelry design service. It seeks to employ the beneficiary permanently in the United States as a first line supervisor, customer service. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly. The petitioner appealed the director's decision. The AAO noted that the petitioner's gross receipts were over $1.5 million in each year for which tax returns were submitted. In addition, the petitioner paid high amounts of total wages in every year, met its wage obligations to the instant beneficiary and the other sponsored workers in two years, and has been in business for over 10 years. Thus, assessing the totality of the circumstances in this individual case, the AAO concluded that the petitioner established that it had the continuing ability to pay the proffered wage. The AAO also determined, beyond the decision of the director, that the petitioner had not established that the beneficiary is qualified for the offered position.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. 8 C.F.R. § 103.5(a)(3). In addition, a motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The record shows that the motion is properly filed, timely and makes a specific allegation of error in law or fact. The petitioner submits additional evidence, e.g., letters pertaining to the beneficiary's prior employment experience, in an attempt to establish that the beneficiary is qualified for the proffered position. Thus the motion will be granted. Upon review, however, the appeal will be dismissed. 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.

The single issue in this case is whether the petitioner demonstrated that the beneficiary has the required experience as of the priority date.

As set forth in the AAO's dismissal, and as identified in the AAO's Request for Evidence and Notice of Derogatory Information (RFE), an additional issue was identified on appeal, whether the petitioner demonstrated that the beneficiary has the required experience as of the priority date.

On motion, counsel contends that the petitioner has established that the beneficiary is qualified for the offered position. The AAO disagrees.

As discussed in the AAO decision dated April 13, 2012, the petitioner has not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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'r 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. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS,* 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[1] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful

[1] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

> misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> . . .
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b),

> 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

The beneficiary must also 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)(l), (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).

The AAO noted that in its RFE, discrepancies existed between the experience claimed by the beneficiary on the ETA Form 9089 and that listed on a prior application. Specifically, on the prior application, the beneficiary stated that she was unemployed from November 1999 to the date the application was filed, May 2002 and that she worked for [redacted] from March to November 1999. On the ETA Form 9089, the beneficiary stated that she began working for the petitioner on April 22, 2002, worked for [redacted] from June 10, 2001 to April 7, 2002, and for [redacted] from June 1, 1998 to August 1, 2000. The AAO's RFE noted that the petitioner previously stated that [redacted] paid the beneficiary "in cash only therefore she does not have pay stubs from her employment at either location" and that [redacted] does not keep any sort of payroll records. The RFE stated that in light of the inconsistencies, independent and credible evidence of the beneficiary's experience was necessary to meet the experience requirements of the ETA Form 9089. The AAO's RFE further noted that "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." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In response, the petitioner stated that the beneficiary's prior application was prepared by a non-attorney advisor at a time when the beneficiary spoke little to no English so was completely reliant on that assistance in completing the application. The affidavit submitted from the beneficiary stated that she handwrote the answers to questions that were translated by a friend and that she "focused and carefully answered" questions pertaining to that application and "forgot to write about [her] work experience at [redacted]" characterizing that omission as a "mistake." She further stated that she worked full time at [redacted] from June 1, 1998 through August 1, 2000 and worked

part-time at during that same time. The petitioner also submitted a letter from , owner of dated December 5, 2011 stating that the beneficiary worked as a production supervisor from June 1, 1998 through August 1, 2000. Mr. also stated that he paid the beneficiary in cash, does not keep payroll records, and that Indonesia does not have any sort of official income reporting such as the U.S. Form W-2. The petitioner does not submit credible evidence that Indonesia does not create records of work for tax or other purposes. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

Although counsel notes that the petitioner was not assisted by an attorney but by an agent, there is no remedy available for a petitioner who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on its behalf. *See* 8 C.F.R. § 292.1. The AAO only considers complaints based upon ineffective assistance against accredited representatives. *Cf. Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988) (requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel).

The AAO requested in the RFE that the petitioner submit independent and credible evidence to overcome the discrepancy between the dates provided for employment on the ETA Form 9089 and the prior application. The beneficiary's affidavit does not provide independent, objective evidence of her prior work experience. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The letter from Mr. does not provide independent evidence of the beneficiary's experience to overcome the discrepancies in the applications. Although Mr. states that no records are available in Indonesia since the beneficiary was paid in cash and Indonesia does not have an income tax, the petitioner has not attempted to submit secondary evidence that is objective and independent. Where a discrepancy exists such as here where the beneficiary signed two applications under penalty of perjury, *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) provides that the petitioner must "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 provided contemporaneous documents or other independent and objective evidence, instead of documents generated for the purpose of the current petition. As a result, the petitioner did not provide sufficient evidence to demonstrate that the beneficiary had the required two years of experience.

On motion, in an attempt to establish the beneficiary's experience, the petitioner submits a letter from dated April 25, 2012. Mr. states that he is the oldest son of Mr. and is the successor of the family business, Mr. also states that from June 1, 1998 until August 1, 2000, Mrs. (the beneficiary) had been employed at the jewelry store as a Production Manager. He states that Mrs. is hardworking, responsible and trustworthy. Also submitted on motion, is a notarized letter from dated May 8, 2012. Mr.

states that on April 8, 1996 he began employment marketing jewelry at the jewelry store and that from June 1, 1998 until August 1, 2000, had been employed at the jewelry store as a Production Supervisor. The record includes photo identifications for

Both and attest to Mrs. employment at the jewelry store from June 1, 1998 until August 1, 2000, and a job title in which she was employed. However, they do not provide details of the employment, such as her responsibilities in the capacity in which she was employed, and they do not indicate how they date the period of her employment, or whether they had access to her employment records. Neither the petitioner nor the beneficiary explain the reason for the prior inconsistency, other than the fact that the beneficiary spoke little English when the earlier application submitted. The beneficiary's disavowal of the record she has participated in creating cannot be sustained in light of her admission of willingly signing a blank document. Specifically, her failure to apprise herself of the contents of the paperwork or the information being submitted constitutes deliberate avoidance and does not absolve her of responsibility for the content of her petition or the materials submitted in support. *See Hanna v. Gonzales,* 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents). The law generally does not recognize deliberate avoidance as a defense to misrepresentation. *See Bautista v. Star Cruises,* 396 F.3d 1289, 1301 (11th Cir. 2005); *United States v. Puente,* 982 F.2d 156, 159 (5th Cir. 1993). To allow the beneficiary to absolve herself of responsibility by simply claiming that she had no knowledge or participation in a matter where she provided all the supporting documents and signed a blank document would have serious negative consequences for USCIS and the administration of the nation's immigration laws. While potentially ineligible aliens might benefit from approval of an invalid petition or application in cases where USCIS fails to identify fraud or material misrepresentations, once USCIS does identify the fraud or material misrepresentations, these same aliens would seek to avoid the negative consequences of the fraud, including denial of the petition or application, a finding of inadmissibility under section 212(a)(6)(C) of the Act, or even criminal prosecution.

The record lacks supporting documentation, such as earnings statements, and employment related evidence, to establish the applicant's employment with the jewelry store from June 1, 1998 until August 1, 2000. The letters, therefore, do not overcome the inconsistencies in the beneficiary's qualifying employment experience.

The record lacks sufficient credible corroborating documentation of the beneficiary's claimed employment experience. It is concluded, therefore, that the petitioner has failed to establish the beneficiary's qualifying experience.

The petition will be denied for the above stated reason. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion to reopen and reconsider is granted. The appeal is dismissed. The denial of the petition is undisturbed.