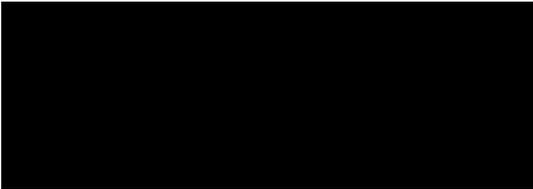


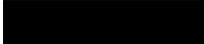


U.S. Citizenship  
and Immigration  
Services

B6



FILE:



WAC-97-123-54828

Office: CALIFORNIA SERVICE CENTER

Date: **AUG 31 2005**

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:



**PUBLIC COPY**

Identifying data deleted to  
protect privacy unwarranted

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, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the Director, California Service Center. In connection with the beneficiary's application to adjust status to lawful permanent resident and a subsequent investigation by the U.S. Embassy in Manila, Philippines, inconsistent and/or contradictory information was obtained and the director consequently served the petitioner with 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) due to the petitioner's failure to timely respond to the NOIR. The Administrative Appeals Office (AAO) rejected a subsequent appeal for lack of jurisdiction over abandoned petitions. The matter is again before the AAO on motion to reconsider and reopen. The motion will be granted. The petition will be remanded to the director.

The petitioner is a general engineering contractor. It seeks to employ the beneficiary permanently in the United States as a specification writer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director notified the petitioner that she determined the beneficiary misrepresented his employment experience on the Form ETA 750 because a consulate investigator at the American Embassy in Manila, Philippines went to the location of a prior employer and could not find the business, and she thus intended to revoke the approved petition. The director subsequently revoked the approval because the petitioner did not timely respond to the director's notice of intent to revoke and she deemed the petition abandoned. Citing 8 C.F.R. § 103.2(b)(15), the AAO rejected the petitioner's appeal because according to that regulatory provision, there is no jurisdiction over abandoned petitions.

On motion, counsel submits a brief and evidence. 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: (1) 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 Citizenship & Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). On motion, counsel asserts that CIS erred by failing to consider evidence that the petitioner's response to the director's NOIR was timely submitted and submits additional evidence proving the timeliness of its response. Thus, since new evidence is presented and an assertion made that the AAO's decision was erroneous, the motion qualifies for consideration as a motion to reopen and a motion to reconsider.

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 has established that it provided a timely response to the director's NOIR. The director issued his NOIR on November 20, 2000 and provided the petitioner thirty (30) days to respond. The record of proceeding does not reflect a response from the petitioner. On appeal, the petitioner provided its Express Mail receipt for its responsive submission to the director's NOIR. The petitioner's evidence on motion consists of a letter from the United States Postal Service confirming that a package with item number EL653475818US was delivered to the director's office on December 15, 2000 at 9:00 a.m. The petitioner also provides the Express Mail receipt with a

corresponding item number. Although the USPS letter and Express Mail receipt do not identify the petitioner or beneficiary on either item, the AAO accepts this evidence as proof of a timely response<sup>1</sup>.

As properly noted in its prior decision, the AAO does not have jurisdiction over abandoned petitions. The petitioner has presented sufficient evidence that it did not abandon the petition. The issue to be discussed in this case then is whether or not the petitioner established the beneficiary's qualifications for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is January 30, 1995. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, 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 specification writer. In the instant case, item 14 describes the requirements of the proffered position as follows:

- |                         |                |
|-------------------------|----------------|
| 14. Education           |                |
| Grade School            | 6              |
| High School             | 4              |
| College                 | Blank          |
| College Degree Required | Not required   |
| Major Field of Study    | Not applicable |

The applicant must have four years of experience in the job offered in order to perform the job duties listed in Item 13, which will not be recited here since they are incorporated into the record of proceeding which is a public access file. There are no special requirements listed.

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 Part 15, eliciting information of the beneficiary's work experience, he indicated that he worked for Continental Data Graphic as a coordinator/supervisor in an aircraft technical documentation business from January 1990 through the date of filing the Form ETA 750. Prior to that, the beneficiary indicated that he worked for Liberty Construction & Development Corporation in Los Angeles, California as a specification writer from June 1983 through December 1989. Prior to that, the beneficiary indicated that he worked for [REDACTED] Architects, Engineers, Builders, at Canlapan St. in Malolos, Bulacan, Philippines, as a specification writer from March 1979 through May 1982.

<sup>1</sup> The AAO notes that counsel identified the petitioner on a mail receipt submitted with the appeal.

With the initial petition, the petitioner submitted an undated letter from Liberty Construction & Development Corporation, which corroborated the beneficiary's represented employment with them. In response to a request for additional evidence from the director, the petitioner submitted a more detailed letter from Liberty Construction & Development Corporation, dated May 12, 1997, verifying the beneficiary's employment capacity as a full-time specification writer with them from June 1983 through December 1989.

The petition was approved on June 17, 1997. The beneficiary filed an application to adjust to lawful permanent resident on July 18, 1997. After requests for evidence confirming an offer of employment and verifying the beneficiary's qualifications, the director determined that the beneficiary's qualifications were unclear since Liberty Construction & Development Corporation "is no longer in business" and "[at the] time of [the adjustment of status to lawful permanent resident interview, the beneficiary] was unable to provide a letter of employment from his previous employer in the Philippines." The record of proceeding suggests that the interview took place on April 2, 1999. According to the director, the beneficiary also presented "conflicting previous employment information." Thus, on November 9, 1999, the director faxed a request to the U.S. Embassy in Manila, Philippines requesting them to verify his past employment with [REDACTED] Architects, Engineers, Builders, from June 1983 to December 1989 as a specification writer and quoted details from the ETA 750B.

A response from the CIS Officer-in-Charge in Manila, dated March 6, 2000, stated the following:

A field investigation was conducted on 03 March 2000 at the vicinity of [REDACTED] supposed address of [REDACTED] Architects, Engineer[s], Builders. The whole stretch of this street was searched from end to end and no office with this name was located. Several long time residents and community officials were queried if they have any knowledge about this business entity. All responded negatively. Likewise, this business establishment is not even listed on the yellow pages of the Philippines Long distance telephone Co. (PLDT) in Malolos, Bulacan.

Because of the adverse information resulting from the investigation, the director issued a notice of intent to revoke the petition on November 20, 2000. The director informed the petitioner about the results of the investigation, asserting that the beneficiary committed fraud and willfully misrepresented a material fact in obtaining approval of the Form ETA 750 from DOL, and provided the petitioner 30 days to rebut the evidence. The director ultimately revoked the petition on February 13, 2001 for failure to provide a timely response.

On appeal, counsel submitted a letter from [REDACTED] that he claims verifies the beneficiary's employment experience. The letter submitted on appeal is drafted [REDACTED] on [REDACTED] letterhead, stating its address as 29 San Augustine, Hagunoy, Bulacan and providing telephone contact information. The letter was subscribed and sworn to before a notary public on September 22, 2000. The letter states the following:

This is to certify that I, the undersigned is [sic] the business owner of J. MENDOZA JR & ASSOCIATES.

That [the beneficiary] has been an employee of this company as a Specification Writer from March 1979 to May 1982, at which time, the address of the company was located at Canlapan St., Malolos, Bulacan, Philippines.

At present the company is now located at 29 San Augustine, Hagonoy, Bulacan, Philippines and [sic] still in active business.

(Emphasis in original). As noted above, the AAO rejected the appeal for procedural reasons. The AAO notes that it could affirm the AAO's decision on the same grounds, but since the petitioner has provided evidence that its response was timely, we will issue a decision on the substantive merits even though the director's decision only dealt with a procedural basis<sup>2</sup>.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department 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." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Based on the record of proceeding at the time of adjudication, the director had good and sufficient cause to revoke the approval of this petition. However, the instant petition requires additional adjudication by the director for substantive issues not addressed in her decision. For example, the director just stated in a memorandum to the embassy in Manila that the Liberty Construction & Development Corporation was out of business and could not verify the beneficiary's qualifying employment experience. The director did not state that Liberty Construction & Development Corporation never existed or that the experience letter submitted from that business failed to meet the regulatory requirements at 8 C.F.R. § 204.5(1)(3).<sup>3</sup> The director needs to explain her decision not to accept the

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<sup>2</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp.2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

<sup>3</sup> The regulation at 8 C.F.R. § 204.5(1)(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

evidence concerning the beneficiary's qualifications at Liberty Construction & Development Corporation and provide the petitioner with notice and opportunity to rebut her findings.

The AAO is concerned with the evidence submitted on appeal. The petitioner failed to present additional independent, probative, and relevant corroborative evidence of the beneficiary's employment at [REDACTED] Associates/Architects, Engineers, Builders. While the letter submitted on appeal meets most of the regulatory requirements at 8 C.F.R. § 204.5(l)(3) on its face, the beneficiary raised suspicions concerning the authenticity of the factual assertions and supporting evidence at his adjustment of status to lawful permanent resident interview resulting in an overseas investigation. The director properly gave the petitioner notice of the adverse findings from the overseas investigation.

The petitioner merely provided a letter from Jacinto Mendoza that asserts facts without corroboration. There is no evidence when [REDACTED] Architects, Engineers, Builders relocated the business and no explanation provided as to why the beneficiary could not provide evidence from [REDACTED] Architects, Engineers, Builders at his adjustment of status to lawful permanent resident interview but could after a revocation was issued. There was no explanation about why city officials and long terms residents of Malolos, Bulacan did not know of [REDACTED] Architects, Engineers, Builders and why the business yellow pages did not contain a listing for it. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petition is remanded to the director to evaluate the evidence of employment experience at Liberty Construction & Development Corporation, determining if it was in fact *ever* in existence and why the director will or will not accept the letter of experience contained in the record of proceeding. Additionally, the director will examine the evidence submitted by the petitioner in response to the director's NOIR and undertake any procedural mechanisms available to the director's office to investigate and evaluate the claim that [REDACTED] Architects, Engineers, Builders simply moved its business location.

In view of the foregoing, the previous decisions of the director and the AAO will be withdrawn. The petition is remanded to the director for consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision<sup>4</sup>.

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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.

<sup>4</sup> The director is advised that if a determination of fraud is made, the director is entitled to invalidate the underlying labor certification application pursuant to 8 U.S.C. § 1182(a)(6)(C) and 20 C.F.R. §§ 656.30(d) and 656.31(d).

**ORDER:** The AAO's decision dated July 22, 2002 is withdrawn and replaced with the foregoing. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.