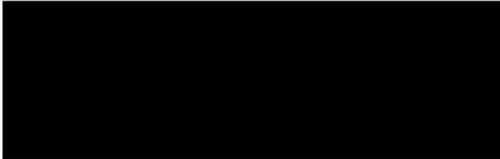


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



B6

Date: APR 22 2011

Office: [Redacted]

FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as an Other Worker pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, [REDACTED] Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a meat and food store. It seeks to employ the beneficiary permanently in the United States as a butcher. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the labor certification did not support the visa category that the petitioner requested and that the petitioner did not submit evidence that the beneficiary had the required amount of experience as of the priority date. The director denied the petition accordingly.

The record shows that the appeal is properly filed, 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.

As set forth in the director's July 21, 2009 denial, the issues in this case are whether the petition was filed under the correct category as the labor certification requires four years of experience, however, the petition was filed as one for an "other worker" instead of for a "skilled worker," and whether the petitioner documented that the beneficiary had the requisite experience for the position offered as of the priority date.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor (requiring less than two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. 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 AAO maintains plenary power to review each appeal on a de novo basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

Here, the Form I-140 was filed on October 26, 2007. On Part 2.g. of the Form I-140, the petitioner indicated that it was filing the petition for an other worker.

¹ 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).

The regulation at 8 C.F.R. § 204.5(i) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the labor certification indicates that four years of experience as a butcher is required for the proffered position. However, the petitioner requested the other worker classification on the Form I-140, which requires less than two years of experience. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. On appeal, counsel states that the Form I-140 does not include the classification for laborers requiring at least 2 years experience and that such a failure in the form resulted in choosing the incorrect category. Part 2.e. of the Form I-140, at the time of filing, is the classification for "A professional (at a minimum, possessing a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree) or a skilled worker (requiring at least two years of specialized training or experience)."² The language on the Form I-140 is clear. As the I-140 petition is not supported by a labor certification for an other worker, the petition remains denied on this basis.

Regarding the beneficiary's qualifications for the position, the regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies that:

(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.

The Form ETA 750A requires four years of experience before the April 30, 2001 priority date as a butcher. 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. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). On the Form ETA 750B, the beneficiary stated that he began working for the petitioner in July 2000 as a butcher and worked for [REDACTED] in [REDACTED] as a butcher from March 1997 to April 2000. The beneficiary submitted an amendment to the Form ETA 750B that stated that he worked for the petitioner from May 1998 to the present (the amendment was signed November 5, 2006). The petitioner submitted a letter from [REDACTED] its president, stating that the beneficiary "was employed steadily by the company from July 2000 till April 2003 as Butcher." With the initial filing, the petitioner submitted a letter from [REDACTED] stating that she was a shopper at [REDACTED] and that she saw the beneficiary working there from 1997 to 2000, no exact months of start or end of employment were stated. On appeal, the petitioner submitted a letter from [REDACTED] proprietor of [REDACTED], stating that

² Form I-140 has subsequently been revised and includes a separate box, 2.f., for skilled workers.

the beneficiary worked for the store as a butcher from January 1997 to October 2000. The dates of the beneficiary's employment are in conflict. The petitioner submitted evidence that the beneficiary worked in [REDACTED] for [REDACTED] (from 1997 to 2000) and at the same time was working for the petitioner in the United States. The ETA 750B amendment signed by the beneficiary claimed that he began his employment with the petitioner in 1998.³ "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." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). "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." *Id.* at 591.

The letter from [REDACTED] conflicts with the beneficiary's "amended" Form ETA 750B start date in 1998, as well as with the letter from the petitioner which states that he began working in July 2000 and the beneficiary's listed I-140 entry date of May 2000. Without resolution of the conflicting dates, supported by independent, objective evidence such as evidence of pay or records of employment from the proper [REDACTED] none of the letters will be accepted as evidence of the beneficiary's prior employment.⁴ As noted above, "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." *Matter of Ho*, 19 I&N Dec. at 591-592. "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." *Id.* at 591.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 appeal is dismissed.

³ Additionally, we note that Form I-140 states the beneficiary's date of arrival in the United States as May 2000.

⁴ It should be noted that willful misrepresentation of a material fact in these proceedings may render a beneficiary inadmissible to the United States. *See* INA Section 212(a)(6)(c), [8 U.S.C. 1182], regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."