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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



FILE:



Office: TEXAS SERVICE CENTER

Date: **FEB 09 2011**

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:

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 of the Texas Service Center certified a decision revoking the approval of the instant petition, and the Administrative Appeals Office (AAO) affirmed that decision revoking the approval. The matter is before the AAO on a motion to reopen and reconsider. The motion will be denied. The appeal will remain dismissed. The AAO's May 21, 2007 decision will be affirmed.

The petitioner is an individual investor. He seeks to employ the beneficiary permanently in the United States as a clerical assistant. As required by statute, a Form ETA 750,<sup>1</sup> Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. After initially approving the petition, the director revoked the decision's approval under Section 205 of the Act, 8 U.S.C. § 1155, and certified that decision to the AAO. The AAO affirmed the director's decision to revoke the petition's approval for the reasons stated in his decision as the petitioner failed to establish that the beneficiary had the requisite experience specified on the Form ETA 750. The petitioner filed a timely motion to reopen and reconsider of the AAO's decision.

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.

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.

8 C.F.R. § 103.5(a)(2) states the requirements for a motion to reopen which include that new evidence be submitted. 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). The regulation at 8 C.F.R. § 103.5(a)(3) requires motions to reconsider to 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 United States Citizenship and Immigration Services policy. A motion to reconsider a decision on an application or petition must, when filed, also 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). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The motion does not meet the standards for a motion to reopen. The only evidence included with the petitioner's motion is a "resubmission" of the beneficiary's Workbook with a confirmation of translation. By counsel's characterization, this is not new evidence, but is a second copy of evidence already in the record. In addition, as stated in the AAO's original decision, counsel's submission of the beneficiary's entire Workbook was submitted for the first time on appeal instead of in response

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<sup>1</sup> After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

to the director's Notice of Intent to Revoke which was issued for just such information.<sup>2</sup> As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The AAO applied *Matter of Soriano* barring the newly submitted entire workbook. Counsel claims that the workbook was not previously sent in its entirety as it was not viewed as relevant. As the director's NOIR sought to obtain information to resolve the discrepancies in the beneficiary's experience, it is unclear how the workbook would not have been viewed as relevant. While counsel states that the AAO's "decision places Workbook, and for first time, translations at issue," this is as a result of counsel's failure to submit the workbook in its entirety with the requisite translation to the director in response to the NOIR.<sup>3</sup> As a result, only counsel's statements and the beneficiary's representations form the basis of the motion to reconsider. Further, the petitioner's argument concerning the dates of the beneficiary's employment is the same in the motion to reopen and reconsider as its argument on initial appeal and therefore does not present new facts. As the motion fails to state new facts to be proved in the reopened proceeding regarding accepted evidence, the motion does not qualify as a motion to reopen.

In support of the motion to reconsider, counsel argues that the director and the AAO incorrectly concluded that the evidence regarding the beneficiary's dates of employment and duties of employment did not demonstrate that the beneficiary had the requisite amount of experience required by the terms of the Form ETA 750.

The motion does not meet the standards for a motion to reconsider. A motion to reconsider must establish that the decision was wrong based on the evidence in the record at the time. The petitioner argues that the AAO misapplied the law and thus the motion qualifies as a motion to reconsider. As stated in AAO's original decision, the petitioner's argument that it was harmed by ineffective

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<sup>2</sup> As noted in the AAO's May 21, 2007 decision, only two pages of the workbook were submitted in response to the director's NOIR.

<sup>3</sup> As noted in the AAO's May 21, 2007 decision with respect to the workbook submission:

With regard to the NOIR, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's NOIR. *Id.* Thus, the AAO does not accept the submission of the beneficiary's entire work book at this point in these proceedings.

counsel who incorrectly supplied dates of the beneficiary's previous employment on the Form ETA 750 does not clear the discrepancy between the letters submitted to verify the beneficiary's employment.<sup>4</sup>

The petitioner has not adequately resolved the inconsistencies in the evidence to show that the workbook pages accurately reflect the beneficiary's previous experience as opposed to the letters in the record and the information on the ETA 750. 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). Additionally, "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.* Counsel also argues that the preponderance of the evidence establishes the beneficiary's qualifications. The preponderance of the evidence would not establish that the beneficiary has the required experience for the position where the four experience letters submitted contain conflicting dates and job duties as set forth at length in the AAO's prior decision. As such, we find no reason to amend or retract the AAO's original decision and affirm our decision of May 21, 2007.

In addition, the motion shall be dismissed for failing to meet one other applicable requirement. 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." The motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C) regarding judicial proceedings and, therefore, the submission is not in accordance with the regulations.

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<sup>4</sup> As noted in the AAO's prior decision, regarding the first three letters of work verification, two state the beneficiary's employment period as March 1995 to April 1998, while the third letter stated an employment period of June 1995 to April 1998. These first three letters are in conflict with the final letter of work verification, which states the experience as July 1985 to June 1993, as the first three letters stated the beneficiary worked for the beneficiary's prior employer [REDACTED] for three years from 1995 to 1998.

Additionally, the AAO decision noted:

It is further noted that the period of times the beneficiary worked for [REDACTED] changed significantly following the director's description of the results of the consular investigation in Brazil. Only after the consular investigation stated that the human resources personnel in Brazil identified the beneficiary's period of employment as being from 1985 to 1993 did the petitioner, through current counsel, obtain a fourth letter of work verification that indicated the beneficiary worked for [REDACTED] for eight years rather than three, and from 1985 to 1993, rather than from 1985 to 1998 [or 1995 to 1998].

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 motion to reopen and reconsider is denied. The appeal remains dismissed. The AAO's May 21, 2007 decision is affirmed.