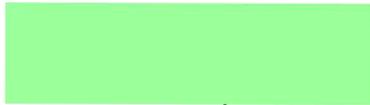




U.S. Citizenship  
and Immigration  
Services

(b)(6)

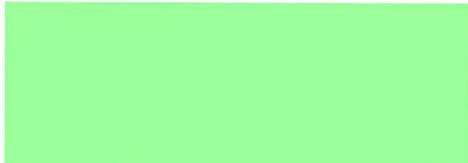


Date: **MAR 15 2012** Office: NEBRASKA SERVICE CENTER FILE:

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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as an retail manager/supervisor as a skilled worker pursuant to Section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). As required by statute, the petition is accompanied by a Form ETA 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL). The director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum experience stated on the labor certification. The director denied the petition on November 18, 2008.

The record shows that the appeal is properly filed 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.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Section 203(b)(3)(A)(i) of 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.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. See *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The priority date of the petition is November 14, 2005, which is the date the labor certification was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d). The Immigrant Petition for Alien Worker (Form I-140) was filed on April 12, 2007.

The labor certification requires two years of experience in the job offered. During the adjudication of the petition, the director issued a Request for Evidence (RFE), instructing the petitioner to the submit evidence of the beneficiary's qualifying experience for the offered position. The petitioner submitted a letter stating that it had employed the beneficiary in the job offered since July 2004. This letter failed to establish that the beneficiary possessed two years of qualifying experience by the November 14, 2005 priority date. The director denied the petition accordingly.

On appeal, the petitioner provided an employment experience letter from [REDACTED] in [REDACTED] Mexico, dated December 9, 2008, and signed by [REDACTED]. The letter is dated after the director's denial and indicates the beneficiary was employed as a supervisor, baker and pastry cook from January 1, 1995 to March 1, 1997.

The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). 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 request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

Even if the AAO accepted the experience letter, the appeal would still be dismissed. The experience letter states that the beneficiary was employed from January 1, 1995 to March 1, 1997. The record includes the beneficiary's birth certificate, which states his date of birth as June 5, 1977. The record also contains the beneficiary's high school transcripts, which state that he attended high school in [REDACTED] Mexico for three years, ending in July 1997. Therefore, the beneficiary claims to have supervised a bakery on a full time basis, to have been responsible for managing the operation, scheduling the staff, coordinating sales and formulating prices at the age of 17, and earning a salary of \$500 (pesos) per week while simultaneously attending high school. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The petitioner also failed to resolve the inconsistencies between the initially submitted Form G-325A (which stated that the beneficiary was living in Mexico yet working for the petitioner in Pennsylvania at the time the petition was filed) and the Form G-325A submitted following the issuance of the director's RFE (which stated that the beneficiary had been living in the United States since at least December 2002). The original Form G-325A stated the beneficiary began work with the petitioner in January 1995 to the present, while the revised form indicated he worked at [REDACTED] in Mexico from January 1995 to March 1997, during the period he was attending high school full time. Counsel for the petitioner noted in his response letter that these inconsistencies were due to typographical errors. This is an insufficient explanation and does not constitute independent objective evidence that explains or reconciles the inconsistencies in the record. *See Id.*

The AAO concurs with the director's decision. The petitioner failed to establish that the beneficiary possessed the two years of experience in the job offered by the priority date as required by the terms of the labor certification.

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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 met that burden.

**ORDER:** The appeal is dismissed.