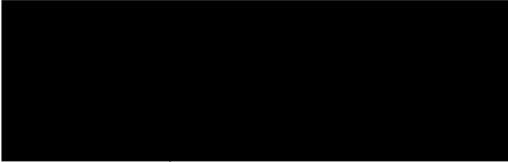


U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

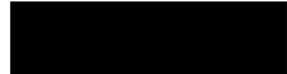


B6

DATE: OCT 17 2012

OFFICE: TEXAS SERVICE CENTER

FILE:



IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as an Other, Unskilled 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 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,

Perry Rhew

Chief, Administrative Appeals Office

**DISCUSSION:** The immigrant visa petition was denied, and the labor certification invalidated, by the Director, Texas Service Center (Director). The Director certified the decision for review to the Chief, Administrative Appeals Office (AAO), who affirmed the Director's decision. The case is now before the AAO on a motion to reconsider. The motion will be granted, and the invalidation of the labor certification will be rescinded. However, the AAO will affirm its dismissal of the appeal, and denial of the petition, on all of the other grounds stated in its prior decision.

The petitioner is a meat processing company. As indicated on the petition (Form I-140), filed on December 13, 2007, it seeks to employ the beneficiary permanently in the United States as a Hallal food processor and to classify her as an "other worker" pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). Under this statutory provision immigrant classification may be granted to:

Other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States."

As required by statute, the petition was accompanied by a labor certification application (Form ETA 750, Application for Alien Employment Certification), which was filed at the Department of Labor (DOL) on May 2, 2001, and certified by the DOL on October 30, 2007.

By decision dated October 2, 2008, the Director denied the petition on three grounds: (1) the failure of the petitioner's president to disclose his familial relationship with the beneficiary during the labor certification process, which the Director found to be a willful misrepresentation of a material fact, called into question the actual availability of the proffered position to other qualified applicants, and warranted the invalidation of the labor certification; (2) the petitioner's failure to establish its ability to pay the proffered wage to the beneficiary; and (3) the petitioner's failure to establish that the beneficiary fulfilled the labor certification requirement of two years experience in the job offered. Finding that "[t]he issues surrounding invalidation of the supporting labor certification are unique," the Director certified his decision to the AAO.

In a decision dated November 14, 2011, the AAO affirmed the Director's decision, including the invalidation of the labor certification, on the following grounds:

- (1) The petitioner did not establish that a *bona fide* job offer was available to U.S. workers because it failed to disclose the familial relationship of its president and the beneficiary to the DOL during the labor certification process.
- (2) The petitioner failed to establish its continuing ability to pay the proffered wage from the priority date (May 2, 2001) up to the present.
- (3) The petitioner has not established that the beneficiary had the requisite two years of experience in the "job offered" at the time the labor certification application was filed in May 2001.

- (4) The petition is not accompanied by a labor certification that is valid for the proffered position because (a) the weekly hours stated in the petition do not match those prescribed in the labor certification, and (b) the work experience requirement of the petition does not match that of the labor certification.

The petitioner filed a timely motion to reconsider the AAO's decision. The requirements for a motion to reconsider are set forth at 8 C.F.R. § 103.5(a)(3):

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 United States Citizenship and Immigration Services (USCIS) 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.

The petitioner's motion meets these regulatory requirements, and will be considered by the AAO. The motion focuses almost exclusively on the first ground for denial in the AAO's decision – specifically, the issues of whether there was a *bona fide* job offer, whether the petitioner engaged in willful misrepresentation regarding the familial relationship of the petitioner's president and the beneficiary during the labor certification process with the DOL, and whether knowledge of that familial relationship would have affected the approval of the labor certification application by the DOL (*i.e.*, whether the relationship was a material fact). Based on the law and the facts presented in the petitioner's motion, the AAO is persuaded that no willful misrepresentation was committed by the petitioner during the labor certification process.

However, as fully explained in the AAO's prior decision of November 14, 2011, the petitioner has not established that a *bona fide* job offer ever existed that was open to all U.S. citizens. This conclusion has not been overcome on motion. The fact remains that there is a familial relationship between the petitioner's president and the beneficiary which was not disclosed to the DOL. In the AAO's view, it is unlikely that the job opportunity at issue in this proceeding was open to qualified U.S. workers.

Accordingly, the AAO will withdraw that part of its decision that affirmed the Director's invalidation of the certified Form ETA 750 due to willful misrepresentation of a material fact.

The petitioner's motion to reconsider, however, does not address all the other grounds for denial in the AAO's decision. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of the evidence that the beneficiary is fully qualified for the benefit sought. *See Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Since the motion to reconsider does not cover all the issues, it is substantively insufficient to overturn the denial of the petition.

**Conclusion**

Based on the analysis in its initial decision dated November 14, 2011, the AAO determines that the instant petition is deniable on the following grounds:

- (1) The petitioner has not established that a *bona fide* job offer was available to U.S. workers because it failed to disclose the familial relationship of its president and the beneficiary to the DOL during the labor certification process.
- (2) The petitioner has not established its continuing ability to pay the proffered wage from the priority date (May 2, 2001) up to the present.
- (3) The petitioner has not established that the beneficiary had two years of experience in the "job offered" – as required on the Form ETA 750 – at the time the labor certification application was filed in May 2001.
- (4) The petition was not accompanied by a labor certification that is valid for the proffered position because --
  - a. the weekly hours stated in the petition (40) did not match the weekly hours prescribed in the labor certification (50, including 40 hours of basic time and 10 hours of overtime), and
  - b. the work experience requirement of the petition (less than two years of training or experience) did not match the work experience requirement of the labor certification (at least two years of experience in the job offered).

For all of these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. Accordingly, the petition will be denied.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The invalidation of the labor certification is rescinded. The AAO affirms its denial of the petition, however, based on the grounds set forth in its decision of November 14, 2011, and reiterated above.