



**U.S. Citizenship
and Immigration
Services**

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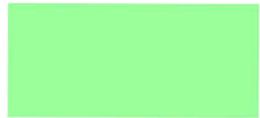


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Office: NEBRASKA SERVICE CENTER

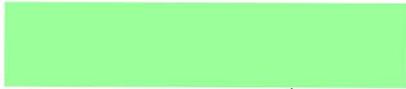
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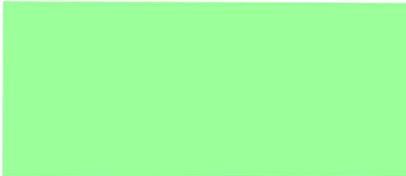
Petitioner:

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 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a construction supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary had the required experience by the priority date of the visa petition. The director also determined that the petitioner had not demonstrated its ability to pay the proffered wage. The director denied the petition accordingly.

On April 13, 2010, the AAO dismissed the subsequent appeal, holding that the petitioner had established the ability to pay the proffered wage from the priority date onwards but finding that the petitioner failed to demonstrate that the beneficiary had the qualifications as required by the terms of the labor certification. The petitioner then filed a motion to reopen and reconsider the AAO decision. The record shows that the motions are properly filed and timely and makes a specific allegation of error in law or fact. A motion to reopen must provide new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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. 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).

Here, we will accept the motions to reopen and reconsider the matter based on the letter submitted by the petitioner to verify the beneficiary's experience. Thus, the instant motions are granted. 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.

Regarding whether the petitioner documented that the beneficiary had the required experience, the regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a skilled worker 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

(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 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.

The regulations for the skilled worker classification contain a minimum requirement that the position require at least two years training or experience. The ETA Form 750 requires two years of experience as a construction supervisor or in the related occupation of construction worker. The previous AAO decision considered a letter from the petitioner's President, [REDACTED] stating that the beneficiary worked as a construction supervisor from April 27, 2001 to the date of the letter, September 7, 2007. Because the letter only established three days of experience prior to the April 30, 2001 priority date, the AAO decision held that the petitioner did not establish that the beneficiary had the experience required by the terms of the labor certification.

With its motion, the petitioner submitted a second letter from [REDACTED] dated May 7, 2010 stating that the beneficiary worked from 1998 through April 27, 2001 with the petitioner as a construction worker. On the Form ETA 750B, the beneficiary represented that he worked for [REDACTED] from August 1998 through December 2000 "developing land for housing development and industrial developments. Building rock walls, planting with irrigation and maintenance. Use of backhoe, lasers, concrete mixers, and pavers." On the beneficiary's Form G-325A filed with the Form I-485 Application to Adjust Status or Register Permanent Residence, and signed by the beneficiary on December 18, 2006, he stated that he worked for the petitioner as a construction supervisor from August 1998 to the date of signing in 2006. The beneficiary's claimed employment on the different forms conflict, as he could not have been employed in a full-time capacity for both [REDACTED] from August 1998 to December 2000 and the petitioner from August 1998 onward.¹ In addition, the job title listed by the beneficiary on the Form G-325 differs from the job title of construction worker listed on the May 2010 employment verification letter. Lastly, the job description on the Form ETA 750B does not seem to be for the job in question of construction worker as opposed to a landscaper or groundskeeper. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* Because of the discrepancies in the record regarding the evidence submitted by the petitioner, we cannot conclude

¹ Although the names of the different claimed employers are similar, the names are not the same and the addresses listed for the companies are different. As a result, we cannot conclude that the employers listed are the same and, instead, a discrepancy exists as to which company, if either, actually employed the beneficiary during the claimed time.

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that the beneficiary has the two years of experience as a construction worker required by the terms of the labor certification. As a result, the petition shall remain denied.

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 motions to reopen and reconsider are granted and the decision of the AAO dated April 13, 2010 is affirmed. The petition remains denied.