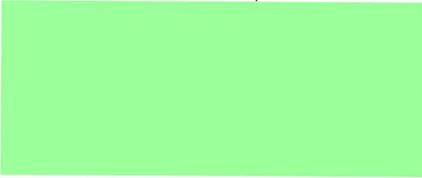


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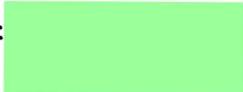
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

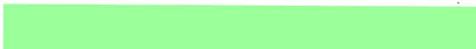


U.S. Citizenship
and Immigration
Services



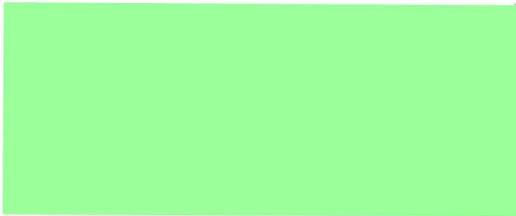
DATE: **FEB 19 2013**

Office: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner: 
 Beneficiary: 

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

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.

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a parking garage. It seeks to employ the beneficiary permanently in the United States as a parking supervisor. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director concluded that the petitioner had failed to demonstrate that the beneficiary possessed the requisite qualifying experience as of the visa priority date, and denied the petition accordingly.¹

On appeal, current counsel submits additional evidence and maintains that the petitioner has demonstrated that the petition merits approval.

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 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 regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(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 or the experience of the alien.

(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.

¹ The director also noted that the petitioner had answered “no” to question 6 of Part 4 of the Immigrant Petition for Alien Worker (Form I-140), in which it asks whether any immigrant petition had ever been filed by or on behalf of the beneficiary. In fact, two previous Form I-140 petitions had been filed on behalf of the beneficiary by two different employers.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. Part of this obligation includes demonstrating that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date of the ETA Form 9089 is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA 9089 was accepted for processing on August 29, 2009, which establishes the priority date.

Pertinent to this proceeding, the labor certification requires completion of a high school education and 24 months of work experience in the job offered as a parking supervisor. It is noted that on Part K of the ETA Form 9089, the instructions direct that all jobs held by the alien in the past three (3) years be listed along with any other experience that qualifies the alien for the job opportunity for which the employer seeks certification. Two jobs are listed. From February 1, 2001 to March 31, 2004, the beneficiary claims to have worked as a parking supervisor for [REDACTED]. From April 1, 2004 to August 29, 2009, the beneficiary claims to have worked for the petitioner as a parking supervisor. The ETA Form 9089 was signed under penalty of perjury by the beneficiary and by the petitioner's chief executive officer on April 13, 2010.

The instant Form I-140 was filed on May 17, 2010. It is not signed by a preparer on Part 9, but was submitted by the beneficiary's former counsel. The record indicates that the beneficiary has employed three attorneys in the current proceeding and has used two different attorneys, respectively, in the two previously filed Form I-140s. For clarity, the beneficiary's first counsel in this Form I-140 proceeding will be designated as counsel "A." The record indicates that counsel A submitted the Form I-140, the ETA Form 9089, a copy of the beneficiary's birth certificate, educational credentials, and an undated employment verification letter from [REDACTED] signed by [REDACTED] as head supervisor. The letter describes the beneficiary's duties and states that the beneficiary worked as a parking supervisor for this firm from February 2001 to March 2004.

The director issued a Notice of Intent to Deny (NOID) on August 2, 2010, indicating that based on documents contained in the record, the beneficiary's employment history claimed in the current proceeding was inconsistent with his previous statements in other petitions. The director's concerns included:

- A. On a Form G-325A, Biographic Information form signed by the beneficiary and submitted with his Application for to Register Permanent Residence or Adjust Status (Form I-485), which was filed on August 1, 2007, the beneficiary listed only one prior job for [REDACTED] in New York, New York, where he claims to have worked as a cook from December 1995 to 1998. The director noted that no claim of employment at [REDACTED] was included on

this 2007 document. It is further noted that no claim of employment for the petitioner is included on this document.

- B. On Part B of a labor certification (Form ETA 750) submitted in support of a prior Form I-140 filed by [redacted] on behalf of the beneficiary in October 2001, the beneficiary claimed to have worked as a cook for [redacted] from October 2000 to the present. The beneficiary signed this Form ETA 750 under penalty of perjury on December 8, 2000. He also states that he worked at "odd jobs" as a parking attendant from December 1998 to October 2000 and that he worked as a cook for [redacted] in New York, New York from December 1995 to December 1998. The director noted that none of these jobs were included on the G-325A and that the claim of employment with [redacted] from December 1995 to December 1998 directly conflicted with the same period of employment with the [redacted] as stated in the G-325A.

The beneficiary's second counsel (herein designated as "counsel B") in this present I-140 proceeding responded to the director's NOID. Counsel B asserted that the ineffective assistance of both counsel A in this proceeding and previous counsel representing another prior filing by, [redacted] d/b/a/ [redacted] in a Form I-140 filed on June 18, 2007, on behalf of the beneficiary, was responsible for the incorrect information submitted about the beneficiary's employment history. Counsel B submitted an affidavit from the beneficiary in support of this contention, as well as a new G-325A signed by the beneficiary on August 31, 2010 that is supposed to represent the beneficiary's actual employment history. The beneficiary also states in his affidavit that he was not fluent in English when he retained the attorney who represented him and the petitioner in the filing of the 2007 Form I-140, but that he supports this August 31, 2010, G-325A. On this document, the beneficiary claims the following employment:

Date	Employer	Job
11/2004 to present	the petitioner	manager supervisor
2/2001 to 3/2004	[redacted]	parking supervisor
10/2000 to 1/2001	[redacted]	cook
12/1998 to 10/2000	odd jobs	parking attendant
12/1995 to 12/1998	[redacted]	cook

The director denied the petition on November 10, 2010, finding that the petitioner had failed to establish the beneficiary's claimed qualifying two years of experience in the job offered of parking supervisor. He observed that the beneficiary claimed employment with [redacted], but had provided no W-2s for 2001 through 2004 to support this claim. The director noted the previous 2007 G-325A, as discussed above, was inconsistent with the claim of employment at [redacted] as it had omitted any mention of this job. The director further noted that the beneficiary's previous claim of employment at [redacted] from December 1995 to December 1998 also conflicted

[REDACTED]

with the beneficiary's claim of employment at [REDACTED] during the same time. The director's decision reflects the doubts raised when the petitioner's response to the director's NOID did not include independent corroborative evidence of the beneficiary's employment at [REDACTED] during the period claimed.

On appeal, current counsel (herein designated as "counsel C") submits another G-325A, dated April 16, 2011, and signed by the beneficiary. This time, the beneficiary claims the following employment:

Date	Employer	Job
11/2004 to present	the petitioner	parking garage mgr/supervisor
10/2003 to 10/2004	[REDACTED]	parking garage mgr/supervisor
2/2001 to 2/2004	[REDACTED]	parking garage mgr/supervisor
2/2001 to 10/2001	[REDACTED]	parking garage mgr/supervisor
10/2000 to 1/2001	[REDACTED]	cook

It is noted that on the G-325A signed by the beneficiary on April 16, 2011, the petitioner's address and [REDACTED]'s address are the same. The petitioner has submitted various copies of payroll records issued by a payroll company on behalf of some of these employers to an individual bearing the beneficiary's name but spelled slightly differently and using a social security number ending in [REDACTED]. It is noted that on the first Form I-140 filed in October 2001, the social security number listed for the beneficiary on Part 3 ends in a [REDACTED]. On Part 3 of the instant Form I-140, the beneficiary's social security number that is listed ends in [REDACTED]. It is also noted that there is no employer listed on the payroll records as [REDACTED] but rather as [REDACTED]. Current counsel has also submitted a letter, dated March 24, 2011, from [REDACTED] who states that he worked for [REDACTED]; and that the beneficiary was his supervisor from 1999 until he left in 2002. He describes the beneficiary's duties and states that the beneficiary worked full-time. It is noted that [REDACTED] is not the employer or trainer as required by 8 C.F.R. § 204.5(l)(3)(ii), and that the beneficiary's date of commencement of employment with [REDACTED] on Form G-325 is claimed to be 2001 and not 1999. These discrepancies raise doubt as to the veracity of the beneficiary's claims throughout the record. 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. 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).

Counsel acknowledges that the employer, [REDACTED] does not appear on this version of the beneficiary's employment history and offers speculation as to what if any relationship that firm may have to any of the firms listed above. It remains that the beneficiary has successively endorsed various documents with his signature signifying that the corresponding document represents his actual employment history and failing to offer any persuasive explanation other than it is the

attorney's misrepresentation and that he was somehow duped into affirming two labor certifications and three G-325A Biographic Information forms with inaccurate and conflicting information.

A labor certification is subject to invalidation by USCIS if it is determined that fraud or a willful misrepresentation of a material fact was made in the labor certification application. *See* 20 C.F.R. § 656.30(d) which states the following: "After issuance labor certifications are subject to invalidation by [USCIS] . . . upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application."²

Whether relevant to counsel A or B in this proceeding or the two different attorneys filing the 2001 and 2007 Form I-140s previously, the AAO notes that the beneficiary's failure to apprise himself of the contents of the paperwork or the information being submitted constitutes deliberate avoidance and does not absolve the beneficiary of responsibility for the content of his petition or the materials submitted in support. *See Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents). The law generally does not recognize deliberate avoidance as a defense to misrepresentation. *See Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005); *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993). To allow a beneficiary to absolve himself of responsibility by simply claiming that he had no knowledge or participation in a matter where he provided all the supporting documents and signed a blank document would have serious negative consequences for USCIS and the administration of the nation's immigration laws.

Additionally, with respect to current counsel's assertions as to the attorneys' malfeasance in the two earlier Form I-140's, it is noted that the record indicates that each of these attorneys has been affiliated with (but not proven) or has actually committed some malfeasance with other clients. For the beneficiary's claims that prior attorneys made substantive errors related to his employment history, it is noted that an appeal or motion based upon a claim of ineffective assistance of counsel requires:

² The underlying labor certification supporting this application may be invalidated pursuant to 20 C.F.R. § 656.30, which provides in pertinent part:

(d) After issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. . ." Further, it is noted that section 212(a)(6)(C)(i) of the Act provides that any "alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

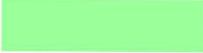
- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). In this case, there is no evidence that these requirements have been fulfilled.

In summary, the AAO cannot find counsel's assertions and the evidence submitted on appeal to be persuasive. To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, United States Citizenship and Immigration Services (USCIS) is bound to follow the pertinent regulatory guidelines pursuant to 203(b)(3)(A)(i) of the Act. USCIS jurisdiction includes the authority to examine an alien's qualifications for preference status and to investigate the petition under section 204(b) of the Act, 8 U.S.C. § 1154(b). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by the DOL. *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary v. Coomey*, 662 F.2d 1 (1st Cir. 1981); *Denver v. Tofu Co. v. INS*, 525 F. Supp. 254 (D. Colo. 1981); *Chi-FengChang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Dragon Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).

At this point, the AAO cannot find the beneficiary's successive affirmations of his employment history to be credible. For instance, his employment with [REDACTED] was claimed on the instant ETA Form 9089 but disclaimed on the most recent version of the beneficiary's G-325A and omitted on the previous 2007 G-325A. *See Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.)

It is noted that 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. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). This principle applies in this case, where there is evidence of unexplained inconsistencies that have not been sufficiently resolved. This office concurs with the



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director's assessment that the petitioner has not established that the beneficiary possessed the requisite work experience as of the priority date of August 29, 2009.

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.