



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JAN 11 2013**

OFFICE: NEBRASKA SERVICE CENTER

FILE: 

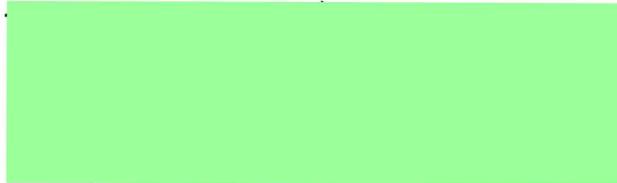
IN RE:

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 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 employment-based immigrant visa petition was originally approved by the Director, Nebraska Service Center (Director). The approval was subsequently revoked by the Director. The petitioner filed an appeal, which was dismissed by the Chief, Administrative Appeals Office (AAO). The petitioner filed a motion to reopen and reconsider, which is now before the AAO. The motion will be dismissed.

The petitioner is an office building and industrial cleaning business. It seeks to employ the beneficiary permanently in the United States in a job it describes as "auto body and mechanic" and to classify him as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1153(b)(3)(A)(i).

The immigrant visa petition (Form I-140) was filed on January 6, 2003. As required by statute, the petition was accompanied by an Application for Alien Employment Certification, Form ETA 750, which was filed with the United States Department of Labor (DOL) on January 14, 1998, and certified by the DOL on May 1, 2001. The Director approved the petition on April 15, 2003.

On December 15, 2011, however, the Director issued a Notice of Intent to Revoke (NOIR). In this notice the Director referred to an investigation by the Chicago Field Office of U.S. Citizenship and Immigration Services (USCIS) in which the beneficiary's supervisor stated that the beneficiary was employed by the petitioner as a general machinist and that the company's business was primarily cleaning services. This information conflicted with that provided by the petitioner on the labor certification application and on the immigrant petition. As pointed out by the Director, on the Form ETA Form 750 as well as on the Form I-140 the proffered position is identified as "auto body and mechanic" and the "nature" or "type" of business run by the petitioner is described as "automobile repair services." In view of this conflicting information, the Director stated that "it appears that the approval of the petition should be revoked."¹

The petitioner responded to the NOIR with a letter from counsel, dated January 12, 2012, and an affidavit from the petitioner's former general manager, or operations manager, [REDACTED]. The affidavit from [REDACTED] dated January 11, 2012, stated that he was the petitioner's general manager overseeing business operations from 1998 to 2005, during which time the instant labor certification application and immigrant petition were filed on behalf of the beneficiary for the job of "auto body and mechanic." According to [REDACTED] the petitioner's line of business was "cleaning services," for which "a stable of vans, cars and transports" was maintained. [REDACTED] indicated that the beneficiary (whose employment with the petitioner

¹ The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The director's NOIR sufficiently detailed the evidence of the record, pointing out discrepancies in the record pertaining to the petitioner's line of business and the position offered to the beneficiary.

allegedly began in 1994) "was filling various roles at [REDACTED] during the time period when the labor certification application and immigrant petition were filed, and "was to transition to the full time Automobile Mechanic/Auto Body & Mechanic position" by the time his adjustment application (Form I-485) was approved. Counsel asserted that this affidavit from [REDACTED] proved that the job offer was valid and the original approval of the petition was not in error.

On April 3, 2012, the Director issued a decision revoking the approval of the petition. The Director reiterated the points he made in the NOIR that the labor certification and the immigrant petition both identified the proffered position as "auto body and mechanic" and both identified the petitioner's line of business as "automotive repair services." The Director also quoted the petitioner's description of the job duties on the labor certification, which reads as follows:

Straightens and aligns damaged auto chassis and frames to original specifications; restores original auto surface to original contours; prepares surface for painting; paints auto surface to match original colors; makes necessary mechanical repairs.

The Director recounted the Chicago Field Office's investigation, which featured an interview of the beneficiary's supervisor, [REDACTED] who stated that the petitioner was an "Office Building and Industrial Cleaning Service" and that the beneficiary worked for the petitioner as a general machinist. The Director reviewed the affidavit from [REDACTED] but determined that it "does not rehabilitate the inconsistencies already present in the record." The Director concluded that the job offered in the petition was different from the job described to the DOL, and revoked the approval of the petition.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security] may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the Director that the petition was approved in error may be good and sufficient cause for revoking the approval. *See Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner filed an appeal on April 20, 2012, followed by a brief from counsel and copies of documents already in the record. Counsel asserted that there was no "good and sufficient cause" to revoke the approval of the instant petition. While acknowledging that the petitioner is "primarily a cleaning service," not an automobile repair service as indicated on the labor certification and the immigrant petition, counsel called this inconsistency a "clerical error" and claimed that the company could nonetheless offer the beneficiary a job as "auto body and mechanic." Counsel objected that the beneficiary's supervisor was not personally identified by the Director in his NOIR or his revocation decision. Even if that person was [REDACTED], counsel contended, the affidavit of [REDACTED] submitted in response to the NOIR confirmed the petitioner's ultimate intention to employ the beneficiary in the position of "Automobile Mechanic/Auto Body and Mechanic." According to counsel, therefore, the petitioner had overcome the grounds for revocation and the approval of the petition should be reinstated.

By decision dated July 5, 2012, the AAO dismissed the petitioner's appeal.

The AAO stated that a labor certification for a specific job offer is valid only for the particular job opportunity and for the area of intended employment as indicated on the Form ETA 750. *See* 20 C.F.R. § 656.30(c)(2). In the instant proceeding, the Form ETA 750 specifically stated that the nature of the petitioner's business is "automobile repair services" (Part A, box 8) and that the job title is "auto body and mechanic" (Part A, box 9). Moreover, the job duties described in Part A, box 13 (quoted by the Director in his decision) were exclusively related to automobile service and repair. These descriptions of the petitioner's business and the beneficiary's proposed employment were mirrored in the subsequent immigrant petition. Neither the labor certification nor the immigrant petition made any mention of industrial cleaning, which is the petitioner's actual line of business and fundamentally different from automotive repair services. The petitioner did not provide a satisfactory explanation for this major discrepancy, and counsel's attempt to minimize it as a "clerical error" was unpersuasive.

The AAO noted that counsel was correct insofar as he asserted that what matters in this proceeding is not the job the beneficiary has been performing for the petitioner up to now (except as noted *infra*), but the job he would perform if and when the instant petition was approved and the beneficiary adjusted status to legal permanent resident. According to [REDACTED] that job would be the "automobile mechanic/auto body and mechanic" position identified in the labor certification and the petition. The evidence of record, however, did not adequately demonstrate that such a position existed, or will exist, for the beneficiary to fill. The petitioner's business is industrial cleaning. The only connection of motor vehicles to this business was the "stable of vans, cars and transports" allegedly utilized in the business, which [REDACTED] stated would be maintained and repaired by the beneficiary. There was no further description of these vehicles by [REDACTED] nor any documentary evidence of the number, types, and age of these vehicles, or the frequency of needed maintenance and repairs. Thus, the record did not demonstrate that there would be enough work generated in the proffered position to occupy the beneficiary in a full-time, 40-hour per week job, as described on the labor certification. Indeed, the record indicated that the beneficiary has been working for the petitioner since the 1990s, but always "filling various roles" (as described by [REDACTED] and never as a full-time auto mechanic or repairman. The AAO determined that the petitioner failed to establish that any such job opportunity has existed up to now, or will exist in the future.

Based on the evidence of record, the AAO determined that the petitioner did not intend to employ the beneficiary in a position that accords with the job described in the Form ETA 750. Since the petitioner did not establish its compliance with the terms of the labor certification, the AAO concluded that the instant petition should not have been approved. *See Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966).

The AAO also found that the the petition was deniable on two other grounds. Specifically, the record failed to establish that the beneficiary had three years of experience in the job offered, as required by the labor certification, and failed to establish the petitioner's continuing ability to pay the proffered wage from the priority date (January 14, 1998) up to the present. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir.

2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

With respect to the beneficiary's prior work experience, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) provides as follows:

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.

The AAO noted that two jobs were listed for the beneficiary on the Form ETA 750, the first with [REDACTED] in Poznan, Poland from 1979 to 1990, and the second with [REDACTED] in Glen Ellen, Illinois, from 1990 to the present (January 1998, when the labor certification application was filed). According to the labor certification, both of these jobs had the same title and the same job duties as the proffered position in this petition.

The petitioner had submitted photocopies of a Polish-language form letter signed by the president of [REDACTED] dated July 16, 1990, with an English translation, which stated that the beneficiary was employed from September 3, 1979 to July 15, 1990 in various positions including mechanic, body worker, painter foreman, and master workman. This listing of alleged positions at [REDACTED] over an 11-year period, however, did not describe the beneficiary's job duties in those various positions with any detail. In particular, it did not confirm that he was performing the specific duties indicated for that job on the Form ETA 750, which are the same as those of the proffered position in the instant petition. The AAO determined that the letter from [REDACTED] president did not conform with the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A), and did not establish that the beneficiary's employment by [REDACTED] constituted experience in the job offered.²

There was no employment letter at all from [REDACTED]. The AAO noted that the address for [REDACTED] was the same as that for [REDACTED] on the labor certification application in January 1998, but the petitioner had not explained its relationship, if any, to [REDACTED]. Moreover, the alleged employment of the beneficiary by [REDACTED] from 1990 to at least January 1998 conflicted with three other documents in the record. One was a letter from [REDACTED] the president of [REDACTED] in Chicago, Illinois, dated January 15, 1995, stating that [REDACTED] employed the beneficiary as a floor machine mechanic from November 30, 1991 to January 31, 1994. Work as a floor machine mechanic, the AAO noted, did not constitute experience in the job offered (Auto Body and Mechanic). The second conflicting document was a letter from the petitioner's [REDACTED], dated July 14, 2005, stating that the beneficiary had been working for the petitioner since September 1994. Though the job duties described in this letter were the same as those of the proffered position – i.e., the duties of an "Auto Body and Mechanic" – [REDACTED] subsequent

² The AAO also noted that the beneficiary's alleged employment in Poland was not revealed on a Form G-325A signed by the beneficiary and dated December 31, 2002, despite a specific direction on that form to identify his "last occupation abroad" on the line indicated.

affidavit of January 11, 2012 described the beneficiary's duties differently – specifically, as "filling various roles" that were not strictly in the realm of auto servicing and repairs. The third conflicting document was the Form G-325A dated December 31, 2002, on which the beneficiary stated that he had been "self-employed" for the last five years (*i.e.*, back to December 1997). According to the Form ETA 750 in 1998, however, the beneficiary was working for [REDACTED] in early 1998, and according to [REDACTED] in 2005 the beneficiary had been working for the petitioner since 1994.

Based on the foregoing analysis and the myriad inconsistencies in the record, the AAO concluded that the petitioner failed to establish that the beneficiary had three years of experience in the job offered as of January 14, 1998, the priority date of the instant petition. Therefore, the beneficiary did not meet the experience requirement on the labor certification to qualify for the proffered position.

As for the petitioner's ability to pay the proffered wage, the regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

In this case, the labor certification stated that the proffered wage of the "auto body and mechanic" position was \$18.36 per hour, which amounted to \$38,188.80 per year (based on a 2,080 hour work year).

The only evidence in the record of the petitioner's ability to pay the proffered wage was (1) an undated statement on the letterhead of [REDACTED], signed by its "operation manager" [REDACTED] and submitted with the labor certification application in January 1998, that "[w]e employ more than 100 employees, and we hereby certify that we are able to meet payroll when due," and (2) a statement dated April 8, 2003 and signed by [REDACTED] who identified himself as "Independent CPA for [REDACTED]" stating that "our firm is willing to verify that [the petitioner] has more than 100 employees working for the firm." Neither of these two statements comported with the regulatory requirements of 8 C.F.R. § 204.5(g)(2) since they were not from "a financial officer" of the petitioner and the second statement did not even refer to the petitioner's ability to pay the proffered wage. Nor did the record include any other documentation of the petitioner's ability to pay the proffered wage, such as annual reports, federal tax returns, or audited financial statements from 1998 onward, as called for in the regulation, or payment records issued by

the petitioner to the beneficiary, such as Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income.

Thus, the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date (January 14, 1998) up to the present.

In accordance with the foregoing analysis, the AAO determined that the petition was deniable on three grounds:

- The petitioner did not establish that it intends to employ the beneficiary in a position that accords with the job described in the Form ETA 750.
- The petitioner failed to establish that the beneficiary had three years of experience in the job offered as of the priority date, as required on the labor certification to qualify for the proffered position.
- The petitioner failed to establish its continuing ability to pay the proffered wage from the priority date up to the present.

Based on these determinations the AAO affirmed the Director's decision of April 3, 2012, revoking the approval of the petition.

On August 6, 2012, the petitioner filed a motion to reopen and reconsider, along with a brief from counsel and accompanying documentation, most of which was already in the record. The only new documents submitted with the motion are an affidavit from the beneficiary, dated August 1, 2012, a "professional evaluation" from [REDACTED] attesting to the beneficiary's employment from 1979 to 1990, and Forms 1099-MISC, Miscellaneous Income, issued to the beneficiary by the petitioner for 1995 and each of the years 1997-2007.

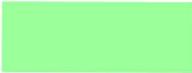
The requirements for a motion to reopen are set forth in the regulation at 8 C.F.R. § 103.5(a)(2):

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

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 [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.

As further provided in 8 C.F.R. § 103.5(a)(4), "[a] motion that does not meet applicable requirements shall be dismissed."



In his brief counsel asserts that the description of the petitioner's business as "automobile repair services" instead of the factually correct "industrial cleaning services" was an "unfortunate error" in which the beneficiary, as alleged in his affidavit, had no part. Counsel refers once again to the affidavit of [REDACTED] the petitioner's general manager, who claimed that the petitioner had a fleet of vehicles which were to be serviced by the beneficiary as an "in-house" auto mechanic. According to [REDACTED] the beneficiary was to transition from "filling various roles" to the "full time Automobile Mechanic/Auto Body & Mechanic position" by the time his application for adjustment of status (Form I-485) was approved. However, the record still contains no documentation to demonstrate the current existence or future likelihood of a fleet of vehicles that would turn the beneficiary's job into that of a full-time auto and body mechanic. In its prior decision the AAO mentioned the types of documentation that could help to establish this element of the petition, but no such evidence has been submitted.

Nor has the petitioner resolved the conflicting evidence of the petitioner's prior work experience. While one additional document has been submitted relating to the beneficiary's alleged experience with [REDACTED] (in Poland) from 1979 to 1990, it has the same deficiency as the previously submitted document in its imprecise description of the beneficiary's job duties, and its failure to explain the need for a full-time auto mechanic in a "trade and service" company. Moreover, the conflicting evidence of the beneficiary's experience in the United States from 1990 onward, discussed in the AAO's prior decision, has not been resolved. The Forms 1099-MISC for the years 1995 and 1997-2007 show that the beneficiary worked for the petitioner as an independent contractor during those years. According to the petitioner, the beneficiary was employed full-time. This information conflicts with the petitioner's statement on the Form ETA 750 that the beneficiary worked full-time for [REDACTED] from 1990 to at least 1998. The petitioner has still not explained its relationship, if any, to [REDACTED]. Nor has the petitioner explained how the beneficiary could have worked at both [REDACTED] and [REDACTED] full-time (40 hours per week at each) in the years 1991 to 1994.

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. at 591-92. Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *Id.*

As for the petitioner's ability to pay the proffered wage from the priority date up to the present, the substantive deficiencies of the letters from the petitioner's "operation manager" and CPA have not been remedied on motion. Nor has the petitioner submitted any of the evidence listed in the regulation at 8 C.F.R. § 204.5(g)(2) – in particular, copies of its annual reports, or federal tax returns, or audited financial statements – for any of the years from 1998 onward. The only evidence submitted in support of the motion are the Forms 1099-MISC, which record the following "nonemployee compensation" from the petitioner to the beneficiary:

1995	\$22,825.87
1997	\$25,634.00

1998	\$24,189.80
1999	\$21,455.00
2000	\$29,490.00
2001	\$19,970.00
2002	\$23,756.00
2003	\$21,856.00
2004	\$27,586.39
2005	\$27,825.00
2006	\$29,680.01
2007	\$24,605.09

These yearly figures were all far below the annualized proffered wage of \$38,188.80. Thus, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date onward based on its actual payments to the beneficiary over the years. Absent any other viable evidence, the petitioner has not established its ability to pay the proffered wage in any year from 1998 up to the present.

Based on the foregoing analysis, the AAO determines that the petitioner has failed to overcome any of the grounds for denial in the AAO's prior decision.

While the petitioner has presented some evidence not previously in the record, it does not overcome the AAO's prior determination that the petition is deniable on three grounds:

- The petitioner has not established that it intends to employ the beneficiary in a position that accords with the job described in the Form ETA 750.
- The petitioner has failed to establish that the beneficiary had three years of experience in the job offered as of the priority date, as required on the labor certification to qualify for the proffered position.
- The petitioner has failed to establish its continuing ability to pay the proffered wage from the priority date up to the present.

Furthermore, the petitioner has not presented any persuasive argument and/or precedent decisions showing that the AAO's initial decision on any of these issues was based on an incorrect application of law or USCIS policy, as required in a motion to reconsider. Counsel asserts that the revocation of the approved visa petition is based on "unsupported statements" concerning the petitioner's intention to employ the beneficiary in the job described in the labor certification, citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). For the myriad reasons discussed in this decision, however, the AAO's affirmation of the revocation is not based on unsupported statements, but rather on the evidentiary shortcomings of the petition on a range of issues. The AAO's current decision, like the previous one dismissing the appeal, is based on the petitioner's failure on multiple grounds to establish its eligibility for the immigration benefit it seeks.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. Therefore, the motion will be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen and reconsider is dismissed. The AAO's decision of July 5, 2012, is affirmed.