

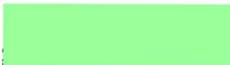


U.S. Citizenship
and Immigration
Services

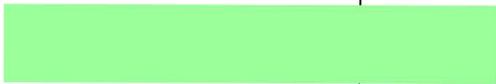
(b)(6)



DATE: OFFICE: TEXAS SERVICE CENTER

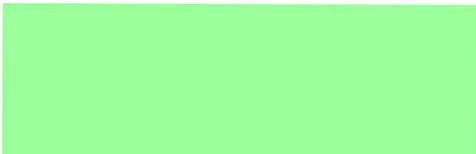
FILE: 

JAN 14 2013

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 preference visa petition was initially approved by the Director, Texas Service Center. In connection with a site visit, the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner describes itself as a furniture manufacturer and importer. It seeks to permanently employ the beneficiary in the United States as a human resources counselor. The petitioner requests classification of the beneficiary as a professional or 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).¹

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is June 29, 2001. *See* 8 C.F.R. § 204.5(d).

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

(b)(6)

On June 30, 2010, the director issued a NOIR, advising the petitioner that USCIS had conducted a site visit at the petitioner's place of business with the beneficiary. The director informed the petitioner that information from the visit directly contradicted information submitted with the Form I-140 petition regarding the size, structure and income of the business. The director also stated that it appeared that the proffered position as listed on the Form ETA 750 did not exist. The director stated that the job performed by the beneficiary bore little resemblance to the proffered position and that the need for a human resources counselor was unusual in so small a company.

In a response dated July 21, 2010, the petitioner stated that the beneficiary's duties had evolved due to a decrease in company staffing, that the beneficiary was performing a job that was 80% similar to the position offered, and that the petitioner had started to pay the beneficiary the proffered wage. The petitioner did not address the discrepancies noted with regard to the size, structure and income of the company.

On August 27, 2010, the director revoked the approval of the Form I-140 petition, stating that as the job duties of the proffered position were no longer the same as those listed on the Form ETA 750, the labor certification was no longer valid. Additionally, the director noted that the petitioner had not addressed the discrepancies between the information submitted on the Form I-140 and the information gathered from the site visit in regards to the size, structure and income of the company. It is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. See *Matter of Ho*, 19 I&N Dec. at 591-592. The director accordingly revoked the approval of the petition.

On appeal, counsel states that the petitioner does intend to employ the beneficiary in the proffered position and maintains that the petitioner anticipates an increase in company workforce and as such "the need for a human resources counselor at the Petitioner's place of business remains especially in light of its economic turnaround." The AAO is not persuaded by this statement. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, the information provided by the petitioner is inconsistent regarding the proffered position, the beneficiary's prior experience, and plans for future employment with the petitioner. In a letter from the petitioner dated January 25, 2010, signed by [REDACTED] the petitioner states that the beneficiary has been employed since 2001 as a human resources counselor. The petitioner states "all of the terms and conditions of the employment-based labor certification continue to exist" and goes on to identify the beneficiary's duties as:

Provide personnel assistance in identifying, evaluating and resolving human relations and work performance problems to facilitate communication and improve employee human relations skills and work performance. Consult with company executive to determine prospective job requirements and solve human resources problems. Develop and conduct training to instruct staff members in

(b)(6)

skills such as communication, conflict resolution, interpersonal communication and group interaction. Evaluate human relations and work related problems and meet with supervisors to determine effective remediation techniques.

The information contained in this January 2010 letter directly contradicts the information provided by the beneficiary during the USCIS site visit on February 3, 2010. During that visit the beneficiary stated that her duties included acting as an administrative assistant in addition to human resources work. By her description, her typical day includes "arrive and pull punch cards for time and attendance, walk around and ask the employees if they have any problems or disputes, check e-mails, answer phones, assist president with whatever he needs, return messages for president". The beneficiary's description of her work is not that of a human resources counselor as stated on the ETA 750 or as claimed in the January 2010 letter from Mr. [REDACTED]. The discrepancies between the statements of Mr. [REDACTED] and those of the beneficiary raise questions about the credibility and the veracity of these statements. 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. at 591.

Additionally, in the July 2010 letter from Mr. [REDACTED] the petitioner states that the beneficiary's duties are 80% similar to those listed on the ETA 750. This is a contradiction of Mr. [REDACTED] January 2010 letter which states that there has been no change in the job description, and it is in direct contradiction to the beneficiary's statements in February 2010 describing her duties as almost exclusively administrative in nature.

Therefore, the petitioner has not provided sufficient evidence of the petitioner's intention or ability to employ the beneficiary in the proffered position as it was recorded on the labor certification application. The record does not contain any evidence of the petitioner's need for or intention to employ the beneficiary in the proffered position of human resources counselor as stated on the labor certification application. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c)(2). If the position offered no longer exists with the petitioning company, then the Form I-140 petition cannot be approved, because there is no longer a valid underlying labor certification application.

Furthermore, the petitioner has not addressed the discrepancies in the information reported on the Form I-140 petition and the information obtained by USCIS during the site visit regarding the size, structure and income of the business.

On appeal, counsel states that that the petitioner did address the inconsistencies in the record. The AAO disagrees with this statement. The petitioner did not address the specific inconsistencies as listed in the NOIR. Rather, the petitioner stated that there had been a decrease in company staffing and the company expected an increase in business in the coming years. The petitioner also does not address the fact that in 2007 it reported having 26 employees but in 2010 it had less than half that number. Furthermore, the income of the company was reported as over \$3 million in 2007. In 2010 it was reported as less than \$1 million during the site visit. The director specifically asked the

(b)(6)

petitioner to explain the differences in the information reported on the Form I-140 and the information discovered on the site visit. The petitioner has not provided any evidence to rebut the director's findings or to refute the inconsistencies in the record. It is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. See *Matter of Ho*, 19 I&N Dec. at 582.

The AAO affirms the director's finding that the petitioner does not intend to employ the beneficiary in the proffered position and as such the labor certification application is no longer valid and the Form I-140 petition approval is revoked.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.