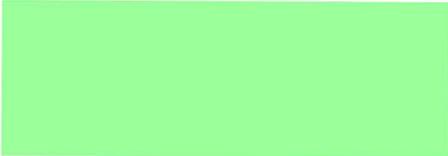




U.S. Citizenship  
and Immigration  
Services

(b)(6)



Date: Office: TEXAS SERVICE CENTER FILE: 

**JAN 24 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:** On February 23, 2012 the Administrative Appeals Office (AAO) dismissed the appeal and affirmed the decision of the Director, Texas Service Center (the director). The petitioner has now filed a motion to reopen and a motion to reconsider the AAO's decision. The motions will be granted, and the appeal will be reconsidered. Upon reconsideration, the appeal will be dismissed.

The petitioner is a landscaping company. It seeks to employ the beneficiary permanently in the United States as a landscape gardener pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).<sup>1</sup> 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 petition was initially approved in 2003 by the Director, Vermont Service Center; however, the approval was revoked in 2010 by the Director, Texas Service Center (the director).

The director found fraud or material misrepresentation involving the beneficiary's qualifications for the job offered, and accordingly, the approval of the petition was revoked and the labor certification was invalidated. The petitioner subsequently filed an appeal with the AAO. Upon review, we agreed with the director and affirmed the director's decision.

On motion to reopen/reconsider, counsel for the petitioner asserts that "it is illogical and erroneous to assume that every beneficiary that cannot verify his or her experience has committed fraud."

The record shows that the motions are properly filed, timely and makes a specific allegation of error in law or fact. 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 filing of the motion.<sup>2</sup>

Citing *Singh v. Gonzales*, 413 F.3d 156, 160-161 (1<sup>st</sup> Cir. 2005), counsel states that a negative credibility finding alone is not the equivalent of a willful misrepresentation "and the one does not necessarily lead to the other." Counsel contends that the documentation submitted to show the

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<sup>1</sup> 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.

<sup>2</sup> The submission of additional evidence on motion is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 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/motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

beneficiary's qualifications for the job offered complies with the regulations for verification of employment.

A motion to reopen must state the new facts to be proved in the reopened proceeding 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 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, the motion to reopen will not be granted since it does not state new facts to be proved in the reopened proceeding, however, the motion to reconsider provides reasons for reconsideration and is supported by a pertinent precedent decision. Therefore, the motion to reconsider is granted, and the appeal is reconsidered. Upon reconsideration, we conclude that the AAO's February 23, 2012 decision is based on the evidence of record as well as a correct application of law.

First, we note that the record contains specific material inconsistencies between where the beneficiary claimed to have lived and worked in Brazil from 1994 to 1997. The beneficiary, according to his Biographic Information (Form G-325) which he filed in conjunction with the Application to Register for Permanent Residence or Adjust Status (Form I-485), claimed to have lived in the city of [REDACTED] from 1995 to 1997. The location of [REDACTED] where the beneficiary claimed to have worked as a landscaper from 1994 to 1996, was in [REDACTED]. The director in the December 7, 2010 decision expressed his doubt that the beneficiary could work in [REDACTED] and live in [REDACTED] because "there is about a forty-five minute drive between the two cities." We note that the distance between [REDACTED] and [REDACTED] according to <http://www.distancecalculator.globefeed.com>, is about 46.36 km (or 28.81 miles). The estimate road distance can be around 53.31 km (or 33.13 miles). (Last accessed January 31, 2012).

Counsel states on motion that commuting 45 minutes from home to work in the United States is not uncommon. On a similar note, counsel indicates that the same or longer commuting time in Brazil is not uncommon. Counsel submits several news articles and survey reports to support his assertions above, however, we do not find these to be on point or persuasive. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Further, the record does not contain any explanation or evidence showing where the beneficiary lived and worked in Brazil between 1994 and 1996.

In addition, we have previously informed the petitioner that none of the letters of employment verification from the beneficiary's former employer in Brazil meets the minimum requirements

as prescribed by the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), in that none includes a sufficient description of the experience or training received by the beneficiary between January 1994 and December 1996. Simply stating that the beneficiary worked as a landscaper is not a sufficient description of the experience and does not establish the reliability of the claim. 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, 591-92 (BIA 1988).

Moreover, counsel's argument that the beneficiary could have worked as a landscaper before or after becoming an electronic engineer is not persuasive.<sup>3</sup> The director had asked the petitioner to submit additional evidence – independent and objective; primary and secondary – to demonstrate that the beneficiary possessed the requisite work experience in the job offered as of the priority date. However, the petitioner has not submitted any independent objective evidence – primary or secondary evidence – showing where the beneficiary lived and worked in Brazil from 1994 to 1996. It is incumbent on the petitioner to resolve such 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. *Id.*

Considering the number of inconsistencies pertaining to the beneficiary's qualifications in the record and the petitioner's failure to rebut these, the AAO finds fraud and willful misrepresentation. Accordingly, we find that the petitioner has failed to establish that the beneficiary possessed the minimum requirements on the labor certification application at the time it was filed. Although the motion is granted and the appeal is reconsidered, the appeal will be dismissed for the reasons stated above with each considered as an independent and alternative basis for the decision. 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 motion to reconsider is granted; upon reconsideration, the appeal is dismissed. The AAO's prior decision remains undisturbed.

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<sup>3</sup> Counsel on motion states that the director and the AAO made an illogical conclusion that the beneficiary could not have worked as a landscaper simply because he stated he was an electronic engineer in his 1996 Brazilian passport application. Specifically, counsel states that "an actor may wait tables for years before settling in his career, a lawyer or judge may work in a number of jobs during his or her education."