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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



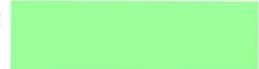
U.S. Citizenship
and Immigration
Services



DATE: JUL 19 2013

OFFICE: NEBRASKA SERVICE CENTER

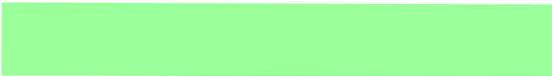
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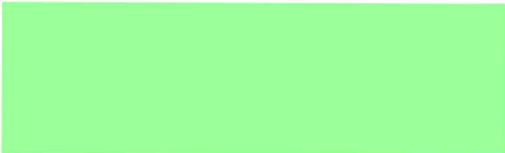
Petitioner:

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

*Josh K
For*

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center on May 17, 2007. The petitioner filed a motion to reopen and a motion to reconsider on June 20, 2007. The director granted the motions and reaffirmed his prior decision denying the petition on July 24, 2009. The petitioner filed an appeal on August 27, 2009. On October 29, 2009, the director rejected the appeal as being untimely filed. The petitioner filed an appeal to the Administrative Appeals Office (AAO) on December 1, 2009. On December 26, 2012, the AAO dismissed the appeal on the merits.¹ The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motions will be granted; however, the previous decision of the AAO will be affirmed, and the petition will remain denied.

In its December 26, 2012 dismissal, the AAO determined that the petitioner failed to establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Beyond the decision of the director, the AAO determined that the petitioner failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO also found that the petition was not supported by a *bona fide* job offer.

Here, the Form ETA 750 was accepted on April 30, 2001.² The labor certification states that the offered position requires two years of experience in the proffered position of cook or two years of experience in the related occupation of cook helper/assistant. On the Form ETA 750B, signed by the beneficiary on February 5, 2006, the beneficiary claims to qualify for the offered position based on his prior experience, which includes working as a cook since January 2001 for [REDACTED] in Charlottesville, Virginia; working as a cook helper from May 2000 through November 2000 for [REDACTED] in West Bradenton, Florida;³ and working as kitchen help from an

¹ The petitioner must appeal an unfavorable decision within 30 days of service. 8 C.F.R. § 103.3(a)(2)(i). In the instant case, the director's most recent decision on the merits was issued on July 24, 2009. The petitioner's appeal, filed August 27, 2009, was received 34 days after the director's decision, therefore, the director rejected the appeal as untimely. Counsel appealed the decision to the AAO on December 1, 2009, which was 130 days after the director's July 24, 2009 decision. Therefore, the appeal was untimely. However, the AAO exercised its discretion and issued a decision on the merits despite the untimely appeal.

² In its dismissal, the AAO noted that this petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the Department of Labor (DOL). On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition, April 30, 2001, predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution may be permitted.

³ The beneficiary's claimed employment at [REDACTED] from May 2000 through November 2000 on the labor certification conflict with the beneficiary's Form G-325A, Biographic Information, in the record. The beneficiary's Form G-325A was signed by the beneficiary on May 25, 2006 and submitted in support of his application for adjustment of status. The beneficiary states that he was employed at [REDACTED] as a kitchen helper/preparer from May 2000 through

unlisted month in 1989 through April 1996 for [REDACTED] in Atlantic City, New Jersey.

In the director's July 24, 2009 decision, he stated that the petitioner submitted a letter from [REDACTED] regarding the beneficiary's prior work experience there, but that the letter failed to demonstrate that the beneficiary possessed the requisite two years of experience as of the April 30, 2001 priority date.

The director additionally found that the June 14, 2007 employment verification letter that the petitioner submitted from [REDACTED] on behalf of the beneficiary stated that he worked there as a cook assistant from December 1993 through December 1996, but that the beneficiary instead listed on the labor certification that he worked for [REDACTED] as kitchen help from 1989 through April 1996.⁴ On appeal, the petitioner submitted a new employment verification letter from [REDACTED] dated August 13, 2009, stating that the beneficiary worked there as a cook assistant from October 1990 through July 1993 and then from December 1993 through December 1996. The AAO previously found that the new employment verification letter still did not conform to the dates of the beneficiary's employment as listed on the labor certification, and determined that the inconsistency remained unresolved. The AAO also noted that the petitioner failed to address the other deficiencies within the record of proceeding that the director highlighted within his decision. Beyond the decision of the director, the AAO found that the petitioner failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO also concluded that the petition is not supported by a *bona fide* job offer.

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

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 Service 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.

On motion, counsel asserts that "the letters from [REDACTED] demonstrated a combined experience of more than the 24 months as required by the certified form ETA-750 on April 30, 2001 were possessed by the beneficiary." However, counsel's assertions are not supported by the record. In addition to the doubts cast by the instances of

November 2000. He failed to indicate that he ever worked at [REDACTED] which is inconsistent with the labor certification. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition).

⁴ On motion, counsel submits evidence reflecting that [REDACTED] and [REDACTED] are the same entity and have the same ownership.

conflicting dates of employment, none of the letters in the record conform with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A).

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A).

The record contains a copy of an experience letter dated August 13, 2009 from a human resources representative at [REDACTED]. The letter states that the beneficiary worked full-time as a cook assistant from October 29, 1990 to July 27, 1993, and from December 10, 1993 to December 26, 1996. As the letter does not list any duties performed by the beneficiary, the letter does not meet the regulatory requirements. *Id.* Therefore, the letter is insufficient to document the beneficiary's claimed experience. It is also noted that the petitioner provided a copy of the beneficiary's identification cards from [REDACTED] however, these documents cannot stand in lieu of the regulatory required evidence, and do not document the beneficiary's position, hours, or duties. Therefore, they are insufficient to document the beneficiary's claimed experience even if they met the regulatory requirements.

The record contains a copy of an experience letter dated July 8, 2005 from the general manager at [REDACTED] in Charlottesville, Virginia. The letter states that the beneficiary had been employed as a cook since January 31, 2001. The letter does not list any duties performed by the beneficiary, therefore the letter does not meet the regulatory requirements. *Id.* Further, the letter does not state whether the beneficiary's employment was full- or part-time, preventing the AAO from determining the extent of the beneficiary's purported employment. The AAO notes that only experience prior to the April 30, 2001 priority date can be considered to be qualifying experience for the position offered.

The record contains an experience letter dated June 14, 2007 from a human resources representative at [REDACTED]. The letter states that the beneficiary worked full-time as a cook assistant from December 10, 1993 to December 26, 1996. As the letter does not list any duties performed by the beneficiary, the letter does not meet the regulatory requirements. *Id.* Therefore, the letter is insufficient to document the beneficiary's claimed experience.

The record contains a copy of an undated Spanish-language letter from the general manager at [REDACTED]. The letter is accompanied by an English translation, which is certified as accurate and dated November 27, 2006. The affiant states that the beneficiary was employed as a cook helper from March 1981 to July 1983. The letter does not list any duties performed by the beneficiary, therefore the letter does not meet the regulatory requirements. *Id.* Further, the letter does not state whether the beneficiary's employment was full- or part-time, preventing the AAO from determining the extent of the beneficiary's purported employment. The AAO notes that this purported employment was not listed on the ETA 750B provided with Form I-140.

Counsel submits copies of the previously submitted experience letters and an amended Form ETA 750B. The amended Form ETA 750B, signed by the beneficiary on January 20, 2013, reflects that

the beneficiary worked as a cook helper/assistant at [REDACTED] from October 1990 until July 1993 and from December 1993 until December 1996. Counsel contends that any "discrepancies of dates" have now been clarified.

The AAO views the petitioner's change of items on the beneficiary's subsequent amended Form ETA 750B as questionable. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). Counsel does not explain the cause of the inconsistencies or provide any basis for the changes to Form ETA 750B. Accordingly, the petitioner has failed to reconcile the inconsistencies in the record.

Therefore, the petitioner has failed to establish that the beneficiary possessed the experience required for the position offered as of the priority date.

On motion, counsel also asserts that "the petitioner has demonstrated the ability to pay the required wage by [REDACTED] as it has also been included proof of [REDACTED] employing over 100 employees." [sic] Counsel submits a copy of a letter from the "general manager/financial officer" at [REDACTED] confirming that it "employs over 100 people and that it has the ability to pay the prevailing wage for the position of cook" based on audited financial documents. However, counsel failed to submit any audited financial documents, annual reports, or federal tax returns demonstrating its continuing ability to pay the proffered wage since the priority date. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, in all previous filings this same individual has been identified solely as the petitioner's general manager, and has not been identified as a financial officer. This inconsistency casts doubt on his purported role as the restaurant's financial officer. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition).

In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. It further provides: "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." (Emphasis added.) Given the record as a whole and the noted inconsistency, we find that USCIS need not exercise its discretion to accept the letter from the general manager.

Therefore, the petitioner has failed to establish its ability to pay the beneficiary's proffered wage.

Further, in its decision, the AAO noted that the new Form ETA 750 submitted with the Form I-140 reflecting the substitution of the instant beneficiary lists the work location as Harrisonburg, Virginia, whereas the location of the work location on the original Form ETA 750 was Alexandria, Virginia. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(c)(2). It seems that the petitioner intends to employ the beneficiary as a cook in Harrisonburg, Virginia, outside the terms of the Form ETA 750. See *Sunoco Energy Development Company*, 17 I&N Dec. 283 (Reg'l Comm'r 1979). On motion, counsel submits an amended Form ETA 750, indicating the place of employment as Fredericksburg, Virginia. Counsel fails to reconcile the discrepancy as the original work location was Alexandria, Virginia, and the amended Form ETA 750 now adds a third location. The location of the beneficiary's employment is unclear; in either case, the work location does not appear to be in Alexandria, Virginia as certified by the DOL. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Further, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). Counsel does not explain the cause of the inconsistencies, or provide or explain the basis on which the corrections were predicated. Accordingly, counsel has failed to reconcile the inconsistencies in the record. As previously stated in the AAO's decision, the petitioner failed to provide any evidence that the DOL certified this change in work location. The labor certification is only valid for the specific job, employer, and location for which it was certified. 20 C.F.R. § 656.30(c)(2). As both Harrisonburg, Virginia and Fredericksburg, Virginia are outside of the Metro Statistical Area (MSA) of Alexandria, Virginia, there does not appear to be a *bona fide* job offer.

As stated in the AAO's prior decision, the petitioner has failed to establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date; the petitioner failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence; and the petition is not supported by a *bona fide* job offer.

The petition will remain denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden. Accordingly, the motions will be granted, the previous decision of the AAO will not be disturbed.

ORDER: The motions are granted. The previous decision of the AAO, dated December 26, 2012, will not be disturbed. The petition remains denied.