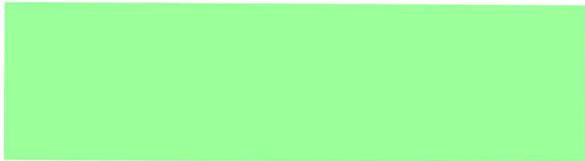




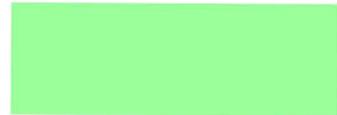
U.S. Citizenship
and Immigration
Services

(b)(6)



Date: JUN 20 2013

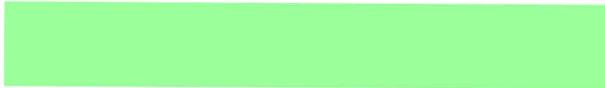
Office: VERMONT SERVICE CENTER



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:

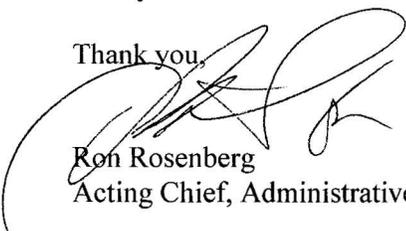


INSTRUCTIONS:

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 initially approved by the Director, Vermont Service Center. Upon determining that the petition had been approved in error, the director served the petitioner with a Notice of Intent to Revoke (NOIR) the approval of the petition. In the Notice of Revocation (NOR), the director revoked the approval of the preference petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion reconsider. The AAO will grant the motion but affirm the previous decisions of the director and the AAO's dismissal of the appeal. The petition's approval remains revoked.

The petitioner is a restaurant. It sought to employ the beneficiary permanently in the United States as a manager.¹ As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition.

The director determined that the petitioner had failed to establish that the beneficiary had four years of experience required by the terms of the labor certification had failed to establish that the job offer was *bona fide*. In its decision of November 13, 2012, the AAO concurred with the director's decision to revoke the petition's approval and additionally noted that there appeared to be alterations on the labor certification and that the petition would not be approvable as the original labor certification was not contained in the record. The AAO also noted (footnote 10 of AAO's Nov. 13, 2012 decision) that the ability to pay the proffered wage had not been established, although this had not been cited as a basis for revocation by the director. Finally, the AAO determined that the provisions of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) did not apply to the facts of this proceeding.

Current counsel has filed a motion reconsider. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision.

As noted in the prior decisions, the priority date of the instant petition is June 2, 2000, which is the date the DOL first accepted the application for the labor certification. The priority date is the date by which the beneficiary must have obtained the educational, training and work experience requirements² set

¹ Section 203(b)(3)(A)(i) of the Act 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.

² 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

forth on the labor certification. In this case, the only requirements are that the beneficiary have four years of experience as a manager or restaurant manager. In its prior decision, the AAO cited several inconsistencies relevant to the jobs claimed for the beneficiary's qualifying experience including:

- Part B of the Form ETA 750 signed by the beneficiary on May 26, 2000 states that he worked as a manager (50 hours per week) for [REDACTED] Carolina from September 1998 to February 1999. An employment verification letter from [REDACTED] claims that this employment was from October 1998 to April 1999. It did not list the author's job title, the beneficiary's job title or the beneficiary's duties in accordance with 8 C.F.R. § 204.5(l)(3). A Form G-325, Biographic Information form signed by the beneficiary and submitted in connection with his Form I-485, Application to Register Permanent Residence or Adjust Status, states that this employment was from February 1998 to March 1999. It did not identify the job title. Neither of the W-2s issued by [REDACTED] for 1998 or 1999 reflect full-time employment.
- Part B of the Form ETA 750 states that the beneficiary worked as an assistant manager for [REDACTED] Virginia from April 1999 to January 2000. However, the employment verification letter from [REDACTED] states that the restaurant employed the beneficiary as a busboy from May 28, 1995 through June 15, 1997. The beneficiary claims on the G-325 that he has worked for the petitioner as a manager from March 2000 to October 2001. This job was omitted from the Form ETA 750B, signed by the beneficiary on May 26, 2000,³ and the employment dates stated for both [REDACTED]; are not consistent with the dates of employment claimed in the Form ETA 750B or [REDACTED] letter regarding [REDACTED]

On motion, counsel asserts that the inconsistencies are immaterial and amounts of income are irrelevant to whether the beneficiary gained the requisite experience. The AAO does not concur because the requirements of the labor certification must be met as of the priority date. The labor certification requires four full-time years of experience. Where the experience is not accurately documented or wages reflect part-time employment, the petitioner has not established that the terms of the labor

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.

³ 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.)

certification have been met. Counsel failed to submit any evidence on motion to resolve the foregoing issues. Counsel's assertions in this regard do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO does not find that the petitioner established that the beneficiary obtained four years of experience as a manager or restaurant manager as of the priority date. 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)

As noted the AAO's prior decision, it was concluded that the petitioner had failed to demonstrate the *bona fides* of the job offer. The AAO had previously noted that the beneficiary shared the same surname as the authors of the employment verification letters and additionally noted the petitioner's structure as a partnership composed of five partners when the labor certification application was initially submitted. As also noted in the AAO's prior decision, the beneficiary owned 20%, which was less than a controlling interest, but was the third largest share. Two of the other partners also shared the same surname as the beneficiary. The petitioner has never disclosed whether the authors of the employment verification letters and the partners in the petitioner were relatives, but if so, the three interests together would constitute a controlling interest. Counsel states on motion that the beneficiary's ownership status was disclosed and never concealed. However, there is no evidence in the record that the petitioner disclosed the beneficiary's ownership interest in the petitioner or the existence of a family relationship to other owners to DOL at any stage in the labor certification process, consistent with the obligation that a bona fide job offer was existent to "an employee for an employer other than oneself." *See* 20 C.F.R. § 656.3. While Part 12 of the Form ETA 750 contains a notation that "since 1994 has worked with relatives in Mexican restaurant management," this does not convey that the beneficiary or his relatives had an ownership interest in the petitioner, which would have permitted the DOL to assess those factors prior to certifying the labor certification. *See Matter of Modular Container Systems, Inc.*, 89 INA 228 (July 16, 1991).

As noted in the AAO's prior decision, although the beneficiary is claimed to have been employed at the petitioning business since February 2000 at a salary of \$28,000, the beneficiary's W-2s for 2003, 2004, and 2005 do not reflect any employment in Georgia, the location of the petitioner. On motion, counsel asserts that it is not required that a beneficiary be employed by a petitioner in order to port to other employment under the American Competitiveness in the Twenty-First Century Act (AC21). While this is true, the AAO was observing that there was a specific assertion that the beneficiary worked for the petitioner, as well as two other restaurants in Ohio, one of which was claimed as the beneficiary's sole proprietorship on his 2003 individual tax return, and that this raised a question as to the existence of an intent to accept the job offer originally represented on the labor certification, not whether an alien has the ability to port to another job on the basis of another visa petition under AC21.⁴

⁴ As noted in the AAO's prior decision, statute and regulations allow adjustment only where the alien has an approved petition for immigrant classification. If a petition's approval is properly revoked, as has been done here, there is no basis of the beneficiary to seek benefits pursuant to AC21. *See also HQ Memorandum, Interim Guidance for processing I-140 employment-based*

It is concluded that the petitioner failed to establish that the beneficiary possessed the requisite qualifying experience or has demonstrated that a *bona fide* job offer existed.

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. The prior decision of the AAO, dated November 13, 2012 is affirmed. The petition's approval remains revoked.

immigrant petitions and I-1485 and H-1B petitions affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21 (Public Law 106-313), (Michael Aytes, Acting Director of Domestic Operations) (December 27, 2005) (an I-140 is no longer valid for porting purposes when an I-140 is denied or revoked at any time except when it is revoked based on a withdrawal that was submitted after an I-485 has been pending for 180 days.).