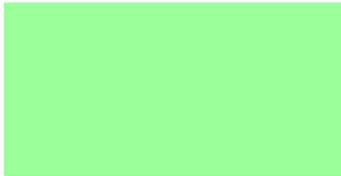




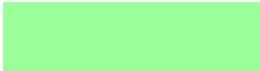
U.S. Citizenship  
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Services

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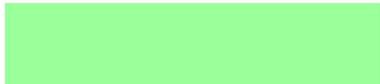


DATE: JUN 21 2013

OFFICE: TEXAS SERVICE CENTER

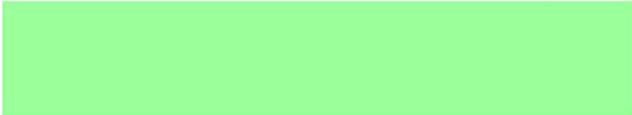
FILE: 

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 Director, Texas Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on September 18, 2012 the AAO dismissed the appeal. The petitioner filed a second appeal on October 17, 2012. The AAO will consider the second appeal as a motion. The motion will be approved. Upon review, the appeal will be dismissed.

On September 18, 2012 the AAO dismissed the appeal. The AAO upheld the director's determination that the petitioner failed to establish that the beneficiary met the experience requirements of the labor certification. The cover page of the AAO's decision instructed the petitioner that it may file either a motion to reopen or a motion to reconsider the decision pursuant to the requirements found at 8 C.F.R. § 103.5, and that any motion must be filed with the office that originally decided the case within 30 days of the decision that the motion seeks to reconsider or reopen as required by 8 C.F.R. § 103.5(a)(1)(i).

Counsel subsequently filed another appeal on the petitioner's behalf on October 17, 2012. The AAO, however, does not exercise appellate jurisdiction over its own decisions. The AAO only exercises appellate jurisdiction over matters that were specifically listed at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). For instance, in the event that a petitioner disagrees with an AAO decision, the petitioner can file a motion to reopen or a motion to reconsider in accordance with 8 C.F.R. § 103.5. In this matter, the petitioner did not check box D ("I am filing a motion to reopen a decision"), box E ("I am filing a motion to reconsider a decision"), or box F ("I am filing a motion to reopen and a motion to reconsider a decision") on the Form I-290B, Notice of Appeal or Motion.

However, we will consider the appeal as a motion to reopen/reconsider in this instance. The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[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." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.<sup>1</sup> The motion is granted. Upon further review, the previous decision of the AAO will be affirmed, and the petition will be denied.

On motion, the petitioner through counsel has offered three new affidavits and an explanation concerning the beneficiary's date of entry into the U.S. However, the petitioner has offered no new independent objective evidence to resolve the inconsistency noted in the previous decision.

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the

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<sup>1</sup>The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . . ." *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).

requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). See also, *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Next, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EXPERIENCE: Four (4) years in the job offered.

The job duties of the job offered are described in block 13 of the form ETA 750 as follows:

Set stone to build structures...Shape stone preparatory to setting...Align stone...Clean surface of finished wall...

The labor certification also states that the beneficiary qualifies for the offered position based on work experience as a stone mason in Ecuador from August 1985 until November 1989. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

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.

*Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

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...[i]t 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.

As noted on the AAO's previous decision, the record contains an experience letter from [REDACTED] stating that the business employed the beneficiary as a stone mason from August 1985 until November 1989. However, the letter is contradictory to other records in the beneficiary's file in which he claims to have been present in the United States since April of 1988. Further, a letter from [REDACTED] and an affidavit from [REDACTED] both attesting to the beneficiary's work at [REDACTED] from 1980 – 1985, used the exact same language as the letter from [REDACTED] thus reducing the probative value of this evidence. Furthermore, the beneficiary did not list this latter experience on the Form ETA 750.

On appeal, the AAO found that the submission of a letter from an accountant employed by [REDACTED] did not suffice to establish the beneficiary's work experience. The accountant letter indicated that records were available to confirm the beneficiary's employment, but this evidence was not submitted. The petitioner did not address the AAO's concern about the lack of independent objective evidence on motion.

On motion, the petitioner submits a second affidavit from [REDACTED]. In this affidavit drafted October 8, 2012, the affidavit states that he worked together with the beneficiary at [REDACTED] for many years until 1989. In his earlier affidavit dated January 6, 2009, [REDACTED] states that he worked with the beneficiary at [REDACTED] from 1980 – 1985. The AAO questions why the affiant failed to mention both of the relevant employment experiences in both of his affidavits or to explain why he testified to the employment in separate statements.

On motion, the petitioner submits an affidavit from the beneficiary indicating that the inconsistent dates of the beneficiary's presence in the U.S. were the work of the beneficiary's attorney who has since been charged with immigration fraud. Although the petitioner claims that the beneficiary's counsel has been charged with immigration fraud, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1<sup>st</sup> Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not address these requirements. The petitioner does not explain the facts surrounding the preparation of the beneficiary's immigration forms or the engagement of the representative. Accordingly, the petitioner did not articulate a proper claim based upon the beneficiary's previous representation. Further, the beneficiary cannot disavow knowledge of the contents of a document that he signed. Specifically, his failure to apprise himself of the contents of the paperwork or the information being submitted constitutes deliberate avoidance and does not absolve him of responsibility for the content

of his petition or the materials submitted in support. *See Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6<sup>th</sup> Cir. 2005) (unpublished) (an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents). The law generally does not recognize deliberate avoidance as a defense to misrepresentation. *See Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11<sup>th</sup> Cir. 2005); *United States v. Puente*, 982 F.2d 156, 159 (5<sup>th</sup> Cir. 1993).

Also on motion, the petitioner submits an affidavit from [REDACTED] both attesting to the beneficiary's work experience in the early 1980's for [REDACTED]. However, this is inconsistent with other evidence that indicates the beneficiary worked for [REDACTED] from 1980 – 1985, and that his work with [REDACTED] was from 1985 until 1988 or 1989. *See Matter of Ho*.

The evidence submitted on motion does not overcome the inconsistencies created by the beneficiary's previous statement that he was in the United States as of April 1988 at the same time as his work experience letters indicate that he was working in Ecuador, and creates an additional doubt about his experience from 1980 – 1985 for [REDACTED].

Therefore, after a complete review of the record at hand, we find that the evidence submitted in support of the beneficiary's work experience does not establish that he had four years of experience working in the job offered before the priority date.

Accordingly, the previous decisions of the director and the AAO will not be disturbed. 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 sustained that burden.

**ORDER:** The motion to reopen is granted and the decision of the AAO dated September 18, 2012 is affirmed. The petition is denied.