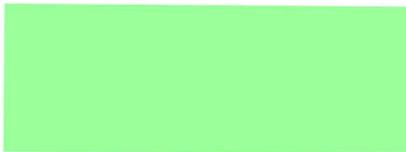




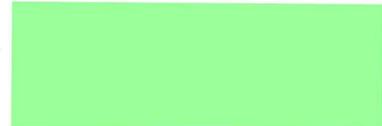
U.S. Citizenship
and Immigration
Services

(b)(6)



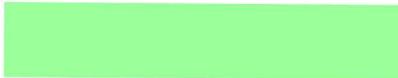
DATE: JUN 27 2013

OFFICE: TEXAS 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 visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed the appeal. The petitioner filed a motion to reopen and reconsider which, the AAO dismissed. The petitioner has filed a second motion. The petitioner's motion will be granted as a motion for reconsideration, the prior decision of the AAO dismissing the motion to reopen and reconsider will be withdrawn, but the AAO's prior decision of March 10, 2010, dismissing the appeal will be affirmed. The petition will remain denied.

The petitioner is a food and convenience store. It seeks to employ the beneficiary permanently in the United States as a store manager. 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 possessed the required qualifying employment experience. The director denied the petition, accordingly.

The AAO dismissed the appeal on March 10, 2010. The AAO also dismissed a motion to reopen and reconsider on November 26, 2012. The petitioner, through current counsel has filed a second motion, which will be accepted as a motion to reconsider.¹ The AAO will withdraw the AAO's dismissal of the first motion, and will address former counsel's first motion.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The record shows that the motion was properly filed, timely 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.

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. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides in relevant part:

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

¹ 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 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. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

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.

The regulation at 8 C.F.R. § 204.5(1)(3) provides in pertinent part:

(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 description of the training received or the experience of the alien.

The petitioner must demonstrate that a beneficiary has the necessary education, training and experience specified on the labor certification as of the priority date. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, the priority date set by the Form ETA 750 is April 30, 2001. As set forth in Item 14 of the labor certification, the position of store manager requires two years in the job offered as store manager or two years in a related occupation defined as “store manager in any retail environment.”

As detailed in the AAO's decision of March 10, 2010, the beneficiary had submitted a Form G-325, Biographic Information submitted in connection with the beneficiary's Form I-485 application to adjust status to lawful permanent resident status based on her spouse's prior Form I-140 petition. On that form, signed by the beneficiary on February 5, 2003, the beneficiary claimed two jobs in the previous five years. From June 1996 to February 1997, she worked at [REDACTED]. From March 1999 to present (date of signing), she states she was a housewife.² Employment verification documents signed by [REDACTED] as owner also indicate that the beneficiary worked for the [REDACTED] India as a manager from February 1997 to February 1999. Other employment verification letters as set forth in the AAO's decision were also submitted to the record. As the claimed employment was omitted from the G-325, the director had requested the petitioner to resolve this discrepancy. In

²Another Form G-325 in the record, signed by the beneficiary on January 22, 2007, states that the beneficiary worked at [REDACTED] from April 1999 to February 2000, which further conflicts with the prior Form G-325 and undermines the credibility of her asserted experience. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

response, the petitioner's first counsel attributed the omission to the beneficiary's misunderstanding of the instructions on the G-325 because she thought that USCIS was requesting her last employment abroad of "more than one year." This is illogical and unpersuasive given that her claimed employment with [REDACTED] as a manager started in February 1997 and ran until February 1999, and therefore lasted longer than one year, the AAO does not find that this inconsistency was ever credibly resolved by the petitioner either in the underlying record or on motion filed by former counsel on April 20, 2010. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Former counsel's motion asserts that the petitioner has established that the beneficiary has acquired the required two years of work experience as a store manager. Accompanying the motion is another affidavit from [REDACTED]. It reiterates that the beneficiary worked as an assistant manager between June 1996 and January 1997 and as a manager between February 1997 and February 1999. [REDACTED] explains that he was confused when he had spoken to an individual from the U.S. Consulate and could not recall the beneficiary's dates of employment or that she had ever been a paid worker. It is also noted that no employment verification document, either from [REDACTED] or any other individual has corroborated full-time employment by the beneficiary. On motion, former counsel also submits an affidavit from the beneficiary describing her employment history, as well as an affidavit from Vimalkumar Jagdishchandra Bhatt, age 33, who states that he is a partner in [REDACTED] and beginning in January 1998 when he joined the store, he was a trainee under the beneficiary. [REDACTED] statement does not explain how his employment with the store in 1998 enables him to verify the beneficiary's employment in a particular occupation prior to that year.³ The AAO does not find [REDACTED] affidavits submitted on motion sufficient to overcome the deficiencies identified in the AAO's prior decision of March 10, 2010. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Independent, objective evidence such as would be kept by an official government entity has never been submitted. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

³ It is noted that the beneficiary's maiden name is [REDACTED]. The beneficiary's mother's family name is [REDACTED]. It is unclear if [REDACTED] are related to the beneficiary in any way, or if members of the petitioner's organization are related in any way. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart* 374, 00-INA-93 (BALCA May 15, 2000). This issue should be addressed in any further proceedings.

The petitioner has not established that the beneficiary acquired the employment experience required by the terms of the labor certification. 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 reopen is granted as a motion to reconsider. The prior decision of the AAO, dated March 10, 2010, is affirmed. The petition remains denied.