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

(b)(6)

DATE: MAY 0 6 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal on May 31, 2011. The petitioner filed a motion to reopen and reconsider. The AAO reaffirmed its dismissal of the appeal on August 13, 2012 and found that the grounds for dismissal had not been overcome by the petitioner's motion. The matter is now before the AAO on a second motion to reopen and reconsider. The AAO will grant the motion but affirm its previous decisions. The appeal remains dismissed. The petition remains denied.

The petitioner is a dairy farm. It sought to employ the beneficiary permanently in the United States as a milker.[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 not established that it had the continuing ability to pay the beneficiary the proffered wage and that the beneficiary had six (6) months of work experience in the job offered as of the priority date and denied the petition, accordingly on November 20, 2008.

The petitioner appealed and on May 31, 2011, the AAO dismissed the appeal. Although determining that the petitioner had established its continuing financial ability to pay the proffered wage, the AAO concluded that the petitioner had failed to establish that the beneficiary possessed the requisite employment experience in the job offered as of the September 8, 2004, priority date.

The petitioner filed a motion to reopen and reconsider the AAO's decision. Following a review of the record and the petitioner's response to the AAO's second Notice of Intent to Deny (NOID), on October 15, 2012, the AAO reaffirmed its dismissal of the appeal. Relevant to the beneficiary's qualifying experience, the AAO summarized in detail the four employment verification letters submitted by the petitioner, as well as the additional five statements in Spanish provided, together with an enumeration of the discrepancies and inconsistencies which the petitioner had not addressed, which led the AAO to conclude that the beneficiary's qualifying employment experience had not been established.[2] The AAO also noted that the record did not contain sufficient evidence that the

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[1] Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

[2] The first letter from gave conflicting employment dates than the ones listed on Part B of the ETA 750B, signed under penalty of perjury, by the beneficiary on July 18, 2007. Additionally, the job duties described in the letter did not relate to those duties required on the Form ETA 750. The second letter from mirrored the employment dates on the labor certification, but the same job duties as those given in the first letter with no explanation as to how they related to the job duties required on the labor certification. A third letter from gave the same employment dates as those on the Form ETA 750 and included job duties that related to those on the labor certification but failed to designate the amount of time the beneficiary was employed as a milker and indicated that the beneficiary was employed in other duties. That letter failed to provide any explanation for the discrepancies between those three letters.

instant beneficiary's substitution for the original beneficiary had been in compliance with the regulation at 20 C.F.R. § 656.30(c)(2) and 20 C.F.R. § 656.11(a),[3] in that the petitioner had failed to submit persuasive evidence that the petitioner requested DOL to substitute the instant beneficiary for the original beneficiary identified on the labor certification prior to July 16, 2007. The AAO had advised the petitioner in the second NOID that it should submit any correspondence to or from DOL, which discusses the petitioner's requested change to the beneficiary listed on the labor certification.

The petitioner has filed another motion to reopen and reconsider.[4] Included with the motion, the petitioner submits a statement from the owner who states that she stands behind the documentation of experience already submitted and that the inability to get information from DOL somehow affected the petitioner's ability to produce any evidence that its request for substitution was made prior to July 16, 2007. The petitioner asserts that the regulation at 20 C.F.R. § 656.30(b)(1) permits a grace period to continue to approve the Form I-140. The AAO accepts counsel's filing as a motion to reopen and reconsider, but affirms the dismissal of the appeal.

In response to the AAO's second NOID, which had advised of the various discrepancies of the employment verification letters and had further noted that [redacted] name had been spelled differently in each of the letters, the petitioner submitted a fourth letter from [redacted] As noted in the AAO's October 15, 2012, decision, this letter did not address the discrepancy in the dates of employment, indicate the length of time that the beneficiary was specifically employed as a milker, versus the time employed in other duties, address whether the employment was full or part-time, or address the misspellings of the author's name which he purportedly signed. The AAO determined that the letter could not be considered independent, objective evidence corroborating the beneficiary's claimed experience and the previous letters. 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. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

[3] Those regulations provide that a labor certification is valid only for the alien named on the labor certification (unless a substitution was approved prior to July 16, 2007), the job offer specified on the labor certification and the area of intended employment. Any request to substitute the identity of the alien beneficiary is prohibited after July 16, 2007.

[4] 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. 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).

It is noted that the petitioner has not submitted any additional independent and corroborative evidence of the beneficiary's qualifying employment experience on motion and has not resolved the numerous discrepancies and inconsistencies of the previously submitted employment verification documents as noted in the AAO's decisions of May 31, 2011 and October 15, 2012 and as summarized herein at footnote 2. Therefore, the AAO affirms its prior decisions that the petitioner failed to establish that the beneficiary possessed six (6) months of qualifying experience in the job offered or met the minimum requirements of the offered position set forth on the Form ETA 750 as of the priority date.

The regulation at 20 C.F.R. § 656.3(b)(1) provides that "[a]n approved labor certification granted on or after July 16, 2007 expires if not filed in support of a Form I-140 petition with the Department of Homeland Security with 180 calendar days of the date the [DOL] granted the certification." This regulation merely provides that a petitioner has 180 days to file a Form I-140 using a labor certification approved after July 16, 2007. The petitioner in this proceeding complied with this regulation as it filed the Form I-140 on or about August 15, 2007 with the Form ETA 750 that was approved on July 24, 2007. This provision, however, does not relate to requests for substitutions of beneficiaries which must be made prior to July 16, 2007 as required by 20 C.F.R. § 656.11(a). The petitioner has provided no evidence that the request for substitution, which DOL stamped, corrected, and initialed on July 24, 2007, was made prior to July 16, 2007. The petition was, therefore filed without a valid certified labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i). The AAO must dismiss the appeal on this basis.

Based on a review of the underlying record, as well as the evidence submitted on appeal and on motion, the petitioner has failed to establish that the beneficiary possessed the required work experience set forth in the labor certification and failed to establish that the labor certification accompanying the Form I-140 is valid. Therefore, the beneficiary does not qualify for classification as an unskilled worker pursuant to section 203(b)(3)(A)(iii) of the Act.

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 and motion to reopen is granted. The prior decisions of the AAO, dated May 31, 2011 and October 15, 2012 are affirmed. The petition remains denied.