

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 22 2013 OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:
[REDACTED]

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.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On July 27, 2002, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on October 9, 2003. The director of the Texas Service Center (the director), however, revoked the approval of the immigrant petition on May 14, 2009. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motions will be granted, the previous decision of the AAO will be withdrawn, and the approval of the petition will be reinstated.

The petitioner is a retail store. It seeks to employ the beneficiary permanently in the United States as an assistant manager pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3)(A)(i).¹ As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification. As stated earlier, this petition was approved on October 9, 2003 by the VSC, but that approval was revoked in May 2009. The director determined that the petitioner failed to follow the U.S. Department of Labor (DOL) recruitment procedures in connection with the approved labor certification application and that the documents submitted in response to the director's Notice of Intent to Revoke (NOIR) were in themselves a willful misrepresentation of material facts, constituting fraud. The director also found that the petitioner failed to establish that the beneficiary possessed the minimum qualifications for the proffered position as of the priority date. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On October 23, 2012, the AAO dismissed the subsequent appeal, affirming the director's revocation based on the petitioner's failure to demonstrate that the beneficiary had the experience required by the terms of the labor certification and the failure to demonstrate the petitioner's ability to pay the proffered wage from the priority date onwards. The AAO's decision overturned the portion of the director's decision finding that the petitioner had not followed the DOL's recruitment procedures and that the petitioner committed fraud and willful misrepresentation. The petitioner then filed a motion to reopen and reconsider the AAO's decision. The record shows that the motions are properly filed, timely and includes letters to verify the beneficiary's experience from [REDACTED] and [REDACTED], paystubs issued from the petitioner to the beneficiary, and the petitioner's 2002 and 2003 Internal Revenue Service (IRS) Forms 1120S. A motion to reopen must provide new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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 USCIS 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

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), 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.

initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, we will accept the motion to reopen the matter based on the new information submitted and the motion to reconsider based on arguments made by counsel. Thus, the instant motions are granted. 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.

Concerning the beneficiary's experience, as stated in the prior AAO decision, the labor certification states that the offered position requires a minimum of two years of work experience in the job offered. The letter submitted with the petitioner's motion stated the name, address, and title of the employer as well as a description of job duties of the beneficiary's former petition. This letter is sufficient to establish that the beneficiary had the experience required by the terms of the labor certification as of the priority date in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(A). Therefore, the AAO withdraws its prior decision on this issue and concludes that the petitioner has established that the beneficiary possesses the minimum requirements for the proffered position.

The other issue raised in the prior AAO decision was whether the petitioner demonstrated its ability to pay the proffered wage from the priority date onwards. The prior AAO decision noted that the petitioner demonstrated its ability to pay the proffered wage in 2001 and 2004 alone. On motion, the petitioner submitted evidence demonstrating its ability to pay the proffered wage in 2002 and from 2005 onwards. Therefore, the AAO withdraws its prior decision on this issue and finds that the petitioner has established the ability to pay the proffered wage in all relevant years in accordance with 8 C.F.R. § 204.5(g)(2).

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 met that burden.

ORDER: The motions to reopen and reconsider are granted. The appeal is sustained, and the approval of the petition is reinstated.