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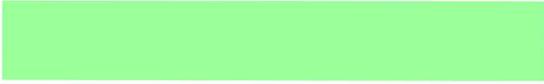
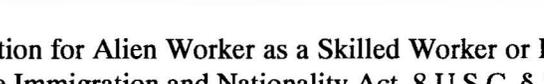
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

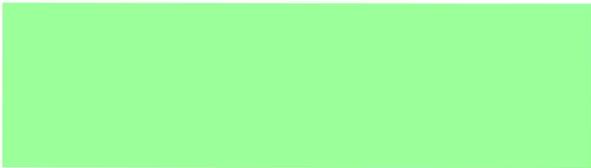


DATE: **MAY 28 2013** OFFICE: TEXAS SERVICE CENTER FILE: 

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,

Rachel DiToro
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen. The motion to reopen will be granted, the previous decision of the AAO will be affirmed, the petition will remain denied and the labor certification will remain invalidated.

The petitioner describes itself as a contractor. It seeks to permanently employ the beneficiary in the United States as a gardener pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act). The director determined that the petitioner had failed to establish its ability to pay the proffered wage and denied the Form I-140, Immigrant Petition for Alien Worker, accordingly.

On appeal, the AAO found that the record did not establish the petitioner's ability to pay the proffered wage pursuant to the regulation at 8 C.F.R. § 204.5(g)(2). It also concluded that the beneficiary had willfully misrepresented his qualifications for the offered position and, based on this misrepresentation, invalidated the Form ETA 750, Application for Alien Employment Certification, underlying the Form I-140. The AAO also indicated that the petitioner's failure to respond to its Request for Evidence and Notice of Derogatory Information, issued November 7, 2011, constituted an additional basis for its dismissal of the appeal.

On motion, counsel for the petitioner submits a brief, new evidence in the form of statements from the beneficiary and two former employers relating to his employment in Ecuador during the period 1993 through 1998, and a map of Ecuador showing the locations of his employment.

The requirements for a motion to reopen are found at 8 C.F.R. § 103.5(a)(2):

(2) Requirements for motion to reopen. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence

The record reflects that the motion to reopen is properly filed and timely, and meets the above regulatory requirements. Therefore, the motion is granted and the AAO will reopen the matter.

The initial issue before the AAO is whether the petitioner has established a continuing ability to pay the offered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements In appropriate

cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

On appeal, the AAO determined that the evidence of record failed to establish the petitioner's ability to pay the proffered wage as of April 30, 2001, the date on which the Form ETA 750 had been accepted for processing by the U.S. Department of Labor (DOL). On motion, the petitioner does not dispute or otherwise address the AAO's determination regarding its ability to pay. Accordingly, the AAO incorporates by reference its discussion of this issue in its February 7, 2012 decision and affirms its finding that the petitioner has not established its ability to pay the beneficiary the proffered wage.

The petitioner does, however, contest the AAO's determination on appeal that inconsistencies between the employment claimed by the beneficiary on the Form ETA 750 and that reflected on an ETA Form 9089, Application for Permanent Employment Certification, filed by the petitioner on July 9, 2009, not only prevent it from establishing the beneficiary's qualifications for the offered position, but constitute willful misrepresentation on the part of the beneficiary in the labor certification application process and, pursuant to 20 C.F.R. § 656.30(d), support the invalidation of the underlying Form ETA 750.¹ To reconcile the identified inconsistencies, the petitioner submits affidavits from the beneficiary and his former employers in Ecuador.

The AAO now turns to a consideration of this new evidence and the extent to which it, when considered with that previously submitted, resolves the inconsistencies in the beneficiary's employment history.

In its February 7, 2012 decision, the AAO noted that, on the Form ETA 750, the beneficiary had claimed full-time employment as a gardener with [REDACTED] in Cuenca, Ecuador from February 1996 through November 1998, but on the subsequently filed ETA Form 9089 had indicated that he had been employed full-time as a bricklayer by [REDACTED] in Gualaceo, Ecuador from March 1, 1993 to November 15, 1997. The AAO also observed that the beneficiary's employment history in the Form G-325A, which indicated that he had begun working for the petitioner as a gardener in July 2007, was inconsistent with that provided in the ETA Form 9089,

¹ Pursuant to the regulation at 20 C.F.R. § 656.30(d):

(d) After issuance labor certifications are subject to invalidation by INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a RA or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

where he claimed to have begun working for the petitioner as a bricklayer on October 1, 2007. Noting that neither the petitioner nor the beneficiary had responded to the November 7, 2011 Request for Evidence and Notice of Derogatory Information, the AAO concluded that the petitioner had not established the beneficiary's qualifications for the offered position and, further, that the beneficiary had deliberately concealed and misrepresented facts about his prior work experience, preventing DOL from properly considering the Form ETA 750 and resulting in its erroneous certification.

The petitioner now submits a statement from [REDACTED] in the form of a February 22, 2012 affidavit in which he attests that the beneficiary managed his farm and garden from February 1996 until November 1998, working from 4pm to 7pm, Monday through Friday and from 7am until 7pm on Saturdays and Sundays. [REDACTED] states that the beneficiary's duties included: the cultivation and production of organic vegetables; maintenance and care of green areas of the property, "starting with gardening activities;" the raising of small animals; grassland management; and the packaging and marketing of the organic production. In an affidavit of the same date, [REDACTED] the owner of [REDACTED] states that the beneficiary was employed by his company as a mason from March 1993 until November 15, 1997, working from 7am until 3pm, Monday through Friday. [REDACTED] indicates that the beneficiary's duties included making "brick and block walls, horizontal and vertical plaster, stone walls, roadside stone and tile, ceramic floor placement, painting in general, etc." The beneficiary's former employers state that they paid him in cash and also indicate that they were aware that they were both employing him. In an affidavit dated February 29, 2012, the beneficiary states that he began working for [REDACTED] in March 1993 and was employed by him until November 1997. He attests that his employment with [REDACTED] began in February 1996 after [REDACTED] obtained a contract with the City of Cuenca and mentioned him to [REDACTED] and that he worked for [REDACTED] through November 1998. The petitioner also provides a Google map of Ecuador showing the cities of Cuenca, the location of [REDACTED] farm, and [REDACTED] the location of [REDACTED] as being 38.2 kilometers or 38 minutes apart.

With regard to the starting date of the beneficiary's employment with the petitioner, counsel for the petitioner contends that the employment history provided by the beneficiary on the Form G-325A, dated July 26, 2007, which indicates that he began working for the petitioner as a gardener in July 2007, is "factual and true." He states that the Form G-325A was submitted in conjunction with the joint filing of the Form I-140 and Form I-485, Application to Register Permanent Residence and Adjust Status, which were based upon the Form ETA 750 that had been filed by the petitioner to obtain the beneficiary's services as a gardener. To support this claim, counsel submits copies of DOL Certification Notices, issued on May 10, 2007 and March 11, 2010, U.S. Citizenship and Immigration Services (USCIS) Form I-797Cs, Notices of Action, dated July 27, 2007 and December 16, 2010; and a copy of the beneficiary's Form G-325A. Counsel does not, however, specifically address the inconsistency between the employment history reflected in the Form G-325A and that claimed by the beneficiary in the ETA Form 9089.

The AAO acknowledges the evidence submitted on motion, but does not find it sufficient to reconcile the inconsistencies in the beneficiary's employment history that were identified in the dismissal of the petitioner's appeal on February 7, 2012. As indicated in the Request for Evidence and Notice of Derogatory Information issued to the petitioner on November 7, 2011, such inconsistencies must be resolved by the submission of "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, 591-92 (BIA 1988). The petitioner was informed in the Request for Evidence and Notice of Derogatory Information that resolving the identified inconsistencies would require the submission of evidence in the form of pay stubs, tax documents, financial statements or other evidence of payments made to the beneficiary by his previous employers during the periods of time in which he worked for them. The petitioner has failed to submit such independent objective evidence of the beneficiary's employment in Ecuador and has not asserted or demonstrated that such evidence is unavailable. The AAO, therefore, again finds that the petitioner has failed to establish that the beneficiary was qualified to perform the offered position of gardener as of the April 30, 2001 priority date of the Form ETA 750.

In that the petitioner has failed to resolve the inconsistencies in the beneficiary's employment history, it is also unable to overcome the AAO's finding that these inconsistencies establish that the beneficiary deliberately concealed and misrepresented his prior work experience in order to obtain an immigration benefit under the Act or its determination that the Form ETA 750 in this case is appropriately invalidated pursuant to the regulation at 20 C.F.R. § 656.30(d), leaving the instant Form I-140 without the underlying labor certification required for filing. 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i). The AAO, therefore, affirms its dismissal of the petitioner's appeal on these bases as well.

The dismissal of the petitioner's appeal for its failure to respond to the November 7, 2011 Request for Evidence and Notice of Derogatory Information issued by the AAO is also affirmed. In its Request for Evidence and Notice of Derogatory Information, the AAO informed the petitioner that the information being sought was required for the substantive adjudication of the appeal and that failure to respond would result in its dismissal pursuant to 8 C.F.R. § 103.2(b)(14). On motion, counsel confirms that the petitioner chose not to respond to the Request for Evidence and Notice of Derogatory Information, explaining that it believed the instant case was moot as a result of USCIS approval of the Form I-140 it had filed for the beneficiary on July 6, 2010. Counsel further indicates that the petitioner also believed that the inconsistencies identified by the AAO "could and would be addressed at the [b]eneficiary's Adjustment of Status hearing." In that counsel indicates that the petitioner received the Request for Evidence and Notice of Derogatory Information and decided not to provide the requested evidence, the AAO finds its dismissal of the appeal under the regulation at 8 C.F.R. § 103.2(b)(14) to have been correct.

For the reasons discussed above, the AAO does not find the record on motion to contain evidence sufficient to overcome its prior findings in the present case. Accordingly, the prior decision of the AAO will be affirmed.

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 and the decision of the AAO dated February 7, 2012 is affirmed. The petition remains denied, and the labor certification remains invalidated.