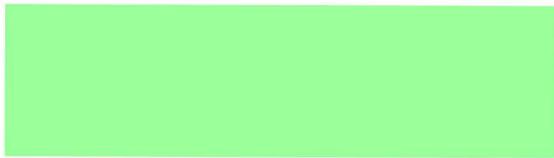


(b)(6)

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

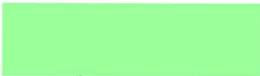


U.S. Citizenship
and Immigration
Services



DATE: NOV 01 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)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(iii)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition and dismissed the beneficiary's motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on the petitioner's appeal. The appeal will be rejected as untimely filed.

The director dismissed the beneficiary's motion because the beneficiary was not an "affected party." See 8 C.F.R. § 103.5(a)(1)(iii)(A) (an "affected party" must sign a motion to reopen or reconsider); 8 C.F.R. § 103.3(a)(1)(iii)(B) (the term "affected party" does not include the beneficiary of a visa petition).

The petitioner is an affected party that may appeal an unfavorable decision. 8 C.F.R. §§ 103.3(a)(1)(iii)(B), (2)(i). But the petitioner must appeal within 30 days of the decision's service. 8 C.F.R. § 103.3(a)(2)(i). If the unfavorable decision was mailed, the appeal must be filed within 33 days. 8 C.F.R. § 103.8(b).

The AAO must reject an untimely appeal as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(B)(1). Neither the Immigration and Nationality Act (the Act) nor U.S. Citizenship and Immigration Services (USCIS) regulations grant the AAO authority to extend this time limit.

The filing date of an appeal is the actual date of receipt at the location designated for filing. 8 C.F.R. § 103.2(a)(7)(i). The affected party must sign the appeal and submit it with the correct fee. *Id.*

In the instant case, the director mailed the decision denying the petition on April 29, 2013. The decision properly notified the petitioner that it had 33 days to file an appeal or motion. On May 28, 2013, the beneficiary submitted a motion to reopen and reconsider the decision, which the director dismissed as improperly filed on June 28, 2013. The petitioner filed its appeal on August 1, 2013, 94 days after the director mailed his decision on the petition and 34 days after his decision on the beneficiary's motion.¹ Accordingly, the appeal is untimely.

If an untimely appeal meets the requirements of a motion to reopen or reconsider, USCIS must treat the appeal as a motion and decide the case on its merits. 8 C.F.R. § 103.3(a)(2)(v)(B)(2). The USCIS official who made the last decision in a proceeding, in this case the director, has jurisdiction over a motion. 8 C.F.R. § 103.5(a)(1)(ii). As required by 8 C.F.R. §§ 103.3(a)(2)(ii)-(iv), the record shows that the director reviewed this appeal before forwarding it to the AAO. He did not conclude that it met the requirements of a motion or otherwise warranted favorable action.

Even if the petitioner timely filed the instant appeal, the appeal would be dismissed for several reasons. First, the record does not establish that the petitioner, for immigration purposes, may offer

¹ The record shows that USCIS initially rejected the petitioner's appeal on July 16, 2013 because the appeal did not include the correct fee amount. See 8 C.F.R. §§ 103.3(a)(2)(i), (7)(i) (USCIS will reject an appeal where the affected party does not pay the required fee).

the job opportunity stated on the approved Form ETA 750, Application for Alien Employment Certification (labor certification), that accompanies the petition. A labor certification remains valid only for the particular job opportunity stated on the application. 20 C.F.R. § 656.30(c)(2) (2004). If a petitioner and the employer named on the labor certification are different entities, the petitioner must show that it acquired the essential rights and obligations necessary to carry on the business of the labor certification employer. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482 (Comm'r 1986) (a petitioner other than the labor certification employer must establish that it is a "successor-in-interest" to the previously proposed employer).

In the instant case, the same person appears to have owned and operated the petitioner and the employer named on the labor certification, [REDACTED] since the petition's priority date of April 30, 2001. But the instant petition and a previous petition by the labor certification employer for the same job opportunity and the same beneficiary reflect different names, worksite addresses, and federal employer identification numbers of the two businesses. Also, public information and copies of the petitioner's recent federal income tax returns, which the beneficiary submitted with his application for adjustment of status, state that the petitioner, identified as [REDACTED] was established on September 30, 2009. *See California Secretary of State, "Business Search", available at <http://kepler.sos.ca.gov/> (accessed on Oct. 25, 2013).* The record therefore suggests that the petitioner and the labor certification employer are different entities.

In any future filings regarding this job opportunity, the petitioner must establish either that it is the same entity as the labor certification employer or that it is a successor-in-interest to that entity. *See Dial Auto Repair Shop*, 19 I&N Dec. at 482. To establish a valid successor relationship, the petitioner must: 1) fully describe and document the transaction transferring ownership of all, or a relevant part, of the labor certification employer to it; 2) demonstrate that the job opportunity remains the same as originally offered; and 3) otherwise prove its eligibility for an approved petition, including the continuous ability of the labor certification employer and it to pay the beneficiary's proffered wage from the petition's priority date onward. *Id.*

Also, the petitioner has failed to establish its ability to pay the beneficiary's proffered wage. A petitioner must demonstrate its continuing ability to pay the proffered wage from the petition's priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.* If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

The labor certification, which was submitted with the previous petition, states a proffered wage of \$11.99 per hour for a 40-hour work week, or \$24,939.20 per year.

Copies of annual reports, federal tax returns, or audited financial statements did not accompany the petition. The petitioner also did not submit any evidence that it has employed the beneficiary.

The record contains copies of the petitioner's 2009 and 2010 federal tax returns, which the beneficiary submitted with his adjustment application. But the petitioner and the labor certification employer have failed to submit copies of their tax returns, annual reports, or audited financial statements from 2001 through 2008 and since 2010. The petitioner's 2010 federal tax return reports an annual net income amount that exceeds the annual proffered wage of \$24,939.20. But the petitioner's 2009 tax return reflects negative annual net income and net current asset amounts. The tax return therefore does not establish the petitioner's ability to pay the beneficiary's proffered wage in 2009.

The failure of the petitioner and the labor certification employer to provide complete annual reports, federal tax returns, or audited financial statements for each year beginning with the year of the priority date is sufficient cause to dismiss an appeal. The petitioner and the labor certification employer may submit additional evidence to establish their ability to pay the proffered wage, such as copies of Internal Revenue Service (IRS) Forms W-2 or 1099 showing annual compensation amounts they have paid the beneficiary during the relevant years. But they may not substitute the additional evidence for the annual reports, tax returns, or audited financial statements required by regulation.

In any future filings regarding this job opportunity, the petitioner and the labor certification employer must establish their ability to pay the proffered wage from the petition's priority date of April 30, 2001 onward. The petitioner and the labor certification employer must submit copies of their annual reports, federal income tax returns, or audited financial statements since and including 2001. The petitioner must also submit additional evidence of its ability to pay the proffered wage in 2009.

In addition, the petitioner has not established the beneficiary's qualifications for the offered position of repairer of televisions, video cassette recorders, copiers, and fax machines. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. §§ 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating whether the beneficiary qualifies for the offered position, USCIS must examine the job offer portion of the labor certification to determine the minimum job requirements of the position. USCIS may not ignore a term on the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires 3 years of experience in the job offered. On the labor certification, the beneficiary claims to qualify for the offered position based on more than 3 years of full-time experience as a repairer of televisions, radios, video cassette recorders, fax machines and copiers at [REDACTED] California from November 1995 to May 1999.

The petitioner must support the beneficiary's claimed qualifying experience with letters from employers

giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A). Any letter in a foreign language must be accompanied by a full English translation, which the translator has certified as complete and accurate. 8 C.F.R. § 103.2(b)(3). The translator must also certify that he or she is competent to translate from the foreign language into English. *Id.*

The record contains two experience letters that the labor certification employer submitted with the previous petition. An April 23, 2001 letter on [REDACTED] stationery states that the beneficiary worked full-time as an electronic home installer/repairer from January 1996 through March 1999 and includes a description of the beneficiary's purported job duties there. Also, an English translation accompanies an April 26, 2001 letter from a purported general manager on the stationery of Imagen in Argentina, stating that the business employed the beneficiary full-time from January 1992 to April 1995 as an installer of audio systems, televisions, fax machines, and copiers. The letter also contains a description of the beneficiary's purported job duties there.

The experience letter from [REDACTED] does not comply with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) because it does not contain the employer's title. The letter therefore cannot establish the beneficiary's qualifying experience for the offered position. The dates of employment in the letter (January 1996 through March 1999) also conflict with the dates of employment (November 1995 to May 1999) that the beneficiary stated on the labor certification. The discrepancies in the beneficiary's dates of employment at [REDACTED] cast doubt on the validity of [REDACTED] experience letter and the beneficiary's qualifications for the offered position. See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (a petitioner must resolve any inconsistencies in the record with independent, objective evidence).

Further, the record contains a sworn statement from the beneficiary to an immigration officer upon the beneficiary's application for admission at [REDACTED] on February 4, 1999. The beneficiary stated that he resided in the United States from January 1997 to December 1998 and received \$800 a week to play soccer for a team in [REDACTED] California for almost 2 years. The beneficiary's sworn statement that he played soccer in 1997 and 1998 casts doubt on his claimed full-time employment with [REDACTED] during the same time period. In addition, the beneficiary's apparent entries and departures from the United States during this time cast doubt on the claimed length and continuity of his employment with Videotech.² See *Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on

² The record contains conflicting information about the beneficiary's entries into and presence in the United States. The instant petition states that he last entered the U.S. without inspection on an unspecified date. His Form I-485, Application to Register Permanent Residence or Adjust Status, states that he last entered the United States as a visitor on December 1, 1995. When denied admission to the U.S. on May 26, 2001, he reportedly told immigration officials that he had been admitted to the U.S. as a visitor under the visa waiver program earlier that month. The Form G-325A, Biographic Information, dated October 20, 2012, in his adjustment application states that he has lived in the U.S. since at least April 2005. But the form does not state any employment experience for the preceding 5 years or his last address outside the U.S. of more than 1 year.

any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of the petition).

The English translation of the experience letter from Imagen does not comply with the regulation at 8 C.F.R. § 103.2(b)(3) because the translator, who is not identified, has not certified his or her competence, or the completeness and accuracy of the translation. In addition, the beneficiary did not state his purported experience at Imagen on the labor certification as related experience. The beneficiary's omission of the claimed employment at Imagen on the labor certification casts doubt on the validity of Imagen's experience letter. *See Matter of Leung*, 16 I&N Dec. 12, 14 (BIA 1976), *disapproved on other grounds*, *Matter of Lam*, 16 I&N Dec. 432, 434 (BIA 1978) (an adjustment applicant's testimony about his prior employment was not credible where his application and the petition for him did not state the claimed experience).

For the foregoing reasons, the record does not establish the beneficiary's qualifying employment experience for the offered position. In any future filings regarding this job opportunity, the petitioner must submit additional letters from employers and/or a properly certified English translation of the [REDACTED] letter to demonstrate the beneficiary's qualifying experience. The petitioner must also submit evidence explaining why the beneficiary did not state his purported experience with [REDACTED] on the labor certification and how he purportedly worked full-time at [REDACTED] while playing soccer in 1997 and 1998. The petitioner should also detail the time periods the beneficiary spent in and out of the United States since his purported employment with Imagen in January 1992.

Finally, the instant petition seeks to classify the beneficiary as an "other worker" requiring less than 2 years of training or experience under section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii). The previous petition for the beneficiary sought to classify him as a "skilled worker" requiring at least 2 years of specialized training or experience under section 203(b)(3)(A)(i) of the Act.

Because the labor certification requires at least 2 years of experience for the offered position, the petitioner may request classification of the beneficiary as a "skilled worker." *See* 8 C.F.R. § 204.5(l)(4) ("The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.") Traditionally, skilled workers have received lawful permanent resident status more quickly than "other workers" because of quota backlogs in the other worker preference category.

In summary, because the petitioner's appeal was untimely, the AAO must reject it pursuant to the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

ORDER: The appeal is rejected.