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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

[Redacted]

Date: **NOV 14 2013**

Office: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner:
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 (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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner describes itself as a retail sales business. It seeks to permanently employ the beneficiary in the United States as a manager. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹ The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 30, 2001. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concluded that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of experience stated on the labor certification because the labor certification, employment letters, Forms I-485, Application to Register Permanent Residence or Adjust Status and Forms G-325A, Biographical Information in the record were inconsistent with each other. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The director found that the evidence submitted by the petitioner failed to overcome the inconsistencies in the record, finding that the beneficiary committed material misrepresentation on the Form ETA 750. The director denied the petition and invalidated the labor certification on June 11, 2012.

On appeal, the AAO found that the beneficiary does not have the 24 months of experience in the proffered position and fails to meet the requirements of the labor certification, and, thus, does not qualify for preference visa classification under section 203(b)(3) of the Act. The AAO affirmed the director's conclusion that the beneficiary misrepresented a material fact and the invalidation of the labor certification.

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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon motion.

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

On motion, counsel submits a brief, copy of Internal Revenue Service (IRS) instructions, google.com/maps printouts, copy of customer orders, copy of change of address requests with the Texas Public Works & Engineering Building Inspections, copy of correspondence and Texas Sales and Use Tax Permit, letter from CPA, financial documents, photographs and copies of documentation already in the record.

8 C.F.R. § 103.5(a) provides, in pertinent part:

(2) Requirements for motion to reopen.

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . .

(3) Requirements for motion to reconsider.

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 Service 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 initial decision.

On motion, counsel contends that the AAO's decision was based on misreading of the evidence and minor inconsistencies of immaterial facts. Counsel contends that the evidence establishes that the beneficiary has the two (2) years of required experience for the proffered position.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: 0 years

High School: 12 years

College: 0 years

College Degree Required: None

Major Field of Study: None

TRAINING: None

EXPERIENCE: Two (2) years in the job offered or two (2) years as an assistant manager.

OTHER SPECIAL REQUIREMENTS: None.

The labor certification states that the beneficiary qualifies for the offered position based on experience as a manager with [REDACTED] Texas from April 1992 until September 1995; and as an assistant manager with [REDACTED] Texas, from October 1995 until April 2000. There is no other experience listed on the labor certification. The beneficiary signed the labor certification on April 25, 2001 under a declaration that the contents are true and correct under penalty of perjury.

The record contains an experience letter, dated July 5, 2007, from [REDACTED] store manager, on [REDACTED] letterhead stating that the company employed the beneficiary as a manager at [REDACTED] from April 1, 1992 until September 30, 1995. On appeal, counsel submitted an experience letter, dated August 9, 2012, from [REDACTED] store manager, on [REDACTED] letterhead stating that the company employed the beneficiary as a manager at [REDACTED] from April 1, 1992 until September 30, 1995, providing greater detail regarding the beneficiary's duties as a manager.

The record contains a copy of a Social Security Administration (SSA) Federal Insurance Contribution Act (FICA) statement for the beneficiary.² On motion, counsel has provided a letter from [REDACTED] CPA, indicating that his office handled [REDACTED] bookkeeping and income tax preparation, thus explaining the inconsistency on the FICA statement regarding the address of Pioneer. The FICA statement indicates that [REDACTED] paid the beneficiary the following amounts in wages:

- \$7,200.00 in 1993.
- \$9,360.00 in 1994; and
- \$7,560.00 in 1996.

The AAO found both experience letters to be inconsistent with the address listed on the labor certification.³ On motion, counsel provides copies of photographs, google.com/maps print-outs, correspondence, a Texas Sales and Use Tax Permit and customer orders for Pioneer reflecting that the store is located at the cross streets of Fuqua and Kings Point, thus explaining the inconsistency through independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. at 591-92. Therefore, the AAO accepts that the qualifying employer's true address is the one listed on the experience letters.

However, as discussed in the AAO's decision, the signatory of two experience letters, Mr. [REDACTED] has close ties to the beneficiary: he is engaged in business with individuals related to the beneficiary's spouse, has previously resided with the beneficiary and is related to individuals engaged in business ventures with the beneficiary and relatives of the owners of the petitioner.⁴ Mr.

² On motion, counsel correctly contends that the AAO misread the FICA returns by placing the earned amounts under the posting cycle date, rather than the reporting year. As such, the AAO incorrectly stated amounts earned by the beneficiary as being reported in the year after they were actually earned.

³ The labor certification indicated that the beneficiary was employed at [REDACTED] Texas [REDACTED]

⁴ The beneficiary married [REDACTED] on April 19, 1993. Mr. [REDACTED] is in business with [REDACTED] a relative of the beneficiary's wife, who is also related to Mr. [REDACTED] through marriage to [REDACTED] and the beneficiary resided at the same addresses in [REDACTED] Texas and [REDACTED] Texas. The beneficiary has engaged in various business ventures with relatives of Mr. [REDACTED] such as [REDACTED] and the beneficiary have been engaged in business with [REDACTED] a relative of one of

statements are self-serving and do not provide independent, objective evidence of the beneficiary's prior work experience. *Id.* 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. at 165. Furthermore, as discussed in the AAO's decision, the FICA statement indicates that the beneficiary was not paid a salary corresponding to the position of a manager or even reflecting full-time employment by Pioneer.⁵

The record contains an experience letter, dated April 8, 2003, from the beneficiary, in his capacity as president, on letterhead. As discussed in the AAO's decision, the letter does not meet the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) and is inconsistent with the beneficiary's claimed experience as an assistant manager with . As discussed in the AAO's decision, the letter conflicts with a Form G-325A the beneficiary signed on April 27, 2002 and a Form G-325A the beneficiary signed on August 15, 2012. The 2002 Form G-325A indicates that the beneficiary had been employed by as a manager from October 1995 until 2000 and had thereafter been employed as a manager with from January 2001 until the date on which the Form G-325A was executed.⁶ The 2012 Form G-325A indicates that the beneficiary had been employed as a manager with from 1995 until the date on which the Form G-325A was executed. *See Matter of Ho*, 19 I&N Dec. at 591-92. On motion, counsel contends that the beneficiary listed the experience as ending in 2000 because of his purchase of the business in 1998 and the transition of his role from a manager to president and owner of the business and that the beneficiary lumped all of his experience with one business together for expediency; however, such an explanation does not address why the beneficiary would indicate that he no longer worked with as of 2000 or that he described his position as "manager" and not "assistant manager" prior to 1998 or that the employment was cut-off in 2000, rather 1998, the year in which the beneficiary purchased the business.

On appeal, counsel submitted an experience letter, dated August 6, 2012, from President/Owner, on letterhead stating that the company employed the beneficiary as an assistant manager from 1995 until 1998. The letter provides a full description of the beneficiary's duties as an assistant manager. However, as discussed in the AAO's decision the letter conflicts with a Form G-325A the beneficiary signed on April 27, 2002 and a Form G-325A the beneficiary signed on August 15, 2012.⁷ Additionally, documentation in the record reflected that the

the owners of the petitioner.

⁵ While the experience letters do not explicitly state that the beneficiary was employed on a full-time basis, the labor certification indicates that the beneficiary was employed by 40-hours per week.

⁶ On appeal, counsel contended that the beneficiary owned and operated the dba business of concurrent with his employment at which explains the inconsistency; however, such an explanation does not address why the beneficiary would indicate on the Form G-325A that he no longer worked as a manager with as of 2000.

⁷ The 2002 Form G-325A indicates that the beneficiary had been employed by as a

beneficiary purchased [REDACTED] from [REDACTED] in 1998. Further, [REDACTED] is an owner of the petitioning business and, as such, his statements are self-serving and do not provide independent, objective evidence of the beneficiary's prior work experience. See *Matter of Ho* at 591-592. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

On motion, counsel correctly contends that the AAO misread the FICA returns by placing the earned amounts under the posting cycle date, rather than the reporting year. As such, the AAO incorrectly stated amounts earned by the beneficiary as being reported the years after they were actually earned. Even so, the FICA statement and Forms W-2 indicate that the beneficiary was not paid a salary corresponding to the position of an assistant manager.

The FICA statements indicate that [REDACTED] paid the beneficiary the following amounts in wages:

- \$6,000.00 in 1995.
- \$16,500.00 in 1996.
- \$18,000.00 in 1997.
- \$16,500.00 in 1998.
- \$19,500.00 in 1999; and
- \$18,000.00 in 2000.

On motion, counsel correctly contends that the AAO misread the [REDACTED] tax returns by stating that the beneficiary received his "salary" as compensation to an officer in 1997. However, the information contained in the quarterly reports for [REDACTED] still conflicts with the beneficiary's purported job duties as an assistant manager. The Texas Employer's Quarterly Reports for [REDACTED] from 1995 through 1999, reflect that the beneficiary was the only employee of the company until the last quarter of 1999, when one other employee appeared on the quarterly report.

The AAO finds that the documentation submitted before the director, on appeal and on motion is not sufficiently independent and objective evidence of the beneficiary's employment by [REDACTED] and [REDACTED] as a manager and/or assistant manager in view of the noted inconsistencies and self-serving statements made by the owners and employees of the businesses. As such, the petitioner has failed to provide independent, objective evidence sufficient to overcome the inconsistencies in the record.

manager from October 1995 until 2000 and had thereafter been employed as a manager with [REDACTED] from January 2001 until the date on which the Form G-325A was executed. The 2012 Form G-325A indicates that the beneficiary had been employed as a manager with Texas Food Mart Inc. from 1995 until the date on which the Form G-325A was executed.

On motion, counsel contends that the inconsistencies in the record have been resolved and that there was no fraud or willful misrepresentation of a material fact on the labor certification. As discussed above, inconsistencies regarding the beneficiary's duties and employment with [REDACTED] remain and have not been overcome with independent, objective evidence. The AAO finds that by stating that the beneficiary was employed full-time by [REDACTED] as a manager and assistant manager, the beneficiary made a willful misrepresentation of the material fact that the beneficiary had the required experience including duties beyond those of general store operations including development and improvement of vendor and customer relations, maximization of gross profit and minimization of cost of goods sold, implementation of management techniques such as management ration, cost reduction and employee efficiencies.

As the evidence reflects fraud involving the labor certification, the director appropriately invalidated the Form ETA 750, Application for Alien Employment Certification (labor certification) in this case.

Beyond the decision of the director,⁸ the AAO found that the petitioner had also failed to establish its continuing ability to pay the proffered wage as of the priority date. See 8 C.F.R. § 204.5(g)(2). As discussed in the AAO's decision, according to USCIS records, the petitioner has filed another I-140 petition on behalf of another beneficiary. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

On motion, counsel states that the petitioner had the ability to pay the proffered wage for both of the Form I-140 immigrant petitions and provides copies of the petitioner's tax returns for 2001, 2002, and 2004 through 2012. However, the petitioner failed to submit copies of the Schedule L for 2003, 2011 and 2012. Further, the petitioner failed to submit the specifically requested information regarding the other beneficiary: the priority date, proffered wage or wages paid to each beneficiary, whether the other petition has been withdrawn, revoked, or denied, or whether the other beneficiary has obtained lawful permanent residence. Thus, on motion, the petitioner has failed to establish its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

It was also concluded that the petition is not supported by a *bona fide* job offer. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). Specifically, from the evidence in the record it appears that the owners of the petitioner have pre-existing business and familial relationships with the beneficiary.⁹

⁸ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

⁹ This information undermines the credibility of the statements made in Mr. [REDACTED] experience letters.

On motion, counsel contends that the statements of Mr. [REDACTED] and Mr. [REDACTED] are not self-serving and that the pre-existing business and familial relationships to the beneficiary are not relevant; however, the petitioner has failed to provide evidence that the job opportunity was legitimate and open to U.S. workers. Counsel contends that the DOL certified that the job opportunity was *bona fide*. However, the record reflects that the DOL was unaware of the pre-existing business and familial relationships of the beneficiary.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motions are granted. Upon reopening and reconsideration, the AAO's previous decision, dated June 7, 2013, is affirmed. The petition will remain denied. The labor certification remains invalidated.