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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

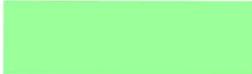


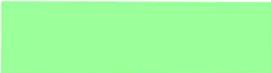
U.S. Citizenship
and Immigration
Services



DATE: OCT 15 2013

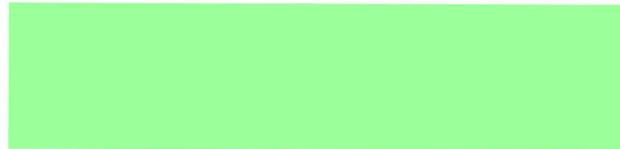
OFFICE: TEXAS SERVICE CENTER

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 (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,

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center (the director), and 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 motion to reopen will be dismissed, the motion to reconsider will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner describes itself as a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook. 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 an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is December 13, 2005. *See* 8 C.F.R. § 204.5(d). The director's decision denying the petition concluded that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date and that the petitioner had failed to establish the ability to pay the proffered wage.

On appeal, the AAO affirmed the director's finding that the petitioner failed to establish that the beneficiary possessed the minimum experience required to perform the offered position by the priority date and that the petitioner had failed to establish the ability to pay the proffered wage.

The record shows that the motion is properly filed, timely and makes a specific allegation of error in law or fact. 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.² On motion, counsel submits a brief, an experience letter for the beneficiary, financial documents, press releases and news articles regarding attorney [REDACTED] and copies of documentation already in the record.

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

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.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). While the petitioner did not comply with regulations governing motions, which require the submission of any documentation with the motion, the AAO will consider the documents newly submitted subsequent to motion.

(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.

The AAO finds that the petitioner has not filed a proper motion to reopen. The request was not accompanied by any new evidence or arguments based on precedent decisions. The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that "[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." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.³ In this matter, the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen.

On motion, counsel contends that a fraudulent experience letter was submitted with the Form I-140 immigrant petition by the attorney who represented the petitioner and that the petitioner and beneficiary should not be held accountable for the attorney's actions as he has been convicted of massive immigration fraud. Counsel contends that the petitioner has the ability to pay the proffered wage as of the priority date and submits additional financial documentation to support this assertion. Counsel contends that it is the same attorney who fraudulently filed other Form I-140 immigrant petitions utilizing the petitioner's information without its consent. As a result of this fraud, counsel contends that it need not establish the ability to pay 18 beneficiaries as it has only ever filed petitions on behalf of the instant beneficiary and one other beneficiary. The motion therefore meets the requirements for a motion to reconsider.

In the instant case, the proffered position requires 24 months of experience as a sushi cook. The labor certification also states that the beneficiary qualifies for the offered position based on experience as a cook with [REDACTED] Israel from January 2, 1998 until January 31, 2000. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

An experience letter from [REDACTED] Manager of the [REDACTED] on company letterhead states that the company employed the beneficiary as a cook from January 2, 1998 until January 31, 2000 in [REDACTED] Israel. As discussed in the AAO's decision, the letter is inconsistent with statements made by the beneficiary on the labor certification and is not experience

³The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence>" *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).

listed by the beneficiary on the labor certification. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988); *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976).

On motion, counsel contends that this fraudulent experience letter was submitted with the Form I-140 immigrant petition by [REDACTED] the attorney who represented the petitioner. Counsel states that [REDACTED] was convicted of massive immigration fraud and provides copies of news articles and press releases establishing that [REDACTED] was disbarred for and convicted of immigration fraud. Counsel contends that the petitioner and beneficiary were unaware of the attorney's actions and should not be punished for those actions. On motion, the AAO finds that the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). Moreover, the record reflects that no preparer was listed on the ETA Form 9089.⁴

An experience letter from [REDACTED] on [REDACTED] restaurant letterhead states that the company employed the beneficiary from January 1998 until 2000 in [REDACTED] Israel. As discussed in the AAO's decision, the letter does not meet the requirements set forth in 8 C.F.R. § 204.5(l)(3)(ii)(A). Furthermore, information published by [REDACTED] and in public databases indicate that [REDACTED] was not established until 1999 and that it serves South American cuisine, which conflicts with the statements made by the beneficiary on the labor certification that he was employed as a sushi cook. Finally, public records establish that the beneficiary was issued a Florida driver's license on January 25, 2000, during the period he claims to have been employed in Israel. *See Matter of Ho*, 19 I&N Dec. at 591-92.

On motion, counsel contends that the petitioner has rebutted the fraudulent experience letter and established that the beneficiary possesses the minimum requirements for the proffered position. Counsel submits an experience letter, dated April 4, 2013, from [REDACTED] restaurant letterhead, which states that the company employed the beneficiary as a sushi chef from January 2, 1998 until January 31, 2000 in [REDACTED] Israel. The letter provides a description of the beneficiary's duties and states that the employer is unable to provide records or pay stubs to verify the beneficiary's employment because Israeli Internal Revenue laws require that such documentation be maintained for a period of seven (7) years. On motion, counsel fails to address the inconsistencies noted by the AAO, namely that [REDACTED] was not established until 1999, it does not serve sushi, and that the beneficiary was living in Florida during the claimed period of employment in Israel. *See Matter of Ho*, 19 I&N Dec. at 591-92. Furthermore, the address on the experience letters are inconsistent with the address set forth on the labor certification.⁵ On motion, counsel fails to provide any independent, objective evidence to overcome the inconsistent information in the record. *Id.*

Without a reasonable explanation as to the origin of the inconsistent information, and without independent, objective evidence resolving the inconsistencies, the AAO declines to accept the letters

⁴ The ETA Form 9089 states in Section M that the application was completed by the employer.

⁵ The labor certification states that the employer's address is [REDACTED] whereas the experience letters provide an address of [REDACTED]

from [REDACTED] as proof of the beneficiary's employment. As such, the petitioner has not established that the beneficiary is qualified to perform the duties of the position as of the priority date.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). See 8 C.F.R. § 204.5(g)(2). Here, the ETA Form 9089 was accepted on December 13, 2005. The proffered wage as stated on the ETA Form 9089 is \$10.62 per hour (\$22,089.60 per year based on a 40-hour work week).

As discussed in the AAO's decision, the beneficiary's Forms W-2, Wage and Tax Statement, stated compensation of \$20,000.00 in 2008. Therefore, the petitioner established that it employed and paid the beneficiary partial wages in 2008. A review of the petitioner's tax returns revealed that, for the years 2005 through 2007, the petitioner had net income greater than the difference between the wages actually paid to the beneficiary and the proffered wage. However, as discussed in the AAO's decision, USCIS records indicate that the petitioner has filed 18 petitions since the petitioner's establishment in 2001, including 2 I-129 petitions, and 16 I-140 petitions. Under these circumstances, the petitioner must demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. See 8 C.F.R. § 204.5(g)(2). While counsel contended that the petitioner only filed petitions on behalf of the instant beneficiary and only one other individual, counsel failed on appeal to provide the requested information regarding the other individual. Moreover, the only evidence counsel submitted on appeal regarding his contention that the petitioner did not file such petitions is a letter from [REDACTED] stating that he is the President of the petitioner and that the petitioner has only filed two petitions. As discussed in the AAO's decision the affidavit is self-serving and does not provide independent, objective evidence of his statements. Information available in public databases indicate that another individual, [REDACTED] is the president of the petitioner and, in the letter, [REDACTED] refers to 18 petitions filed on behalf of [REDACTED] a company other than the petitioner. See *Matter of Ho*, 19 I&N Dec. at 591-592; *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *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 contends that the other Form I-140 immigrant petitions were fraudulently submitted by [REDACTED] the attorney who represented the petitioner. Counsel contends that the petitioner was unaware of the attorney's actions and should not be punished for those actions. On appeal, counsel admitted that the petitioner filed petitions on behalf of the instant beneficiary and one other individual; however, counsel failed on appeal and again fails on motion to provide the requested information regarding the other individual. Whether the petitioner filed 18 or 2 petitions, it remains the petitioner's burden to demonstrate its ability to pay the proffered wages of all beneficiaries for whom it petitions.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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NON-PRECEDENT DECISION

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The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The motion to reconsider is granted. Upon reconsideration, the AAO's decision, dated March 8, 2013, is affirmed. The petition will remain denied.