



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: OCT 17 2013

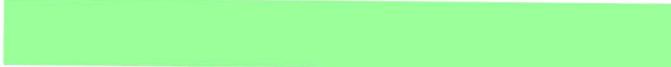
OFFICE: TEXAS SERVICE CENTER

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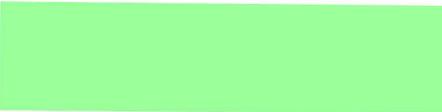
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), initially approved the employment-based immigrant visa petition, but later revoked its approval. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal in a decision dated June 4, 2013. The matter is now before the AAO on the petitioner's motion to reopen and reconsider. The motion will be granted, the AAO's decision will be affirmed, and the petition's approval will remain revoked.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, provides that "[t]he Secretary of Homeland Security may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204 [of the Act]." The realization that the petition was approved in error may constitute good and sufficient cause for revoking its approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner owns and operates a nursing and rehabilitation center. It seeks to permanently employ the beneficiary in the United States as a licensed vocational nurse. The petitioner requests classification of the beneficiary as a professional or skilled worker under section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).¹

An ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), accompanies the petition. The petition's priority date, which is the date the DOL accepted the labor certification for processing, is September 11, 2006. *See* 8 C.F.R. § 204.5(d).

The director's decision revoking the petition's approval concludes that the petitioner failed to establish that the beneficiary, by the petition's priority date, possessed the minimum two years of experience required to perform the offered position.

The AAO affirmed the director's decision and also found that the petitioner failed to demonstrate its continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward.

On motion, the petitioner argues that the AAO improperly dismissed the appeal on a new ground and submits additional evidence of its ability to pay the beneficiary's proffered wage. The petitioner also asserts that the AAO erred in finding that it failed to demonstrate the beneficiary's qualifications for the offered position.

The AAO will grant the petitioner's motion to reopen and reconsider because it states new facts supported by documentary evidence, and it asserts that the AAO erred in applying law or U.S. Citizenship and Immigration Services (USCIS) policy. *See* 8 C.F.R. §§ 103.5(a) (2), (3).

¹ Section 203(b)(3)(A)(i) of the Act allows 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 allows preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 review on a *de novo* basis. See *Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on motion.²

The petitioner first asserts that the AAO, before dismissing the appeal on a new ground, should have provided the petitioner with an opportunity to respond to the agency's concerns about its ability to pay the beneficiary's proffered wage. Counsel states that the director accepted a statement from the petitioner's administrator as evidence of its continuing ability to pay the proffered wage. On motion, the petitioner also submits new evidence of its ability to pay in the form of copies of the beneficiary's recent pay stubs and Internal Revenue Service (IRS) Forms W-2 Wage and Tax Statements, which it issued to the beneficiary from 2006 through 2012.

The record before the director contained the administrator's statement, which claimed that the petitioner employs more than 105 workers, as evidence of its ability to pay the proffered wage. See 8 C.F.R. § 204.5(g)(2) ("In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.")

As the AAO stated in its previous decision, however, the director's acceptance of the administrator's statement as sufficient proof of the petitioner's ability to pay does not bind the AAO. See *La. Philharmonic Orchestra v. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 2000), *aff'd*, 248 F.3d 1139 (table), 2001 WL 85907 (5th Cir. 2001). Under its *de novo* review authority, the AAO found that USCIS should not exercise its discretion under 8 C.F.R. § 204.5(g)(2) in this case. The administrator's statement does not establish the petitioner's ability to pay the proffered wages of the beneficiary and the beneficiaries of its other petitions. USCIS records show that the petitioner has filed at least 14 other Form I-140 immigrant visa petitions since 2002, representing that it intends to employ each of the additional beneficiaries. Thus, to establish its ability to pay the beneficiary's proffered wage, the petitioner must also demonstrate its ability to simultaneously pay the proffered wages of the other beneficiaries whose petitions were pending between the instant petition's priority date and the date the instant beneficiary obtains lawful permanent resident status. See 8 C.F.R. § 204.5(g)(2); see also *Matter of Great Wall*, 16 I&N Dec. 142, 144-45 (Acting Reg'l Comm'r 1977).

The W-2 forms and pay stubs that the petitioner submits on motion appear to show its ability to pay the beneficiary's proffered wage from the petition's September 11, 2006 priority date onward. The W-2 forms reflect annual wage amounts from 2006 through 2012 that exceed the annual proffered wage of \$36,961.90. The 2013 pay stubs show that the petitioner has paid the beneficiary nearly all of the annual

² The instructions to Form I-290B, Notice of Appeal or Motion, which 8 C.F.R. § 103.2(a)(1) incorporates into the regulations, allow the submission of additional evidence on appeal and motion. The record in the instant case provides no reason to preclude consideration of any documents newly submitted on motion. See *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

proffered wage amount through only half of this year. But the W-2 forms and pay stubs only show the petitioner's ability to pay the proffered wage of the beneficiary. The petitioner has not submitted evidence of the priority dates, proffered wages, or wages it paid to the beneficiaries of its other petitions, which the AAO, in its prior decision, stated was necessary. Nor has it established whether any of the other petitions were withdrawn, revoked, or denied, or whether any of the other beneficiaries obtained lawful permanent resident status. On motion, the petitioner did not submit any of the regulatory required evidence of its ability to pay the beneficiaries' proffered wages, such as copies of its federal income tax returns, audited financial statements, or annual reports from relevant years. 8 C.F.R. § 204.5(g)(2). Therefore, the petitioner has failed to demonstrate its ability to simultaneously pay the proffered wages of the beneficiary and the beneficiaries of its other petitions.

The petitioner also argues that the AAO did not inform it of the status of its other petitions. The petitioner argues that, if USCIS approved the other petitions, it would have already demonstrated its ability to pay the proffered wages of its other beneficiaries.

The petitioner, however, not the AAO, bears the burden of proof in these visa petition proceedings. *See* Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The AAO therefore need not inform the petitioner of the contents and status of its own petitions. Moreover, unless the petitioner's other petitions are also before the AAO on appeal, the AAO has access to only limited information about the other petitions. The AAO also has no access to information about whether or how much the petitioner has paid its other beneficiaries.

Because the petitioner has failed to demonstrate its ability to simultaneously pay the proffered wages of the beneficiary and the beneficiaries of its other petitions, it has failed to establish its continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward.

In addition, the petitioner asserts that the AAO, in upholding the director's decision based on the petitioner's failure to demonstrate the beneficiary's qualifications for the offered position, "capitalized" on discrepancies in the record regarding his employment history and "relied on technicalities to justify" the revocation of the petition's approval.

The labor certification states minimum requirements for the offered position of 24 months of experience in the job offered. The labor certification states that the beneficiary continuously worked in the offered position of licensed vocational nurse for former employers for about 27 months, from April 2004 to July 2006.

The labor certification states that the beneficiary worked at [REDACTED] in the offered position for approximately 21 months, from September 2, 2004 to June 20, 2006. But the beneficiary's Form G-325A, Biographic Information, which he submitted with his application for adjustment of status in July 2007, states that the beneficiary worked at [REDACTED] from September 2004 to only February 2006, or only approximately 17 months.

Counsel argues that the beneficiary, in a sworn declaration submitted in response to the director's Notice of Intent to Revoke (NOIR) the petition's approval, adequately explained the discrepancy regarding his dates of employment at [REDACTED]. In the declaration, the beneficiary states that he "could have made an honest mistake" on the Form G-325A regarding his end date of employment at [REDACTED]. He states that he completed the form "based on [his] recollection of the dates of employment," without referencing the employment dates stated on the labor certification or in [REDACTED]'s experience letter.

As indicated in its previous decision, the AAO finds the beneficiary's declaration to be unreliable, as evidence of record contradicts many of the beneficiary's statements in the declaration. A previous Form G-325A, which the beneficiary signed in June 2002 and submitted with an earlier adjustment application, states that he was "unemployed" from May 1997 to June 2001 and that he worked for the petitioner as a "CNA" (certified nursing assistant) from June 2001 to at least June 2002. In his declaration, however, the beneficiary states that he "did not tell [his] previous lawyer that [he] was unemployed from May 1997 to June 2002" and does not remember telling the lawyer that he previously worked for the petitioner. The beneficiary states that he worked as a cook with [REDACTED] from June 1997 to February 2006 and that he joined the petitioner in late February 2006 in the offered position.

The beneficiary's statement in the declaration that he worked for [REDACTED] as a cook from June 1997 to late February 2006 casts doubt on whether he possessed the required 24 months of experience in the offered position before assuming the offered position with the petitioner. *See Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on 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). On motion, the petitioner fails to resolve the discrepancies between the beneficiary's declaration and contrary evidence of record. The petitioner did not submit new evidence to support the beneficiary's declaration. *See Ho* at 591-92 (the petitioner must resolve inconsistencies in the record by independent, objective evidence). The assertions of counsel are not evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Specifically, the petitioner fails to explain how or whether the beneficiary worked full-time in the offered position for [REDACTED] and his other claimed employers from April 2004 to July 2006, as he states on the labor certification, while also working as a cook for [REDACTED] during most of that period. *See Ho* at 591 (doubt cast on 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).

Moreover, as the AAO indicated in its previous decision, a July 20, 2006 letter from [REDACTED] fails to confirm the beneficiary's claimed experience with that employer as it does not comply with the regulations. The letter does not provide the employer's address, state the beneficiary's end date of employment, or describe his experience. *See* 8 C.F.R. § 204.5(1)(3)(ii)(A) (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). On motion, the petitioner does not address the defects in [REDACTED]'s experience letter or provide any additional corroborating evidence of the beneficiary's claimed qualifying experience at Newport. *See Matter of*

Soffici, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190, 193 (Reg'l Comm'r 1972)) (going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings).

The labor certification also states that the beneficiary worked in the offered position for [REDACTED] for about two months, from April 15, 2004 to June 30, 2004, and for [REDACTED] for about six months, from February 2006 to July 2006. But the beneficiary's most recent Form G-325A does not state that the beneficiary worked for either [REDACTED] Counsel and the beneficiary, in his declaration, assert that the beneficiary stated his experience with [REDACTED] on a second page of his most recent Form G-325A, which USCIS purportedly overlooked when adjudicating his most recent adjustment application. Counsel also argues that both [REDACTED] provided letters confirming the beneficiary's claimed experience with these employers.

As the director stated in his Notice of Revocation, USCIS records do not show that the beneficiary submitted a second page of his Form G-325A in 2007 with his most recent adjustment application, as counsel and the beneficiary claim. Rather, the records show that the form's second page was submitted to USCIS for the first time in response to the NOIR of April 27, 2011. Counsel then referred to the document as a "supplement" to Form G-325A that he found in the beneficiary's file from a previous attorney. The Form G-325A supplement contains statements of the beneficiary's claimed employment with [REDACTED] as counsel and the beneficiary assert. But the supplement is undated and unsigned. Beyond the assertions of counsel and the beneficiary, the record does not contain any evidence that the beneficiary submitted the Form G-325A supplement to USCIS with his most recent adjustment application in 2007.

Counsel's assertion that the beneficiary submitted the Form G-325A supplement with his most recent adjustment application is not evidence of the submission. *See Obaigbena*, 19 I&N Dec. at 538 n. 2; *Ramirez-Sanchez*, 17 I&N Dec. at 506 (the assertions of counsel do not constitute evidence). Also, as discussed above, the evidence of record contradicts many of the beneficiary's statements in his declaration, rendering them unreliable. The inconsistencies therefore entitle the beneficiary's assertion that he submitted the Form G-325A supplement in 2007 to little weight. Thus, the lack of evidence corroborating the beneficiary's purported submission of the unsigned and undated supplement in 2007 substantially undermines the document's reliability. On motion, the petitioner has not submitted any evidence to overcome these inconsistencies. *See Soffici*, 22 I&N Dec. at 165 (citing *Treasure Craft*, 14 I&N Dec. at 193) (going on record without supporting documentary evidence is not sufficient for meeting the burden of proof in these proceedings).

Further, the September 5, 2006 experience letter from [REDACTED] does not describe the beneficiary's experience with that purported employer. Because the experience letter fails to comply with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A), it is insufficient proof of the beneficiary's claimed employment with Accel.

The petitioner has failed to establish that the beneficiary submitted the Form G-325A supplement with his most recent adjustment application. The letter from [REDACTED] is also insufficient evidence of his

claimed experience with that employer. Therefore, the supplement and the experience letters from [REDACTED] do not overcome the doubts that the inconsistencies in the record cast over the beneficiary's claimed qualifying experience of about eight months with those employers. As previously discussed, the petitioner has also failed to establish the beneficiary's claimed qualifying experience of at least 17 months with [REDACTED]. Thus, the petitioner has failed to demonstrate that the beneficiary possessed the minimum requirement of 24 months of experience in the offered position by the petition's priority date.

In addition, the petitioner fails on motion to explain other discrepancies in the record that the AAO discussed in its previous decision. The beneficiary states in the declaration that he did not begin working for the petitioner until late February 2006. But a previous immigrant visa petition for the beneficiary contains a 2001 W-2 form, which shows that the petitioner paid him wages of \$5,801.27 in 2001. Although the beneficiary stated in the declaration that he worked as a cook for [REDACTED] from June 1997 to February 2006, the previous petition does not contain a 2001 W-2 form from [REDACTED] to the beneficiary, and a copy of his federal income tax return for that year reports his wages from the petitioner as his only income in 2001. Also, copies of [REDACTED]'s California quarterly wage and withholding reports from the fourth quarter of 2000 through the fourth quarter of 2001 do not identify the beneficiary as an employee. In addition, the previous petition contains a copy of a 2003 W-2 form from [REDACTED] to the beneficiary, showing that [REDACTED] Nursing paid the beneficiary wages of \$4,856.38 that year. Yet, the beneficiary does not identify [REDACTED] as a previous employer on the instant labor certification, which was filed in 2006, or on his most recent Form G-325A, which was filed in 2007. *See Matter of Ho*, 19 I&N Dec. at 591-92 (the petitioner must resolve inconsistencies in the record by independent, objective evidence).

Contrary to counsel's argument, the foregoing discrepancies regarding the beneficiary's employment history are not mere "technicalities." The labor certification states that the offered position has only one requirement: 24 months of employment experience in the job offered. Whether the beneficiary possesses 24 months of full-time experience in the job offered by the petition's priority date is therefore material to the petition's approvability. The labor certification states that the beneficiary continuously worked in the offered position for former employers for about 27 months, from April 2004 through July 2006. Inconsistent statements and contrary evidence in the record, however, cast substantial doubt on whether the beneficiary possessed at least 24 months of full-time experience in the offered position by the petition's priority date.

Because the petitioner has failed to resolve the inconsistencies in the record by independent, objective evidence, the petitioner has failed to establish that the beneficiary, by the petition's priority date, possessed the required experience to perform the duties of the offered position.

In summary, the AAO grants the petitioner's motion to reopen and reconsider. After review of the motion and careful reconsideration of the record as a whole, the AAO affirms its prior decision. The AAO finds that the petitioner, in light of the multiple petitions it has filed for other beneficiaries, has failed to establish its continuing ability to pay the beneficiary's proffered wage. The AAO also finds that the petitioner has failed to resolve inconsistencies in the record regarding the beneficiary's

employment history and thus has not established that the beneficiary possessed the minimum employment experience requirements for the offered position by the priority date. The beneficiary therefore did not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

The revocation of the petition's approval will be affirmed for the above stated reasons, with each considered as an independent and alternative basis for revocation. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act; *see also Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

ORDER: The motion is granted, the AAO's decision of June 4, 2013 is affirmed, and the petition's approval remains revoked.