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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: OCT 1 7 2013 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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 preference visa petition was denied by the Director, Texas Service Center (the director). A subsequent motion to reconsider was also denied by the director. The Administrative Appeals Office (AAO) dismissed the subsequent appeal and a motion to reopen and reconsider. The matter is now before the AAO on a second 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 convenience store. It seeks to permanently employ the beneficiary in the United States as a marketing assistant. 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] To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). 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 June 27, 2008. *See* 8 C.F.R. § 204.5(d).

The director determined that, due to inconsistencies in the record of proceeding, the petitioner had not established that the beneficiary possessed the experience required for the offered position, as stated on the labor certification, before the priority date. The director further found that the beneficiary misrepresented a material fact by misrepresenting his experience on the labor certification and submitting fraudulent documents in an effort to procure a benefit under the Act.

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 AAO granted the petitioner's motion and affirmed its finding 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 also affirmed its finding that the beneficiary knowingly misrepresented a material fact by misrepresenting his experience on the labor certification and submitting fraudulent documents in an effort to procure a benefit under the Act.

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[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.

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.

On motion, counsel submits a brief, an affidavit from the beneficiary and a print-out of the Florida minimum wage history.

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 on motion was based on a set of arbitrary assumptions unsupported by the evidence. Counsel contends that the evidence establishes that the beneficiary has the 24 months of required experience for the proffered position.

In the instant case, the proffered position requires 24 months of experience in the job offered, as a marketing assistant. The labor certification also states that the beneficiary qualifies for the offered position based on experience as an assistant manager/marketing assistant with Florida from March 10, 2003 until April 30, 2007. The only other experience listed is experience gained with the petitioner in the proffered position beginning May 17, 2007.[2] The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

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[2] The certified ETA Form 9089, clearly indicates at J.21 that the beneficiary's experience with the employer in a position substantially comparable to the job opportunity requested cannot be used to qualify the beneficiary for the certified position. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position only if the position was not substantially comparable. Representations made on the ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the employer is only in a position substantially comparable to the job opportunity and cannot, therefore be used to qualify the beneficiary for the certified position.

An experience letter from owner, on letterhead stated that the company employed the beneficiary as an assistant manager and marketing assistant from March 2003 until April 2007. As advised in the director's and the AAO's original decisions, however, the letter conflicted with a Form G-325A, Biographical Information Sheet, the beneficiary submitted in connection with an immediate relative petition filed on his behalf in 2005 and a concurrent application for adjustment of status. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

An Internal Revenue Service (IRS) Wage and Income Transcript for 2005 and copies of IRS Forms W-2, Wage and Tax Statements, for 2006 and 2007 indicated that the beneficiary received $10,400.00 in 2005, $10,000.00 in 2006 and $2,800.00 in 2007 from . The petitioner submitted copies of the Florida Department of State Division of Corporations verifying that has been doing business as in Florida. A copy of the beneficiary's Social Security Card (SSC) verified that the Social Security Number (SSN) listed on the IRS Forms W-2 and other documentation belongs to the beneficiary.[3] Responses to the beneficiary's inquiry to the IRS for certified individual tax returns and attached IRS Forms W-2 for 2005 through 2007 indicated that the IRS was unable to provide certified returns for 2005 because this return had been destroyed. The IRS provided certified copies of the beneficiary's 2006 and 2007 federal tax returns and IRS Forms W-2 indicating that the beneficiary received $10,000.00 in 2006 and $2,800.00 in 2007 from Federal Insurance Contributions Act (FICA) statements certified by the Florida Social Security Administration (SSA) Field Office confirmed that the beneficiary received $10,400.00 in 2005, $10,000.00 in 2006 and $2,800.00 in 2007 from

On motion, the AAO noted that the certified federal tax returns stated that the beneficiary was employed as a "cashier" in 2006 and as a "sales clerk" in 2007 and that the IRS Wage and Income Transcripts stated that the beneficary was at least a part-time student in 2005. The AAO found that the certified tax returns, IRS Forms W-2 and FICA statements were inconsistent with the qualifying experience claimed by the beneficiary on the Form ETA 9089 labor certification and the experience letters submitted with the Form I-140 petition which claimed that the beneficiary was employed full-time by as an assistant manager/marketing assistant. The certified tax returns, IRS Forms W-2 and FICA statements reflected that the beneficiary did not receive sufficient income from to demonstrate full-time employment or employment in the position of an assistant manager or marketing assistant, rather than as a cashier or sales clerk.

While the AAO found that the documents on motion provided independent, objective proof that the beneficiary was employed and paid by in 2005 through 2007, they did not provide independent, objective proof that the beneficary was employed full-time as an assistant manager/marketing assistant at rather than on a part-time basis as a cashier/sales clerk. Furthermore, the AAO found that there was no independent, objective proof that the

[3] Information in publically available credit checks revealed that the SSN had been associated with multiple individuals. This issue has been resolved based on evidence submitted by the petitioner.

beneficiary was employed between 2003 and 2005 as claimed on the labor certification. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In view of the noted inconsistencies the AAO affirmed prior decisions that the beneficiary made a willful misrepresentation of a material fact by stating that he was employed by from March 10, 2003 until April 30, 2007. Moreover, he made a willful misrepresentation of a material fact by stating that he was employed full-time from 2005 through 2007 by in the proferred position, rather than part-time as a cashier or sales clerk.

On motion, counsel contends that the beneficiary's income during 2005 through 2007 is entirely consistent with full-time employment (35 hours per week) for 26 months at above the minimum wage. Counsel contends that the beneficiary's occupational titles of cashier and sales clerk, as stated on his 2006 and 2007 tax returns, is entirely consistent with the beneficiary's job duties, which included sales and cashiering as an assistant manager/marketing assistant. In support of her assertions, counsel submits a print-out of Florida historical minimum wages and an affidavit from the beneficiary. In the affidavit, dated July 25, 2013, the beneficiary reiterates counsel's contentions on motion regarding meeting the minimum wage and states that he was willing to take pay that was not commensurate with his position because of his alien status in the United States. The beneficiary states that the pay he received reflects that he took three-and-a-half weeks of unpaid leave in 2005 to study for examinations; two to two-and-a-half months unpaid leave in 2006 due to health and personal issues; and only worked in January through April of 2007.

The beneficiary's job duties as an assistant manager/marketing assistant, as listed on the labor certification do include sales and cashiering, however, the duties also include marketing activities and store operations including customer relations, purchasing, inventory control, stocking, deposit preparation and general book-keeping. The beneficiary's tax returns present another inconsistency in his claimed experience. Counsel and the beneficiary assert that this is not an inconsistency, but rather a difference in occupational titles. In any case, the titles as listed on the labor certification and on the tax returns are different, thereby creating an inconsistency. Other than counsel's and beneficiary's assertions, nothing was presented to resolve the inconsistency. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO finds that counsel's and the beneficiary's explanation of the beneficiary's occupation as listed on his tax returns do not support a finding that the beneficiary was employed by as an assistant manager/marketing assistant, rather than as a sales clerk or cashier. As such, the petitioner has not established that the beneficiary is qualified to perform the duties of the position as of the priority date.

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

remain and have not been overcome with independent, objective evidence. The AAO finds that by stating that the beneficiary was employed full-time by as an assistant manager/marketing assistant, the beneficiary made a willful misrepresentation of the material fact that the beneficiary had the required experience including duties which involved marketing activities and store operations including customer relations, purchasing, inventory control, stocking, deposit preparation and general book-keeping.

As the evidence reflects fraud involving the labor certification, the director appropriately invalidated the ETA Form 9089, Application for Permanent Employment Certification (labor certification) in this case.

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 motions are granted. Upon reopening and reconsideration, the AAO's previous decision, dated June 25, 2013, is affirmed. The petition will remain denied. The labor certification remains invalidated.