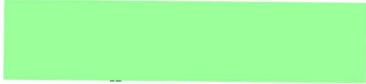


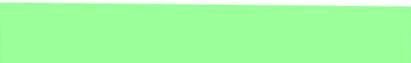


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JAN 23 2014** OFFICE: NEBRASKA SERVICE CENTER 

IN RE: 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, Nebraska Service Center (director), denied the immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The AAO granted the petition's motion to reconsider and affirmed the appeal's dismissal. The matter is now before the AAO on the petitioner's motion to reopen and reconsider. The motion will be granted, the appeal's dismissal will be affirmed, and the petition will remain denied.

The petitioner operates a donut shop franchise in Illinois. It seeks to permanently employ the beneficiary in the United States as a baker. The petition 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

A Form ETA 750, Application for Alien 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 an office in the DOL's employment service system accepted the labor certification for processing, is April 26, 2001. *See* 8 C.F.R. § 204.5(d).

The director found that the petitioner failed to establish its continuing ability to pay the beneficiary's proffered wage. He also found that the petitioner did not demonstrate the beneficiary's educational and experience qualifications for the offered position as specified on the labor certification. Accordingly, the director denied the petition on January 13, 2010.

The AAO affirmed the director's decision on appeal. On October 17, 2013, the AAO granted the petitioner's motion to reconsider and withdrew the finding that the petitioner failed to establish its ability to pay the proffered wage. However, the AAO affirmed the findings that the petitioner failed to demonstrate the beneficiary's educational and experience qualifications for the offered position and dismissed the appeal on those grounds.

In the instant motion, the petitioner submits additional evidence of the beneficiary's employment experience and argues that the record establishes his educational and experience qualifications for the offered position.

Because the petitioner's motion to reopen and reconsider states new facts supported by documentary evidence and alleges error, the AAO will grant the motion. *See* 8 C.F.R. §§ 103.5(a)(2),(3).²

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

² The AAO exercises appellate jurisdiction over employment-based, immigrant visa petitions, "except when the denial of the petition is based upon lack of a certification by the Secretary of Labor ..." 8 C.F.R. § 103.1(f)(3)(iii)(B) (2002) (as delegated in DHS Delegation No. 0150.1); *see* 68 Fed. Reg. 10922 (Mar. 6, 2003). The validity of a labor certification granted before July 16, 2007 expires if the labor certification is not filed with a petition within 180 calendar days of July 16, 2007. 20 C.F.R.

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

The Beneficiary's Qualifying Education

A 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 the beneficiary's qualifications, U.S. Citizenship and Immigration Services (USCIS) must examine the job offer portion of the labor certification to determine the minimum job requirements. USCIS may not ignore a term of the labor certification, nor may the agency impose additional requirements. See *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. 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 educational requirements for the offered position of baker include 8 years of grade school and 3 years of high school. The beneficiary, who was born on January 15, 1979, states on the labor certification that he attended [REDACTED] from September 1985 to June 1992, and [REDACTED] from September 1992 to June 1996.

The record contains copies of the following six, purported school certificates:

- A May 31, 1993 certificate states that the beneficiary attended [REDACTED] from July 17, 1986 to May 31, 1993.
- A May 29, 1995 certificate states that the beneficiary attended [REDACTED] from June 15, 1993 to May 29, 1995.
- A March 31, 1996 certificate states that the beneficiary attended [REDACTED] from June 15, 1993 to February 27, 1997.

§ 656.30(b)(2); see also USCIS Adjudicator's Field Manual, Chapt. 22.2(b)(3)(F)(i) (petitioners may not appeal denials based on expired labor certifications). In the instant case, the DOL approved the labor certification on May 2, 2007. The petitioner filed it with a previous petition on February 21, 2008, more than 180 days after July 16, 2007. However, the record shows that the director twice rejected attempted filings of the labor certification within its 180-day validity period. The record shows that the director validly rejected a December 7, 2007 submission based on an incorrect fee amount. See 8 C.F.R. § 103.2(a)(7)(ii) (requiring a properly filed petition to include the correct fee, unless waived). Because the record does not establish that the director validly rejected a July 5, 2007 submission, the AAO finds that the petitioner filed the labor certification during its validity period and that the AAO has jurisdiction in this matter.

³ The instructions to Form I-290B, Notice of Appeal or Motion, which 8 C.F.R. § 103.2(a)(1) incorporates into the regulations, allows the submission of additional evidence on appeal and motion. See *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

- An April 9, 1996 certificate states that the beneficiary attended [REDACTED] school from June 15, 1995 to April 9, 1996.
- Another certificate of April 9, 1996 states that the beneficiary attended [REDACTED] school from June 15, 1995 to an illegible date; and
- An April 8, 1997 certificate states that the beneficiary attended Multipurpose High School in [REDACTED] from July 22, 1996 to April 8, 1997.

The record also contains a marks record from the [REDACTED] Secondary Education Board in India regarding an "S.S.C." [secondary school certificate] examination in March 1996.

The evidence of the beneficiary's claimed education contains several inconsistencies:

- The beneficiary states on the labor certification that he attended schools from September 1985 to June 1996. The certificates in the record state that he attended schools from July 1986 to April 1997.
- The beneficiary states on the labor certification that he attended two schools. The certificates in the record appear to be issued by four schools.
- The beneficiary's two certificates from [REDACTED] state different dates of his departure and identify him by different general registration numbers.
- One of the [REDACTED] certificates inconsistently states that it was signed and dated on March 31, 1996, but that the beneficiary attended the school until February 27, 1997.
- The petitioner's Form I-140, Petition for Alien Worker, and the beneficiary's Form I-485, Application for Adjustment of Status, state that the beneficiary last entered the U.S. in July 1996. But the April 8, 1997 certificate states that the beneficiary studied in India from July 22, 1996 to April 8, 1997.
- The first name of the student identified on the marks record of the March 1996 examination does not match the beneficiary's first name stated on all other documents in the record.

The discrepancies above raise substantial doubts about the validity and accuracy of the petitioner's evidence and the beneficiary's educational qualifications for the offered position. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (a petitioner must resolve inconsistencies in the record by independent, objective evidence).

On motion, counsel asserts that the beneficiary's qualifying education for the offered position is no longer at issue. He states: "It appears that previous inconsistencies have been clarified and the only issue of contention is whether or not the beneficiary ... established the minimum job experience required for the position."

Counsel misreads the record. In its October 17, 2013 decision on the petitioner's previous motion, the AAO concluded: "The petitioner has not resolved the inconsistencies in the record with independent, objective evidence and, therefore, the petitioner has not established that the beneficiary has the requested education for the proffered position."

Counsel also asserts that the discrepancy regarding the beneficiary's date of last entry into the U.S. "has been addressed." He notes that the beneficiary stated in his February 9, 2010 affidavit that he last entered the U.S. in July 1997 and that "[t]he reference to July 1996, as the date of my entry into the United States on my Application to Adjust Status to Lawful Permanent Resident (I-485), is a typographical error." Counsel states: "The undersigned attorney was the original attorney filing the I-140 petition. A typographical error of one (1) digit (1996 instead of 1997) is not an error which is beyond the realm of probability."

In his affidavit, the beneficiary does not state who prepared his Form I-485 or why he did not notice and correct the error before signing the form. The beneficiary's claim of a typographical error appears to be self-serving and does not constitute independent, objective evidence of an error. *See Matter of Ho*, 19 I&N Dec. at 591-92 (a petitioner must resolve inconsistencies in the record with independent, objective evidence). The record lacks independent evidence and sufficient details to support the beneficiary's claim of a typographical error in his date of last entry on the Form I-485. *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 insufficient to meet the standard of proof in these proceedings).

Counsel's assertion also fails to corroborate the beneficiary's claim of a typographical error in his date of last entry into the U.S. Counsel does not state that a typographical error actually occurred. Rather, he states only that such an error is not "beyond the realm of probability." Further, the July 1996 date of entry was contained in both the petitioner's Form I-140 and the beneficiary's Form I-485, the information in which the petitioner's president and the beneficiary, respectively, certified as "true and correct" by signing the forms. The record therefore does not establish that a typographical error in the beneficiary's last date of entry occurred.

Counsel also asserts that the school certificates of May 31, 1993 and May 29, 1995 refute the AAO's statement in its October 17, 2013 decision that "the beneficiary does not have 8 years of grade school." He argues that the May 31, 1993 certificate states that the beneficiary completed seventh grade at the elementary school and that the May 29, 1995 certificate states that the beneficiary studied from 1993 to 1995 at the high school, completing eighth grade.

The AAO, however, does not find the May 29, 1995 certificate from [REDACTED] to be reliable. A handwritten certificate from the same purported school is signed and dated March 31, 1996 and states that the beneficiary studied there until February 27, 1997. The beneficiary's departure date on the March 31, 1996 certificate not only conflicts with the departure date on the May 29, 1995 certificate, it internally conflicts with the March 31, 1996 certificate itself, as the certificate's signer could not know on March 31, 1996 that the beneficiary left the school almost a year in the future on February 27, 1997. The March 31, 1996 certificate also identifies the beneficiary by a different general register number than the May 29, 1995 certificate. The inconsistencies in the documents cast doubts on the validity and accuracy of the petitioner's evidence of the beneficiary's qualifying education for the offered position. *See Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on any aspect of the petitioner's

proof may lead to reconsideration of the sufficiency and reliability of the remaining evidence in the record).

For the foregoing reasons, the AAO finds that the record does not establish the beneficiary's educational qualifications for the offered position as specified on the labor certification by the petition's priority date.

The Beneficiary's Qualifying Experience

As previously indicated, a petitioner must demonstrate that the beneficiary possessed all the education, training, and experience specified on the labor certification by the petition's priority date. 8 C.F.R. §§ 103.2(b)(1),(12); *see also Wing's Tea House*, 16 I&N Dec. at 159; *Katigbak*, 14 I&N Dec. at 49.

The labor certification states that the offered position of baker requires 2 years of experience in the job offered. The beneficiary states on the labor certification that, before joining the petitioner in the offered position in May 2000, he worked full-time in the offered position for a donut shop franchise in Michigan from April 1998 to May 2000.

A 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).

The petitioner first submitted a June 15, 2000 letter on the stationery of the Michigan franchise stating that the beneficiary worked there as a baker from April 4, 1998 to May 15, 2000. On September 17, 2009, the director requested additional evidence of the beneficiary's experience, stating that the June 15, 2000 letter failed to indicate how many hours the beneficiary worked and to provide the employer's telephone number for verification purposes.

The petitioner responded to the director's request with another copy of the June 15, 2000 letter and an October 16, 2009 letter from the beneficiary stating that he worked full-time for the Michigan franchise from April 4, 1998 to May 15, 2000. The beneficiary's letter also states: "Since I am unable to contact my previous employer since both the business and cooperation have closed and I do not have any contact information of the owner, I ... am writing this letter to show the amount of hours I worked per week."

On appeal, the petitioner submitted a February 7, 2010 affidavit from the purported owner of the Michigan franchise. The affidavit states that the owner's business closed in October 2000 and that the beneficiary worked there full-time as a baker from April 4, 1998 to May 15, 2000.

The letters of June 15, 2000 and February 7, 2010 from the Michigan franchise do not describe the beneficiary's experience as the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) requires. The June 15, 2000 letter states that the beneficiary "performed all duties related to baking donuts according to the standards required by [the franchisor's] headquarters." But the letter does not detail the beneficiary's duties there.

Without evidence of the beneficiary's duties in his previous position, the AAO cannot determine whether his experience was in the job offered as specified on the labor certification.

The beneficiary's letter of October 16, 2009 is self-serving and does not constitute independent, objective evidence of his employment experience. *See Soffici*, 22 I&N Dec. at 165 (going on record without supporting documentary evidence is insufficient to meet the standard of proof in these proceedings).

On motion, the petitioner submits an October 29, 2013 affidavit from the purported manager of another donut franchise in Michigan. The affidavit states that she saw the beneficiary working in the other Michigan franchise in 1998 and that the franchise where she works "often borrowed supplies from that ... location."

The October 29, 2013 affidavit does not establish that the beneficiary worked full-time in the offered position for at least 2 years as specified on the labor certification. The affidavit states that the beneficiary was seen working only in 1998 and does not describe his position, duties, or hours of employment.

Counsel argues that, because the beneficiary illegally entered the U.S. at a young age and feared that records of his unlawful presence and employment in the U.S. would lead to punishment, little evidence exists of the beneficiary's previous employment experience.

If required evidence is unavailable, the regulations require a petitioner to demonstrate the unavailability of the evidence and to submit secondary evidence of the facts at issue. 8 C.F.R. §§ 103.2(a)(7)(i),(ii). In the instant case, the petitioner has not demonstrated that the required letter from the beneficiary's former employer is unavailable. Even if the unavailability of the required letter was demonstrated, the secondary evidence does not establish the beneficiary's qualifying experience for the offered position.

Counsel cites a 1996 Board of Alien Labor Certification Appeals (BALCA) decision, which discusses verification of employment history. The BALCA case cited by counsel, however, does not bind the AAO. The AAO is bound by precedent decisions of USCIS, the Board of Immigration Appeals, the Attorney General, the Secretary of Homeland Security, and U.S. Courts of Appeals with jurisdiction over the area of intended employment. *See* 8 C.F.R. §§ 103.3(c), 103.10(b), 1003.1(g).

Moreover, the 1996 BALCA case - which addresses when an employer in labor certification proceedings can lawfully reject a U.S. worker based on verification of (or inability to verify) the worker's employment history - is irrelevant to these visa petition proceedings. As stated previously, USCIS regulations require a petitioner to demonstrate the beneficiary's qualifying employment experience with letters from the beneficiary's employers. 8 C.F.R. § 204.5(l)(3)(ii)(A).

For the foregoing reasons, the AAO finds that the record does not establish that the beneficiary possessed the employment experience specified on the labor certification by the petition's priority date.

Conclusion

The AAO grants the petitioner's motion to reopen and reconsider. Upon careful reconsideration of the record and the petitioner's arguments and evidence on motion, the AAO finds that the petitioner has failed to establish the beneficiary's qualifying education and experience for the offered position as specified on the labor certification. Accordingly, the AAO will affirm its dismissal of the petitioner's appeal.

The appeal will be dismissed for the above stated reasons. 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, the petitioner has not met that burden.

ORDER: The motion to reopen and reconsider is granted, and the decision of the AAO dated October 17, 2013 is affirmed. The petition remains denied.