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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: **JUL 01 2014** OFFICE: TEXAS SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Professional or Skilled Worker 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,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment based visa petition was denied by the Director, Texas Service Center. The petitioner appealed. On appeal, the Administrative Appeals Office (AAO) remanded the case to the director for further review and entry of a new decision. The Director, Texas Service Center issued a notice of intent to deny and subsequently denied the petition again. The director's decision was certified to the AAO. The matter is now before the AAO on certification. The director's decision to deny the petition is affirmed.

The petitioner is a convenience store/gas station. It seeks to employ the beneficiary permanently in the United States as an assistant manager pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, a Form ETA 750, Application for Alien Employment Certification² approved by the Department of Labor (DOL), accompanied the petition. On July 20, 2009, the Director of the Texas Service Center denied the petition. He determined that the petitioner had not established that the beneficiary had the employment experience required by the terms of the labor certification. Specifically, the director determined that the beneficiary did not possess two years of experience as an assistant manager as of the priority date of April 30, 2001. He additionally found that her experience had been fraudulently misrepresented.

The petitioner, through counsel, appealed this decision. On February 21, 2013, we withdrew the decision to deny the petition, and remanded the case to the director to notify the petitioner of the derogatory information considered prior to a final decision pursuant to 8 C.F.R. § 103.2(b)(16)(i). We also raised concerns relevant to the *bona fides* of the job offer based on the fact that the beneficiary is the sister-in-law of the petitioner's president.

On remand, the Director, Texas Service Center issued a notice of intent to deny, dated May 2, 2013, to the petitioner. The petitioner was permitted thirty (30) days to respond. Upon review of the petitioner's response, the director denied the petition on August 20, 2013, and certified it to this office for review.³ The petitioner was again permitted thirty (30) days to submit a brief or written

¹ In pertinent part, section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, 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.

² After March 28, 2005, the correct form to apply for labor certification is the ETA Form 9089. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

³ The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. See DHS Delegation No. 0150.1 (effective March 1, 2003); see also C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). See DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

Certifications by regional service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

statement in response to the issues raised by the director. The petitioner has submitted a brief to this office.⁴

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

At the outset, it is noted that section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The respective roles of DOL and the U.S Citizenship and Immigration Services (USCIS) have been discussed by various federal circuit courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).⁵ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

⁴ The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

⁵ Based on revisions to the Act, the current citation is section 212(a)(5)(A).

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification. USCIS authority also extends to investigating the bona fides of a job offer to determine whether fraud or misrepresentation is involved.

According to Part 5 of the Form I-140, which was filed on or about July 20, 2009, the petitioner was established on October 19, 2000. The number of employees is not given, although the Form ETA 750 claims that the beneficiary will supervise one worker.

The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The priority date for the instant petition is April 30, 2001. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary does not claim to have worked for the petitioner (as of the date of signing). As indicated in our previous decision, Part B of the ETA 750 appears to have received additional corrections to the two jobs represented to be the beneficiary's employment history. The first job listed is that of an assistant manager for [REDACTED] Texas. It initially listed the beneficiary's employment as occurring from August 1996 to March 1999. The end date was amended to April 2000 as indicated by the beneficiary's initials dated September 22, 2004. To the left side of this entry, the DOL correction approval stamp appears. The second job listed by the beneficiary is also as an assistant manager for the [REDACTED] Texas from April 2000 to the present. "Present" appears to be circled in red and printed in red to reflect "present" as indicating the beneficiary's employment ran until September 24, 2004, as indicated by the beneficiary's initials.

In his initial denial, the director observed the following: 1) that the beneficiary possessed a Social Security number by the time she claimed to have worked for the [REDACTED] but state wage records showed no employment under her number for that time; 2) that the petitioner had failed to provide any employment verification letters; 3) that the beneficiary's Form G-325, Biographic Information form signed by the beneficiary on October 21, 2002 contained "N/A" under the part instructing the applicant to list the employment for the previous five years; and 4) that although the beneficiary claimed to have married her husband on August 7, 2000, she failed to state that she had previously married him on June 20, 1996 in the State of Texas.

On appeal, the petitioner submitted two employment verification letters. One is dated August 24, 2009, from the [REDACTED] signed by [REDACTED] as partner, stating that the beneficiary had worked from August 1, 1996 to April 15, 2000 as a full-time assistant manager. The second is from [REDACTED] President of the [REDACTED] dated August 27, 2009, confirming the beneficiary's employment for him from April 15, 2000 until April 27, 2001 as a full-time assistant manager. An affidavit from the beneficiary, dated September 10, 2009, also asserts this

employment, states that there are no wage records because she was paid in cash and also asserts that she is *currently* an assistant manager at the petitioner's business, who has sponsored her on an I-140. Counsel asserts on appeal that the Form G-325 claiming no employment was simply a mistake by a previous attorney. (Emphasis added).

In response to the director's Notice of Intent to Deny (NOID), the petitioner submitted updated similar affidavits from Mr. [REDACTED] Mr. [REDACTED] and the beneficiary, each dated January 19, 2012. In addition, an affidavit dated January 19, 2012, was submitted from [REDACTED] the petitioner's president, who also vouches for the beneficiary's employment experience with Mr. [REDACTED] and Mr. [REDACTED] (who also shares the same family name as the beneficiary) and states that she has been working as an assistant manager with the petitioner since January 2010.

As noted by the director in his final decision, the Form ETA 750B had been amended by the beneficiary to reflect her employment as an assistant manager with the [REDACTED] as running from April 2000 to "present." As indicated above and on the Form ETA 750B, "Present" appears to be circled in red and printed in red to reflect "present" as indicating the beneficiary's employment ran until September 24, 2004. None of the affidavits reflect this period of employment. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The two G-325 biographic forms are also inconsistent with other claims of employment. Although denied by the petitioner's counsel, the director accurately identified a second Form G-325 contained in the record. It is signed by the beneficiary and dated October 27, 2011. It was submitted in connection with her Form I-485, Application to Register Permanent Residence or Adjust Status, which was submitted on or about November 18, 2011. Her signature matches the notarized signatures appearing on her affidavits. In the part describing the beneficiary's employment history, it states, from 2001 to 2009 as "Unemployed [REDACTED] Texas." It also states "Unemployed [REDACTED] Texas" for the period from 2010 to October 27, 2011 (date of signing).

The petitioner has not resolved any of these contradictions with independent, objective evidence that establishes that the beneficiary acquired two years of full-time employment experience in the job offered as an assistant manager. Even the dates of employment working for the petitioner are in question. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Although we do not find sufficient evidence to support fraudulent misrepresentation as determined by the director, based on the foregoing, we cannot conclude that the petitioner resolved the

inconsistencies contained in the record or persuasively established that the beneficiary possesses the requisite experience set forth on the Form ETA 750.

In visa petitions, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1391. Here, that burden has not been met.

ORDER: The director's decision is affirmed. The petition remains denied.