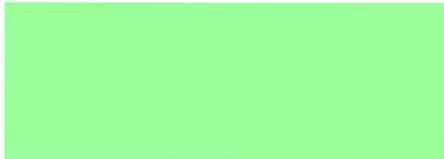




U.S. Citizenship
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Services

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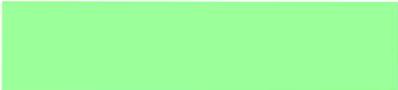


DATE: **SEP 18 2014**

OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE:

Petitioner: 

Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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 (the director) denied the employment-based immigrant visa petition and the petitioner has appealed the director's decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a real estate management business. It seeks to employ the beneficiary permanently in the United States as a maintenance repair worker. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner checked box "f" in Part 2 of the petition, indicating that it seeks to classify the beneficiary as a skilled worker 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). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).

We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted on appeal.¹ An application or petition that fails to comply with the technical requirements of the law may be denied even if the director does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 D.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, *supra*. The record reflects that the motion is properly filed and timely.

Procedural History

The petitioner filed the Form I-140 petition on March 7, 2011. On December 27, 2011, the director denied the visa petition, finding that the petitioner had failed to establish that the beneficiary was a skilled worker and, further, that it had willfully misrepresented material facts during the labor certification process. For this latter reason, the director also invalidated the underlying labor certification, pursuant to the regulation at 20 C.F.R. § 656.30(d). On January 19, 2012, the petitioner appealed the director's decision to this office.

On April 26, 2013, we notified the petitioner that we were referring the labor certification in this matter to DOL. The notice informed the petitioner that it appeared that an improper priority date had been assigned to the labor certification and that, pursuant to our consultation authority at section 204(b) of the Act, 8 U.S.C. § 1154(b), we would seek DOL's advice on this issue. Therefore, on April 26, 2013, we forwarded copies of the instant labor certification [REDACTED] and a previously approved Form ETA 750, Application for Alien Employment Certification [REDACTED], to DOL seeking clarification as to whether the instant labor certification could use the filing date assigned to the earlier labor certification. This issue remains before DOL and our decision in this matter does not preclude DOL from acting independently on our referral.

On July 24, 2014, we issued a Notice of Derogatory Information and Intent to Dismiss (NOID) to the petitioner, indicating that information had come to our attention that raised questions regarding the

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1).

credibility of the qualifying employment claimed by the beneficiary in Part K. of the labor certification. *See* 8 C.F.R. § 103.2(b)(16)(i). On August 20, 2014, the petitioner responded to the NOID by submitting a letter from its counsel.

Having reviewed the petitioner's response to the NOID, we find that we may issue our decision in this matter without waiting for DOL's response concerning the correct filing date for the instant labor certification. For the reasons discussed below, the visa petition may not be approved regardless of the filing date assigned by DOL to the labor certification.

Beneficiary Qualifications

The petitioner is seeking classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i). 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.

To establish that a beneficiary is qualified to perform the duties of an offered position, a petitioner must demonstrate that the beneficiary has met all of the requirements set forth in the labor certification by the priority date of the petition, which is the date on which DOL accepted the labor certification for processing. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

Parts H.6. and H.6-A. of the instant labor certification require the beneficiary to have 24 months of experience in the job offered, maintenance repair worker. In Part K. of the labor certification, the beneficiary claims employment experience as a maintenance repair worker with "[REDACTED] New York from March 10, 1995 until July 17, 1997. He lists no other work experience.²

As required by the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A),³ the petitioner submitted a June 12, 2008 statement signed by a [REDACTED] owner of [REDACTED] in support of the beneficiary's claimed qualifying experience. The statement indicates the beneficiary worked full-time for [REDACTED] as a maintenance repair worker from March 10, 1995 until July 17, 1997.

² Instructions for completing Part K. of the labor certification direct beneficiaries to list all jobs held during the past three years, as well as any other qualifying experience. Although the labor certification was filed with DOL on June 25, 2008, the beneficiary did not list his employment with the petitioner, where he began working in 2005. *See* Form G-325A, Biographic Information, signed by the beneficiary on August 23, 2013.

³ The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

In the brief submitted in support of the appeal, counsel points to the beneficiary's employment experience with [REDACTED] as sufficient to establish his qualifications for the offered position. However, as indicated in the NOID issued to the petitioner on July 24, 2014, information obtained by United States Citizenship and Immigration Services (USCIS) during the appeals process casts doubt on the reliability of the experience claimed by the beneficiary. Specifically, online records maintained by the Division of Corporations, New York State Department of State reflect that [REDACTED] located at [REDACTED] was not established until 1999 and that it is owned by [REDACTED], rather than [REDACTED]. Prior to the issuance of the NOID, the 1999 date of the company's founding was telephonically confirmed with Mr. [REDACTED] who also stated that the beneficiary had worked for him as a carpenter at some point in the past but was employed for no more than two weeks.

Accordingly, pursuant to the regulation at 8 C.F.R. § 103.2(b)(16)(i), we issued a NOID to the petitioner, informing it of the above information and the doubts that this information raised regarding the credibility of the beneficiary's claim to have the qualifying experience required by the labor certification, as well as the legitimacy of the June 12, 2008 experience letter submitted in support of that claim. The NOID further advised the petitioner that it appeared the petition contained a fraudulent document and that submitting fraudulent evidence might implicate the provisions of section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), which could render the beneficiary inadmissible to the United States in future proceedings.⁴

To establish that the employment experience claimed by the beneficiary on the labor certification was genuine, the NOID requested a new experience letter from [REDACTED] that satisfied the evidentiary requirements of the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A). It also asked for evidence to overcome: the doubt cast on the genuineness of the June 12, 2008 letter signed by "[REDACTED]" Mr. [REDACTED] denial of having previously employed the beneficiary for two years as a maintenance repair worker; and the beneficiary's claim of having been employed by [REDACTED] prior to its 1999 founding. Such evidence was to include independent, objective evidence of the beneficiary's employment with [REDACTED] in the form of business, payroll or tax records identifying the beneficiary as an employee; the beneficiary's earnings statements for the period of employment claimed; and/or Internal Revenue Service Forms W-2, Wage and Tax Statements, or Forms 1099 MISC issued to the beneficiary by [REDACTED]. The petitioner was also advised that, pursuant to section 291 of the Act, 8 U.S.C. § 1361, it bore the burden of establishing eligibility for immigration benefit it was seeking and that failure to submit requested evidence that precluded a material line of inquiry would result in the dismissal of the appeal. *See* 8 C.F.R. § 103.2(b)(14).

In response to the NOID, counsel for the petitioner submits a letter, dated August 18, 2014, in which he recounts information obtained from his conversations with the beneficiary. Specifically, counsel states:

⁴ An alien who "by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible." *See* section 212(a)(6)(C)(i) of the Act.

██████████ was born in the Republic of Ireland. When he formed his corporation in 1999, he used the name ██████████ is the Irish name for ██████████ is the English name for ██████████. Before forming a corporation, ██████████ worked on his own out of the same ██████████ address.

....

[The beneficiary] is unaware of what information was put down in the ETA [F]orm 9089 although he signed the form as directed by [the] paralegal . . . believing everything to be accurate. Beneficiary still cannot read nor write English and truly did not have a clue as to what was written on the form he signed in 2008. If there [was] any information that was inaccurate, alien did not know it and had no intention to mislead the government. If there were mistakes in the 2008 ETA [F]orm 9089, they resulted from incompetence of prior counsel and paralegal.

No other evidence is provided in response to the NOID.

While we note counsel's explanation for the signature of ██████████ on the experience letter dated June 12, 2008 and his assertion that Mr. ██████████ was in business prior to the founding of ██████████ in 1999, no evidence supports either of these claims. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 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). Although counsel indicates that the information he provides comes from the beneficiary, the beneficiary's unsupported assertions, like those of counsel, fail to meet the petitioner's burden of proof in the absence of supporting documentation. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Inconsistencies like those identified in the record must be resolved by the submission of "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, 591-92 (BIA 1988). Moreover, counsel's letter is not responsive to the July 24, 2014 NOID, which specifically requested documentary evidence of the beneficiary's employment with ██████████ as well as a new experience letter satisfying the requirements at 8 C.F.R. § 204.5(l)(3)(ii)(A). The petitioner's failure to submit the requested evidence cannot be excused and, pursuant to the regulation at 8 C.F.R. § 103.2(b)(14), the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying a petition.

Even if we were to accept counsel's claims, the evidence they offer would not establish the validity of the 2008 letter. As noted above, the letter indicates that the beneficiary was employed by Mr. ██████████ for a period of more than two years as a maintenance repair worker. Mr. ██████████ however, has informed USCIS that he employed the beneficiary for no more than two weeks as a carpenter and no evidence has been submitted to explain why, in light of his statements to USCIS, Mr. ██████████ nevertheless, purportedly signed the 2008 letter in support of beneficiary's claim to have two years of experience as a maintenance repair worker.

In his August 18, 2014 letter, counsel also attempts to characterize the dates of employment claimed by the beneficiary on the labor certification, March 10, 1995 to July 17, 1997, as inaccurate, resulting from prior counsel's incompetence, rather than an intention of the part of the beneficiary to mislead the government. As noted above, counsel asserts that the beneficiary was "unaware of what information was put down in the ETA [F]orm 9089 although he signed the form as directed by [the] paralegal," and that any mistakes in the labor certification "resulted from incompetence of prior counsel and paralegal." Counsel appears to be asserting an effective assistance of counsel claim. However, counsel has not properly articulated a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988), which requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

As the petitioner has not submitted evidence of its compliance with the above requirements, we will not consider a claim based on ineffective assistance of counsel. We also note that counsel's assertion regarding the inaccuracy of the employment dates claimed on the labor certification fails to take into account that the dates of the qualifying employment claimed on the labor certification are identical to those reflected in the 2008 experience letter, which counsel seeks to establish as genuine.

Moreover, counsel's claim that the beneficiary does not read or write in English and was, therefore, unaware of the contents of the labor certification does not absolve the beneficiary of responsibility for what appears to be the misinformation provided by that document. *See e.g., Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents). The law generally does not recognize deliberate avoidance as a defense to misrepresentation. *See Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005); *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993). Here, the beneficiary signed the labor certification on February 11, 2011, under penalty of perjury, indicating that the information he had provided in Sections J. and K. of the labor certification was true and correct. The beneficiary is, therefore, responsible for the employment experience claimed on the labor certification.

Conclusion

In that the petitioner's only response to the NOID is counsel's unsupported August 18, 2014 letter, the petitioner has failed to resolve the inconsistencies in the employment experience claimed by the beneficiary. Inconsistencies must be resolved by the submission of "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, 591-92 (BIA 1988). The petitioner has not submitted the documentary evidence requested by the NOID and has not demonstrated that such evidence is unavailable. The petitioner's failure to provide the requested evidence precludes further examination of the employment experience claimed by the beneficiary, and, therefore, his eligibility for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act. Moreover, the petitioner, has not submitted the new experience letter requested by the NOID and, therefore, has also failed to satisfy the evidentiary requirements of the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A).

The petitioner has not submitted any of the evidence requested by the July 24, 2014 NDI/NOID. For the reasons discussed above, the petitioner's failure to provide this evidence has prevented further inquiry into whether the beneficiary is qualified for the offered position. Therefore, as indicated in the July 24, 2014 NOID, the appeal will be dismissed pursuant to 8 C.F.R. § 103.2(b)(14), based on the petitioner's failure to submit requested evidence, which has precluded a material line of inquiry in this matter.

For the reasons discussed above, the appeal will be dismissed. Accordingly, we will affirm the director's denial of the visa petition and his invalidation of the labor certification.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The director's decision is affirmed.