

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

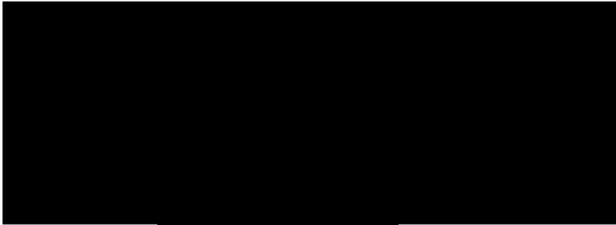
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE:



Office: VERMONT SERVICE CENTER

Date: JUL 30 2007

EAC-04-060-52589

IN RE:

Petitioner:



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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Center Director, Vermont Service Center (“director”) denied the preference visa petition. On August 24, 2004, the petitioner filed an appeal to the Administrative Appeals Office (“AAO”). On February 21, 2006, the AAO rejected the appeal. The AAO reopened the petition on motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii) for entry of a new decision. The appeal will be dismissed.

The petitioner is a painting and construction company. The petitioner seeks to employ the beneficiary permanently in the United States as a painter. As required by statute, the petition was filed with Form ETA 750, Application for Alien Employment Certification (“labor certification,” or “Form ETA 750”), approved by the U.S. Department of Labor (“DOL”).¹ As set forth in the July 28, 2004 decision, the director denied the petition on the basis that the labor certification submitted was not valid for the job opportunity offered to the beneficiary on Form ETA 750. The petitioner appealed to the AAO. The appeal was rejected on the basis that the AAO lacked jurisdiction as the director had invalidated the labor certification, and the petition was, therefore, no longer supported by a valid labor certification.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted. 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.

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. *See also* Section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C), which provides that a labor certification is required, and that “an immigrant visa may not be issued under subparagraph (A) until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 212(a)(5)(A).”

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

¹ The petition, however, was filed with a Form ETA 750 filed by one petitioner, and a second and separate petitioner listed on Form I-140, which forms the crux of the basis for denial and will be discussed below.

In the case at hand, the petitioner filed Form ETA 750² with the relevant state workforce agency on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$22.27 per hour,³ which is equivalent to \$43,321.60 per year, based on a 40 hour work week. The labor certification was approved on July 29, 2002, and the petitioner filed the I-140 on the beneficiary's behalf on December 24, 2003.⁴ On the I-140, the petitioner represented the following information: date established: 1991; gross annual income: \$780,677.68; net annual income: \$107,243.46; and current number of employees: 4.

The Form ETA 750 submitted to DOL initially listed the employer as "Painting by Marge" with an address of [REDACTED]. The Form ETA 750 work location was listed as the same address. The petitioner listed on Form I-140 was "Mill River Builders Partnership," with an address of [REDACTED] and with the beneficiary's work location listed as: "Berkshire County and adjacent counties in Mass. and Conn. within normal commuting distance of Berkshire County."

On July 28, 2004, the director denied the petition on the basis that the labor certification submitted was not valid for the job opportunity offered to the beneficiary. Further, the record contained no evidence that the petitioner had obtained an individual labor certification on behalf of the beneficiary.

The petitioner had cited to a Board of Alien Labor Certification Appeals ("BALCA") case, *Matter of International Contractors Inc. and Technical Programming Services, Inc.*, 89-INA-278 (June 13, 1990),⁵ as well as a DOL memo related to changes after Form ETA 750 had been certified. The director found *Matter of International Contractors Inc. and Technical Programming Services, Inc.* to be inapplicable to the present petition, as the BALCA case cited related to a situation where the labor certification beneficiary was employed as a programmer for the benefit of a third party, and performed work on the third party's premises. The petitioning employer on Form ETA 750 had a contractor relationship with the third party. The Form ETA 750 contractor was subsequently replaced with a different contractor, and the substitution of the contractor did not impact or affect the job that the beneficiary performed, which remained exactly the same. Since the change of contractors did not have any effect on the job opportunity, the labor certification remained valid.

In contrast, in the present case, the director found that the petitioner's attempt to use the labor certification filed by a different employer, did not present the same situation since "this is clearly not the same exact job opportunity offered by the previous prospective employer." Further, the director noted that the DOL memo that the petitioner cited as guidance for a "change of employers" was limited to situations where the employer experienced a name change, relocation, or successor-in-interest situation as a result of a sale, merger, or reorganization.

² The Form ETA 750 submitted to DOL listed the employer as "Painting by Marge."

³ The petitioner initially listed the wage as \$14 per hour, but DOL required that the petitioner increase the wage to \$22.27 per hour prior to certification.

⁴ The petitioner listed on Form I-140 was "Mill River Builders Partnership."

⁵ While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Subsequent to the petitioner's denial, the petitioner appealed to the AAO. On February 21, 2006, the AAO director rejected the appeal on the basis that the AAO lacked jurisdiction because the AAO mistakenly thought that the director had invalidated the labor certification, and the petition was, therefore, no longer supported by a valid labor certification. *See* 8 C.F.R. § 103.1(f)(3)(iii), (as in effect on February 28, 2003); *see also* DHS Delegation Number 150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003).

On June 27, 2007, the AAO reopened the matter on motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii)⁶ for purposes of entering a new decision. We shall review the petitioner's prior appeal filed, and additionally, the petitioner's response to the AAO's June 27, 2007 Notice of reopening the petition. The notice of reopening the matter gave the petitioner 30 days to submit a brief. The petitioner did not provide a reply.

At the outset, the AAO erred in stating in its prior decision that the director invalidated the labor certification submitted with the petition. The labor certification was not invalidated and the AAO is not invalidating the labor certification. The issue in this case is that the petition is not supported by a valid labor certification. This is because the labor certification submitted with the petition is in the name of Painting by Marge but the visa petition was filed by Mill River Builders Partnership, which is not a successor-in-interest to Painting by Marge and has no ownership of or right to use Painting by Marge's labor certification to seek an immigrant visa from Citizenship and Immigration Services ("CIS").

In order to file an I-140 Petition for an employment-based immigrant, the regulation at 8 C.F.R. § 204.5(l)(3)(i) provides:

Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for a Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Market Information Pilot Program.

Regulatory provisions related to the validity and invalidation of labor certifications, 20 C.F.R. § 656.30, provide: "A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification."

In limited circumstances, a new petitioner can assert continued processing under the same labor certification, such as in the case of a successor-in-interest. The new petitioner would need to demonstrate that it has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

⁶ 8 C.F.R. § 103.5(a)(5)(ii) provides:

[Citizenship and Immigration Services (CIS)] motion with decision that may be unfavorable to affected party. When a [CIS] officer, on his or her motion, reopens a [CIS] proceeding or reconsiders a [CIS] decision, and the new decision may be unfavorable to the affected party, the officer shall give the affected party 30 days after service of the motion to submit a brief. The officer may extend the time period for good cause shown. If the affected party does not wish to submit a brief, the affected party may waive the 30-day period.

Counsel, however, does not assert that the petitioner is proceeding based on a successor-in-interest theory. Rather, counsel argues that the labor certification obtained by the "previous prospective employer" remains valid for the I-140 petition for the "present petitioner employer" as a new petitioner since the job title, position duties, and area of employment are the same or similar to the job title, position duties, and area of employment as listed on the ETA 750. She bases this on 20 C.F.R. § 656.30(a) that a labor certification remains valid "indefinitely," and cites to a DOL precedent and memorandum, *Matter of International Contractors Inc. and Technical Programming Services, Inc.*, 89-INA-278, and [REDACTED] Adm. Office of Regional Management, Employment Training Administration (May 7, 1992), 57 Fed. Reg. 31219 (July 14, 1992), in support.

In the petitioner's appeal, counsel asserted that the petition was supported by a labor certification issued by DOL as required. Further, counsel asserted that CIS acknowledges the job title on the ETA 750 and the Form I-140 are the same, and that the petitioner is "in the same general area" as the previous employer. Counsel asserted that CIS "is silent as to the job to be performed by the alien," and further is silent as to the fact that the pay listed on Form I-140 is the same as listed on the ETA 750. Counsel argued that CIS uses a "narrow and restrictive view" in its determination that despite the fact that the salary, job title, and area of employment are very similar, the job opportunities as listed on the ETA 750 and the I-140 are not the same.

Counsel is in error in her interpretation of 8 C.F.R. § 204.5(l)(3)(i). While the petition was filed with a "valid labor certification," the Form ETA 750, the valid labor certification, comprises the job offer. The job offered was for the beneficiary to be permanently employed by, and paid by, Painting by [REDACTED], and work at: [REDACTED] Connecticut. Encompassed in the job offer is the specific employer, and location where the beneficiary will work. The petitioner makes the job offer, files the Form ETA 750⁷, and following certification submits the certified ETA 750⁸ with Form I-140 to CIS in compliance with 8 C.F.R. § 204.5(l)(3)(i). The "job offer" does not follow the beneficiary. The job offer listed on Form ETA 750 is not fungible to be used by another employer.⁹ A new employer, absent successorship, or other limited circumstances, would require a new labor certification filing to reflect the new employer's job offer.

⁷ Further, 20 CFR § 656.21 sets out the basic labor certification process:

- (a) Except as otherwise provided by Section 656.21a and 656.22, an employer who desires to apply for a labor certification on behalf of an alien shall file, signed by hand and in duplicate, a Department of Labor Application for Alien Employment Certification from and any attachments required by this part with the local Employment Service office serving the area where the alien proposes to be employed.

⁸ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program ("PERM"), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. See 69 Fed. Reg. 77326 (Dec. 27, 2004). The present I-140 petition was filed with a Form ETA 750, prior to the implementation of PERM.

⁹ DOL recently issued revised regulations to reiterate this point. Its final rule related to labor certification substitution prohibits substitution, as well as the sale, barter, or purchase of permanent labor certifications and applications. The rule continues the Department's efforts to construct a deliberate, coordinated fraud reduction and prevention framework within the permanent labor certification program. See 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656).

Further, counsel contends that CIS' interpretation that a different petitioner may not file the Form I-140 based on an approved labor certification is contrary to applicable law and an incorrect interpretation of CIS policy. In support counsel cites the Act that "an employer desiring and intending to employ within the United States an alien entitled to classification under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2) or 203(b)(3) may file a petition with the Attorney General for such classification."

Counsel misinterprets the law. Section 203(b)(3) cannot be read individually and without reference to 8 C.F.R. § 204.5(l)(3)(i),¹⁰ which provides that the I-140 petition must be supported by a valid certified Form ETA 750, which refers to the specific job offer made by the employer on the certified ETA 750 corresponding to the employer on the I-140 petition.

Counsel argues that the language of the statute is plain, and should be "construed in accordance with common sense." Further, counsel points out that the [REDACTED] issued by DOL's Employment and Training Administration directs regional administrators not to amend approved labor certifications. Instead, the memo provides that where the request is to change the name and address of the employer, the job requirement, or any items that are related to the test of the labor market, the petitioner should "request to change name and address of employer . . . to legacy INS. Regional administrators may only make those changes if it appears from the file that the request was made before certification." [REDACTED], (May 7, 1992). Counsel contends that CIS erred in its interpretation that a change of employer is limited to a name change, relocation, or successor-in-interest situation created by a sale, merger, or reorganization. Rather, counsel argues that the statute provides "any employer" may file a petition on behalf of an alien worker, and further that the DOL memo allows amendment to the employer's name and address after the labor certification by CIS.

Specifically, the DOL memo provides:

Change in employer. After certification there may be a change in the employer specified on the application form for a variety of reasons; e.g., sale, merger, reorganization, movement to a new location, etc. It has been past policy that the Certifying Officers may make appropriate changes relating to the name and address of the employer on a case-by-case basis.

...

The Employment Service and [CIS] have entered into an agreement whereby all changes relating to the name and address of the employer will be made by [CIS]. This agreement was entered into because of [CIS's] extensive experience in determining whether an entity is the same employer after a change such as a sale, merger, or reorganization, and to enhance consistency in administering immigration laws and policies.

The memo, which is not binding on CIS, clearly contemplates that CIS will consider changes to a certified ETA 750 in terms of the initial employer's sale, merger, reorganization, or change to a new address, and not that any entity unrelated to the initial employer on the labor certification can file an I-140 petition based on the initial employer's labor certification. Nothing in the memo, regulations, or policy guidance allows for, or contemplates, the expansive reading that counsel suggests. The ETA 750 is specific to the initial employer.

¹⁰ In other visa preference categories as set forth in Section 203(b), a petitioner may file an I-140 petition without a labor certification.

Regarding the case that counsel cites to in support, *Matter of International Contractors Inc. and Technical Programming Services, Inc.*, 89-INA-278, while 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Further, as noted in the director's decision, the facts of *Matter of International Contractors Inc.* are distinguishable from the instant petition. In *Matter of International Contractors Inc.* the employer for which the beneficiary would perform the work did not change, rather, the contractor placement company changed. As the company for whom the beneficiary would perform the work did not change, BALCA determined that the change would not have any effect on the job offer.

Counsel next argues that DOL addresses interpretation of the job opportunity "consistent with the delegation made to that agency." A labor certification "involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Certification form." 20 C.F.R. § 656.30(c)(2). Counsel argues that the applicable regulations are "DOL regulations rather than regulations promulgated by [CIS]," and as such "DOL should interpret the regulations, not CIS." Further, counsel contends that CIS has acted outside the scope of its authority in interpreting the petitioner's job opportunity.

The labor certification is part of an admissibility determination under section 212(a)(5)(A)(i) of the Act, which provides:

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.

As set forth, DOL's role is to determine whether there are available workers for a position and whether the employment of foreign labor will impact the conditions of similarly employed workers in the U.S. See 212(a)(5)(A)(i). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. 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. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). CIS makes the determination whether the beneficiary is qualified for the certified Form ETA 750 job offer. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

CIS has not improperly interpreted the job offer. The Form ETA 750 provides that Painting by Marge will employ the beneficiary at the address listed as a painter, and at the rate of pay stated on Form ETA 750A.

Counsel provided no information for CIS to interpret whether Mill River Builders Partnership was the successor-in-interest to Painting by Marge. Accordingly, any interpretation completed by CIS was within the bounds of CIS's proper role and authority.

Further, counsel argues that "the validity or invalidity of the labor certification is a matter which is expressly delegated to the Secretary of Labor,"¹¹ and that it is for DOL to determine whether there are sufficient U.S. workers who are able, willing, qualified, and available at the time and place where the alien is to perform the skilled or unskilled labor; and whether employment of such aliens would adversely effect the wages and working conditions of similarly employed U.S. workers. 8 U.S.C. § 1182(a)(5). Further, counsel contends that DOL determinations "are not subject to review by [CIS] absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within [CIS's] authority." 8 U.S.C. § 1154(b); 20 C.F.R. § 656.30(c)(2). Counsel argues that if CIS is to decide the continued validity of labor certifications, the "shift of administrative power" must result from an act of Congress.

Counsel contends that as CIS has not alleged fraud in the present case, and therefore, where a certification is granted, DOL will not reevaluate the labor market and CIS can conclude that the job is available and that the alien is qualified for the job. Counsel concludes that the labor certification was granted to allow the alien to work as a painter, and the alien has been offered a similar position by an employer in the same intended area of employment, and therefore, "there seems to be no reason why the labor certification would change." Counsel contends that CIS' summary denial is contrary to applicable laws and regulations, and further, is not supported "by reasonable probative and substantial evidence and is an abuse of discretion."

In the case at hand, the instant petition filed was deficient as the ETA 750 submitted was not a valid job offer to support the I-140 petition. DOL issued the final determination on the ETA 750 labor certification to Painting by Marge to employ the beneficiary as a painter. CIS makes the final determination whether the petition is properly supported by a valid labor certification, and demonstrates third preference immigrant visa eligibility, as well as whether the beneficiary meets the qualifications of the job offer, and whether the beneficiary met those qualifications by the time of the job offer. *See* Section 203(b)(3)(c) of the Act; *see also* 8 C.F.R. §§ 103.2(b)(1), 204.5(g) and (l)(3). For the filing to be valid, Mill River Builders Partnership would need to demonstrate that it was the successor-in-interest to Paintings by Marge, or to file an individual certified Form ETA 750 listing Mill River Builders Partnership as the petitioner. The petitioner has done neither, accordingly, the petition was properly denied as it is not supported by a valid labor certification corresponding to the entity filing the petition.

Further, although not raised in the director's denial, we note that there is a conflict in the beneficiary's work experience, and, therefore, the petitioner has failed to demonstrate that the beneficiary has the experience required as set forth in the certified Form ETA 750. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center 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 F.3d 683 (9th Cir. 2003). The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the

¹¹ 20 C.F.R. § 656.30(d) provides express authority to the Department of Homeland Security [DHS] or a Consul of the Department of State to invalidate a labor certification after issuance in cases of fraud or willful misrepresentation of a material fact involving a labor certification. *See also Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986), where the Board upheld CIS's invalidation of an approved labor certification based on willful misrepresentation of a material fact.

AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹²

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. 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. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 750A, the "job offer" position description provides:

Applies coats of paint, varnish, stain, enamel, or lacquer to decorate and protect interior or exterior surfaces, trimmings, and fixtures of buildings and other structures. Reads work order or receives instructions from supervisor or homeowner regarding painting. Smooths surfaces using sandpaper, brushes, or steel wool, and removes old paint from surfaces, using pain remover, scraper, wire brush, or blowtorch to prepare surfaces for painting. Fills nail holes, cracks, and joints with caulk, putty, plaster, or other filler, using caulking gun and putty knife. Selects premixed paints, or mixes required portions of pigment, oil, and thinning and drying substances to prepare paint that matches specified colors. Removes fixtures, such as pictures and electric switchovers, from walls prior to painting, using screwdriver. Spreads drop cloths over floors and room furnishings, and covers surfaces, such as baseboards, doorframes, and windows with masking tape and paper to protect surfaces during painting. Paints surfaces, using brushes, spray gun, or pain rollers. Simulates wood grain, marble, brick, or tile effects. Applies paint with cloth, brush, sponge, or fingers to create special effects. Erects scaffolding or sets up ladders to perform tasks above ground level.

Further, the job offered listed that the position required the following experience: two years in the job offered, Painter, or 2 years in a related occupation [none listed]. The petitioner did not list any other special requirements.

On the Form ETA 750B, signed by the beneficiary on April 23, 2001,¹³ the beneficiary listed prior relevant experience¹⁴ as: (1) Painting by ██████████ Connecticut, from March 1998 to present (date of signature, April 23, 2001), position: painting; (2) Inversiones ██████████ Venezuela, from December 1992 to July 1994, position: painter; and (3) Ingenieria Samblac, Margarita, Venezuela, from February 1989 to November 1992, painter.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3), which provides:

(ii) *Other documentation*—

¹² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

¹³ The beneficiary signed the Form ETA 750B under the declaration pursuant to 28 U.S.C. 1746, "I declare under penalty of perjury the foregoing is true and correct."

¹⁴ Form ETA 750B instructions provide that the beneficiary should list "all jobs held during the last three (3) years. Also, list any other jobs related to the occupation for which the alien is seeking certification as indicated in item 9."

(A) *General.* 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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

To document the beneficiary's experience, the petitioner submitted two letters:

1. Letter from Inversiones Doble K.C.A., [REDACTED] signed by [REDACTED], president, dated July 7, 2003, which provided:
Dates of employment: December 1992 to July 1994;
Title: painter, full-time;
Job Duties: "using brushes, spray guns or paint rollers . . . applied coats of paint, varnish, stain, enamel or lacquer to decorate and protect interior and exterior surfaces, trimmings and fixtures of buildings and other structures; protected interior and exterior surfaces and furnishings during painting with drop cloths; removed old paint from surfaces, smoothed and prepared surfaces for repainting; filled nail holes and cracks with caulk; erected scaffolding for painting at above ground levels and performed other tasks necessary for the job as required."
2. Letter from [REDACTED], [REDACTED] signed by [REDACTED] president, dated September 7, 2004;
Dates of employment: February 1989 to November 1992;
Title: painter, full-time;
Job Duties: "using brushes, spray guns or paint rollers . . . applied coats of paint, varnish, stain, enamel or lacquer to decorate and protect interior and exterior surfaces, trimmings and fixtures of buildings and other structures; protected interior and exterior surfaces and furnishings during painting with drop cloths; removed old paint from surfaces, smoothed and prepared surfaces for repainting; filled nail holes and cracks with caulk; erected scaffolding for painting at above ground levels and performed other tasks necessary for the job as required."

We note, however, that on Form G-325 that the beneficiary filed with another application contained in the record of proceeding,¹⁵ signed on January 14, 1998,¹⁶ contained within the record, that the beneficiary listed his prior work experience¹⁷ as: [REDACTED] (food company),

¹⁵ The record contains Form G-325A, Biographic Information, filed in connection with a prior I-485 Adjustment of Status application based on an I-130 petition filed by an Alien Relative.

¹⁶ Below the signature box, the form provides, "Penalties: severe penalties are provided by law for knowingly and willingly falsifying or concealing a material fact."

¹⁷ The Form G-325A requires that the beneficiary list the applicant's employment for the last five years.

from March 1985 to February 1995. He did not list that he was additionally employed as a painter during this time period. The Form G-325, which lists the beneficiary's experience as the owner of a food company, overlaps, and directly conflicts with the assertions that the beneficiary was employed as a painter for two separate companies during this time period.

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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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. *Id.* at 592.

As the two letters provided are in doubt, and the petitioner has not provided any other evidence to independently corroborate the beneficiary's prior experience, we find that the petitioner additionally failed to demonstrate that the beneficiary had the experience required by the certified ETA 750. Therefore, the record of proceeding does not contain persuasive evidence of the beneficiary's qualifications for the proffered position.

Based on the foregoing, the petitioner has failed to support the immigrant visa petition with a valid labor certification corresponding to the job opportunity offered to the beneficiary, and further, that the beneficiary had the experience required to qualify for the certified ETA 750. Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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, that burden has not been met.

ORDER: The petition is reopened on an AAO motion. The prior decision of the AAO, dated February 21, 2006, is withdrawn and replaced with the foregoing. The appeal remains dismissed. The petition remains denied.