

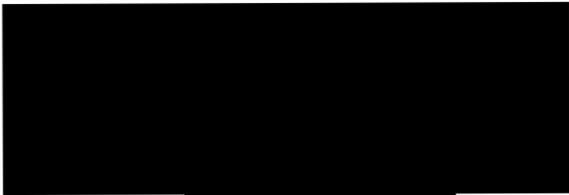


U.S. Citizenship
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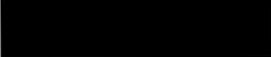
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: MAR 24 2006

WAC-03-120-52493

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the preference visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be affirmed. The petition will be denied.

The petitioner is a drapery service. It seeks to employ the beneficiary permanently in the United States as a dry cleaner. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary was qualified for the proffered position and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The issue to be discussed in this case is whether or not the petitioner established the beneficiary's qualifications for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is January 16, 1998. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of dry cleaner. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	6
	High School	Blank
	College	N/A
	College Degree Required	N/A
	Major Field of Study	N/A

The applicant must also have one year of experience in the job offered, the duties of which are listed on Item 13 of the Form ETA 750A. Item 15 reflects that there are no special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked for the petitioner from March 1993 to the date he signed the Form ETA 750B, and prior to that for [REDACTED] in Federal District Mexico, Mexico from June 1984 to May 1989 listing some duties similar to the duties of the proffered position.

With the initial petition, the petitioner submitted no evidence of the beneficiary's qualifications for the proffered position. Therefore, on June 2, 2003, the director requested evidence that the beneficiary had one year of qualifying employment experience either in letterform on the prior employer's letterhead showing the name and title of the person verifying the information that also states the beneficiary's title, duties, and dates of employment experience and number of hours worked per week, or through proof of a salary received through tax documentation or W-2 forms. In response, the petitioner submitted a letter from the petitioner's owner and the beneficiary. The beneficiary stated that he could not contact his former employer but he worked for them "for approximately for year." The petitioner's representative stated that when the beneficiary was hired, he appeared to have experience.

On February 4, 2004, the director issued a notice of intent to deny the instant petition. The director stated that the petitioner submitted falsified information and documentation from the beneficiary and failed to submit credible evidence of the beneficiary's qualifications. The director stated that the beneficiary represented that he worked for [REDACTED] for five years but in a letter submitted in response to the director's request for evidence stated that he worked there for approximately one year. Thus, the director determined that the representations and documentations concerning the beneficiary's alleged employment experience were falsified.

In response, the petitioner's representative said that the beneficiary made a typographical error in his letter which was misread by the director since "for approximately for year" could be interpreted as "for approximately four years." The petitioner's representative stated that since the beneficiary represented to work for [REDACTED] and [REDACTED] from June 1984 through May 1989, this "amounts to four years and months not the five years you are claiming it to be."

On March 16, 2004, the director contacted the American Consulate's Anti-Fraud Unit in Ciudad Juarez and requested an investigation of the beneficiary's claimed employment experience. On March 24, 2004, the fraud investigator stated that the beneficiary's prior employment was researched through Mexico's federal social security medical service (Instituto Mexicano del Seguro Social), which noted that the only employment experience on record for him was with [REDACTED] whose industry is warehouse tapestry. That agency's record had him working there from June 22, 1990 to July 23, 1990. The investigative report stated that "[n]o other employment record was found for [the beneficiary] and the only record for him indicates he never worked for a Dry Cleaner. FPU could not locate the telephone business in Mexico City."

The director denied the petition on July 3, 2004, stating that the evidence in the record of proceeding was insufficient to establish that the beneficiary was qualified to perform the duties of the proffered position because there were inconsistencies in the information contained in the various evidentiary submissions and factual representations. The director also noted that an investigation revealed that the beneficiary never worked for [REDACTED]

On appeal, counsel states that the director misinterpreted the beneficiary's statement, that he worked for [REDACTED] Dry Cleaning starting at the age of 15 and was paid cash so there would be no record of his employment there, and that common sense dictates that the petitioner would only hire an employee with experience. The petitioner submits a statement from the beneficiary in which he declares that he worked for [REDACTED] for approximately four years, starting in June 1984 and ending in May 1989," that he knew he would not be hired by the petitioner without experience, that he mistyped the word "for" in his prior statement which should have been "four," and that he worked for [REDACTED] Dry Cleaning from the age of 15 and "[t]here are no documents regarding my employment there, because they paid me only cash."

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(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.

* * *

(D) *Other workers.* If the petition is for an unskilled (other worker), it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The AAO concurs with the director's findings and finds the evidence contained in the record of proceeding to lack credibility. All that the record of proceeding contains are unnotarized statements from the petitioner's representative, the beneficiary, and counsel's assertions on appeal. No corroborating evidence has been submitted to corroborate statements from any of those individuals. The declarations that have been provided on appeal and in response to the director's request for evidence and notice of intent to deny are not affidavits as they were not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of a motion are not evidence and thus, as is the case with the arguments of counsel, are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Additionally, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

An investigation was undertaken concerning the beneficiary's alleged employment in Mexico. [REDACTED] Dry Cleaning was not found. The beneficiary's employment with a different business in a different industry was found

with the nation's social security system. No evidence was submitted to show that Dry Cleaning ever existed at all or to combat the overseas investigator's results. Counsel's, the petitioner's representative, and the beneficiary's explanation about the use of the beneficiary's phrase "for approximately for year" is not persuasive. The beneficiary represented that he worked for [REDACTED] Dry Cleaning from June 1984 to May 1989, which is at a minimum interpreted as four years and eleven months, or five years if he began at the beginning of June or ended at the end of May, but less likely to be construed as just four years.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states: "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. at 591-592 also states: "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."

Because of the inconsistent factual representations contained in the record of proceeding and evidentiary submissions, and the lack of competent objective evidence that would reconcile those inconsistencies, the AAO affirms the director's determination that there is insufficient evidence to demonstrate that the beneficiary is qualified for the proffered position with one year of qualifying employment experience as delineated as a requirement on the ETA 750A.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.