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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

File: [redacted] SRC-04-026-53264 Office: TEXAS SERVICE CENTER Date: NOV 09 2006

In re: Petitioner: Beneficiary: [redacted]

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:

[redacted]

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 Director, Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a motel, and seeks to employ the beneficiary permanently in the United States as a manager, hotel or motel ("Motel Manager") pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. As required by statute, the petition was filed with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's February 28, 2005 denial, the petition was denied for failure to document that the beneficiary met the position requirements of the certified 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 upon appeal.[1]

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. 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.

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 priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 27, 2001. The proffered wage as stated on Form ETA 750 for the position of a Motel Manager is $30,200 per year, 48 hours per week. The labor certification was approved on March 17, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on October 27, 2003. On the I-140 petition, the petitioner listed the following information related to the petitioning entity: established 1996; gross annual income: $482,451.00; net annual income: $90,786.00; and employees: seven.

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[1] 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).

On January 20, 2005, the Service Center issued a Notice of Intent to Deny ("NOID"). The NOID allowed the petitioner 30 days to submit evidence to verify the beneficiary's experience and demonstrate that the beneficiary met the position requirements set forth in the certified ETA 750. The petitioner had initially submitted a letter from an individual in Alpharetta, Georgia, who asserted that he formerly owned the motel where the beneficiary worked in Alabama. As the beneficiary was employed in Selma, Alabama, and the individual that provided the letter lived in Georgia, the Service Center requested further documentation to authenticate the beneficiary's work experience. The petitioner responded to the NOID, but the director determined that the evidence submitted in response to the NOID was insufficient to overcome the deficiencies in the petition. The petitioner appealed and the matter is now before the AAO.

We shall address the evidence in the record, and then consider additional evidence on appeal. In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien 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). 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" states that the position requires two years of experience in the job offered, as Motel Manager, with job duties to include: "manage and maintain motel to ensure efficient and profitable operation; set room rates, allocate funds, approve expenditures, and establish standards for service to guests, décor and housekeeping; process reservations, address guest complaints, and resolve problems; interview, hire and evaluate personnel; ensure cleanliness and appearance of guest rooms, public access areas, and outside grounds; make minor electrical, plumbing and structural repairs; perform all other duties necessary to cover for any unavailable employees." The petitioner did not list any educational requirements in Section 14, and listed other special requirements for the position in Section 15 as "must be on call 24 hours per day to resolve problems or emergencies; will be required to work some weekends and holidays."

On the Form ETA 750B. si ed by the beneficiary on April 25, 2001, the beneficiary listed prior relevant experience as: (1) Selma, Alabama, Manager, April 1998 to present (the date of signature, April 25, 2001), 48 hours per week; (2 Chattanooga, Tennessee, September 1996 to April 1998, Manager, 48 hours per week; and (3 Forest Park, Georgia, August 1995 to May 1996, Manager, 48 hours per week.

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

> (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 initially submitted one letter from , which provided: "this is to certify that I owned the ocated at from March 1998 until I sold it on August 2001. From April 1998 until August 2001, Ms was the manager for the She was responsible for managing and maintaining the Inn to ensure its efficient and profitable operation." The letter was signed by and listed an address of Alpharetta, Georgia.[2]

The Service Center raised the issue that the letter provided was not on Economy Inn letterhead and that the author of the letter listed an address in Georgia, and not Alabama. Further, we note that the letter does not provide whether the beneficiary was employed on a full-time or on a part-time basis to allow us to conclude that the beneficiary's experience would equate to two years of experience. Thus, the letter is insufficient evidence of the beneficiary's qualifying employment experience as provided by 8 C.F.R. § 204.5(l)(3)(ii)(A).

On appeal, counsel contends that the letter that provided, while not on letterhead, was notarized and thus a sworn statement. On appeal, counsel submits a purchase agreement for the sale of the Economy Inn in Selma, Alabama, between and (the Sellers) and and (the Purchasers). The agreement is signed and dated September 27, 2001.[3] While this would demonstrate that did own and sell the e evidence that the beneficiary was employed by the Economy Inn is not definitive. The beneficiary's tax returns, discussed below, provide contradictory evidence that the beneficiary's husband, and not the beneficiary, was likely employed by the

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[2] The beneficiary's Form G-325 filed with her I-485 Adjustment of Status application provides that the beneficiary resided also at Alpharetta, Georgia from December 2001 to March 2002. relationship, if any, to the beneficiary is unclear.

[3] It is unclear from the record, whether the beneficiary is related to either the author of the letter, the purchasers or sellers of the or to the President of the petitioning company, all of whom have the same surname. We note that under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See also Paris Bakery Corporation,* 1998-INA-337 (Jan. 4, 1990) (en banc), which addressed familial relationships: "We did not hold nor did we mean to imply in Young Seal that a close family relationship between the alien and the person having authority, standing alone, establishes, that the job opportunity is not bona fide or available to U.S. workers. Such a relationship does require that this aspect of the application be given greater attention. But, in the final analysis, it is only one factor to be considered. Assuming that there is still a genuine need for the employee with the alien's qualifications, the job has not been specifically tailored for the alien, the Employer has undertaken recruitment in good faith and the same has not produced applicants who are qualified, the relationship, per se, does not require denial of the certification."

In response to the NOID, and resubmitted on appeal, counsel provided a letter from Bookkeeping and Income Tax Preparation, as a "secondary" source to confirm the beneficiary's employment at the The letter provides, "I prepared the income tax for for the years of 1998, 1999, 2000, and 2001. A manager's fee was paid to and for each year. The amounts are $8,866 for 1998, $15,200 for 1999, $13,200 for 2000, and $3,600 for 2001." The petitioner additionally submitted Forms 1065 for the for the years 2000 and 2001, which reflected the "guaranteed payments to partners" in the amounts that Ms. listed. Further, the petitioner submitted the beneficiary's tax returns to show that the beneficiary reported the income Ms. referenced as "business income" on the beneficiary's Forms 1040.

If we examine the beneficiary's 1998 tax return, the tax return reflects that prepared the return for the beneficiary and her spouse, as well. In the Form 1040 "signature block," the tax return lists under "your occupation," motel manager, and under "spouse's occupation," the form lists ' which we would understand to be an abbreviation for "housewife," and refers to the beneficiary. Further, while counsel is correct in that the 1998 Form 1040 lists $11,266 in business income, the tax return contains a Schedule C-EZ Net Profit from Business, which provides that the income is attributable to as a Motel Manager. Similarly, income listed on the beneficiary's 1999 Form 1040 provides that is engaged in Motel Management at the business address of Selma, Alabama. His spouse's occupation is listed as "homemaker." For the beneficiary's 2000 tax return, also prepared by the tax return similarly attributes the couple's income to engaged in motel management in Selma, Alabama.

From the beneficiary's tax returns, it would appear that the employed and not the beneficiary, We note that the beneficiary's Form G-325 filed with her I-485 Adjustment of Status application lists that the beneficiary resided at Alabama from April 1998 to December 2001. It would appear that the beneficiary and her husband resided on-site at the Economy Inn, while her husband was employed.

On appeal, counsel provides "the Director's claim that upon reviewing the beneficiary's tax returns, "it cannot be concluded where this income came from" is irrational. It is quite obvious and easy to follow the flow of monies reported on the tax return as guaranteed payments to partners to the beneficiary's tax return as business income." While the flow of money might be traced from the Return to the beneficiary's return, and the amounts do appear to correlate, it does not follow that the income reported on the beneficiary's tax return confirms that the beneficiary worked for the and has the requisite work experience for the position. The beneficiary's tax returns suggest that it was her husband rather than the beneficiary that worked at the

Counsel submitted additional letters on appeal, including a letter from SouthTrust Bank, which provides that "Mrs. and had a personal account with us from March 9, 2000 until December 19, 2001. Account address was ' While this evidence would confirm that the beneficiary and her husband resided on the property, the letter does not confirm that the employed the beneficiary.

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[4] Counsel notes that the beneficiary lacked work authorization, and, therefore, was unable to submit formal payroll documentation.

[5] The 2000 Form 1065 lists the company as A notarized statement provided explains that changed the name from to the after purchase.

As additional evidence, counsel has provided the application for a business license dated 2000, and 2001 initialed by Further, counsel provides three statements:

1. Statement from Selma, Alabama, which provides:
   "In 1998, bought a 36 room hotel, the located at Eighty East, in Selma, Alabama. I own the restaurant next to the . I, also have a motel on West in Selma. I had occasions of interaction with and as well as their young son during their management of the motel from 1998 through 2001. In 2001 they sold the motel to

1. Statement from General Manager, Days Inn & Suites, Selma, Alabama:
   "I am managing Days Inn since October 1997 . . . being in motel business in same town, I have known and from April 1998. was managing Economy Inn located at , Selma, AL 36701 from April 1998 to September 2001."

2. Statement from Lannies Bar B Q Spot, Selma, Alabama:
   "I am owner and manager of a family restaurant . . . . my restaurant was located at East from January 1995 to November 1999. This restaurant building used to be part of the Plantation Inn motel property before 1998. bought the motel (excluding restaurant building) in 1998 and changed the name to Economy Inn. I personally know and have seen and managing Economy Inn on regular basis."

The three statements provide slightly different versions. The statement is more general and might allow for merely seeing the beneficiary on the property with her husband and son, where they resided. The letter provides that the beneficiary managed the motel on her own, and the third letter provides for joint management between the beneficiary and her husband.

The information related to the beneficiary's occupation listed on the tax returns conflicts with the statements provided, which raises concerns regarding the veracity of the beneficiary. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), which states: "Doubt raised 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." Further, "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. at 591-592.

The record of proceeding does not contain sufficient regulatory prescribed evidence of the beneficiary's qualifications. Additionally, while we believe that the secondary documentation submitted demonstrates that the beneficiary and her husband resided at the the tax returns imply that it was the husband who was employed by the Further, it is unclear why the petitioner did not submit any information to document experience that the beneficiary obtained in her other prior positions listed on the ETA 750B, either in response to the NOID or on appeal. The petitioner did not assert that it attempted to obtain other letters, or that it was not possible to obtain letters from the beneficiary's other prior employers. As a result, the petitioner has not documented that the beneficiary had the experience to meet the ETA 750 job offer requirements, and qualify for the position offered.

Based on the foregoing, the case was properly denied failure to document the beneficiary's qualifications for the job offered. 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 appeal is dismissed.