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U.S. Citizenship
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FILE: [REDACTED]
SRC 04 142 52799

Office: TEXAS SERVICE CENTER

Date: DEC 26 2007

IN RE: Petitioner: [REDACTED]
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:



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

The petitioner is a gas station and convenience store. It seeks to employ the beneficiary permanently in the United States as a store manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. The director noted inconsistencies in information pertaining the beneficiary's employment experience. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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.

As set forth in the director's March 17, 2005 denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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 petitioner must 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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on October 16, 2002.

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 On appeal, counsel submits a brief, the beneficiary's previously submitted IRS Forms W-2, Wage and Tax Statements, issued by ██████████ for 2002, 2003 and 2004, the previously submitted IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation, for Sonia Trading Inc. Tucker Express for 1999, 2000 and 2002, various licenses for ██████████ d/b/a/ ██████████ IRS Form 941, Employer's Quarterly Federal Tax Return, for Sonia Trading Inc. d/b/a/ ██████████ for the last quarter of 2003, various fuel bills for ██████████ and a previously submitted letter dated March 1, 2005 from ██████████ regarding the beneficiary's previous employment experience. Other relevant evidence in the record includes a letter dated March 1, 2004 from the petitioner in support of the petition and a letter dated March 1, 2004 from Sonia Trading Inc. regarding the beneficiary's previous employment experience. The record does not contain any other evidence relevant to the beneficiary's qualifications.

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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On appeal, counsel asserts that the information provided by the petitioner relating to the beneficiary's prior work experience is not inconsistent, and that [REDACTED] and [REDACTED] are the same entity. Counsel asserts that the beneficiary simultaneously performed the roles of Vice President of Marketing and Development of [REDACTED] and manager of [REDACTED]. Counsel further states that the beneficiary's experience as Vice President of Marketing and Development of [REDACTED] was omitted on the Form ETA 750 because counsel deemed the experience irrelevant to the instant petition.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and 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 store manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | |
|-------------------------|-------|
| 14. Education | |
| Grade School | blank |
| High School | blank |
| College | blank |
| College Degree Required | blank |
| Major Field of Study | blank |

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A requires experiential references.

The beneficiary set forth his credentials on Form ETA 750B and signed his name on September 14, 2002 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 as a store manager at [REDACTED] from September 1999 to December 2001.² He does not provide any additional information concerning his employment background on that form.

The record of proceeding also contains a Form G-325, Biographic Information sheet signed by the beneficiary on March 4, 2004 and submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form, under a section eliciting information about the beneficiary's employment for the last five years and above a warning for knowingly and willfully falsifying or concealing a material fact, he represented that he worked as a store manager at Tucker Express from September 1999 to December 2001 and that he worked as a Marketing Manager at [REDACTED] from December 2001 to the date he signed the Form G-325.

² This office notes that Part 15 of Form ETA 750B instructs the alien to list all jobs held during the last three years and any other jobs related to the occupation for which the alien is seeking certification.

The regulation at 8 C.F.R. § 204.5(1)(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.

(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.

With the petition, the petitioner submitted a letter dated March 1, 2004 from [REDACTED] regarding the beneficiary's previous employment experience. The letter states that the beneficiary was serving as Vice President of Marketing and Development of [REDACTED] and that the beneficiary has also had the responsibility of being the general manager in Sonia Trading's convenience stores and gas station. The petitioner also submitted a letter dated March 1, 2004 in support of the petition. The letter indicates that the beneficiary worked as a Manager for Tucker Express from September 1999 to December 2001. In a notice of intent to deny dated February 8, 2005 (NOID), the director noted that it was unclear from the evidence submitted with the petition whether the beneficiary worked part-time at one or both of these businesses or if the beneficiary ceased working at Sonia Trading, Inc. for two years in order to pursue employment with Tucker Express. The director also noted that it was unclear if Sonia Trading, Inc. and Tucker Express are affiliated businesses.

In response to the NOID, the petitioner submitted a letter dated March 1, 2005 from [REDACTED] detailing the beneficiary's previous employment experience. The letter states, in part, that the beneficiary:

... is serving as Vice President of Marketing and Development of our company. He has held this position since November 1998, when his L-1A was approved. As such, he is in charge of the development of our business. In this position he has additionally had the responsibility of being the general manager in our Convenience Store and Gas Station, Tucker Express at [REDACTED] [REDACTED].... He works no less than 40 hours per week.

The letter also states that the beneficiary's current responsibilities were left off the ETA 750B because he believed that they were not a requirement for the labor certification.

On appeal, counsel asserts that the information provided by the petitioner relating to the beneficiary's prior work experience is not inconsistent, and that [REDACTED] and Tucker Express [REDACTED] the same entity. Counsel asserts that the beneficiary simultaneously performed the roles of Vice President of Marketing and Development of [REDACTED] and manager of [REDACTED]s. Counsel further states that the beneficiary's experience as Vice President of Marketing and Development of Sonia Trading, Inc. [REDACTED] was omitted on the Form ETA 750 because counsel deemed the experience irrelevant to the instant petition.

The petitioner has provided sufficient evidence to establish that Tucker Express is the trade name of [REDACTED]

However, this office is not persuaded by the petitioner's assertion that the beneficiary simultaneously performed the roles of Vice President of Marketing and Development of Sonia Trading Inc. and manager of Tucker Express. On Form ETA 750, the beneficiary represented that he worked 40 hours per week as a store manager at Tucker Express from September 1999 to December 2001. The petitioner now claims on appeal that the beneficiary works no less than 40 hours per week as Vice President of Marketing and Development of Sonia Trading Inc. and manager of Tucker Express. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has failed to resolve the inconsistencies in the record relating to the beneficiary's prior work experience. It is not clear how the beneficiary could have worked full-time as a manager of Tucker Express while simultaneously working full-time as Vice President of Marketing and Development of Sonia Trading Inc. as required by the terms of his nonimmigrant visa.³ A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience in the job offered from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.

³ This office notes that Sonia Trading, Inc. previously filed a Form I-140 petition on behalf of the beneficiary. In connection with that petition, in a letter dated April 25, 2001, Sonia Trading, Inc. indicated that the beneficiary was currently serving as Vice President of Marketing and Development and that he had four subordinate employees who reported directly to him, including one store manager. Therefore, the beneficiary was not serving as store manager of Sonia Trading, Inc. dba Tucker Express in April 2001 as represented in the instant petition. The I-140 filed by Sonia Trading, Inc. on behalf of the beneficiary was denied by the Texas Service Center on June 4, 2002 and a subsequent appeal was summarily dismissed by this office on November 10, 2003.