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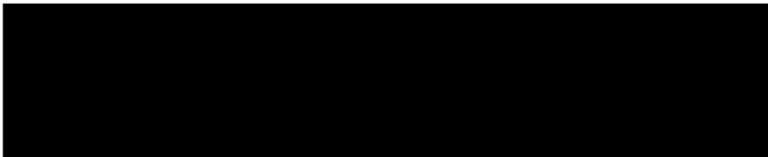


FILE: WAC 01 299 51777 Office: CALIFORNIA SERVICE CENTER Date: MAR 01 2007

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 director of the California Service Center denied the preference visa petition on November 29, 2002 and a subsequent appeal was remanded by the Administrative Appeals Office (AAO) to the director. The director certified his subsequent decision dated May 10, 2005 to the AAO. The director's decision will be affirmed. The petition will remain denied.

The petitioner is a liquor store. It seeks to employ the beneficiary permanently in the United States as a retail 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). As set forth in the director's May 10, 2005 decision, 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 denied the petition accordingly.

In response to the director's Notice of Certification, counsel submits a brief and additional evidence.

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 AAO reviewed the record of proceeding under its *de novo* review authority. The authority to adjudicate appeals is delegated to the AAO by the Secretary of Homeland Security pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296.

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 August 21, 1997.

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 retail 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                 | n/a   |
|     | College Degree Required | n/a   |
|     | Major Field of Study    | n/a   |

The applicant must also have two years of experience in the job offered or two years of experience in any retail establishment. The duties of the proffered job 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 reflects the work schedule for the proffered position.

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.

(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 November 1, 1997 from the beneficiary's previous employer, [REDACTED] which indicates that the beneficiary was employed as a sales manager of a retail toy store from March 1, 1985 to March 1, 1991.<sup>1</sup> On April 15, 2002, the acting director issued a notice of intent to deny the petition. She advised the petitioner that the information provided relating to the beneficiary's past employment was insufficient. She advised the petitioner that the beneficiary's Biographic Information sheet (Form G-325), dated August 10, 1992, submitted with her asylum application reflected that the beneficiary had listed no work experience for the preceding five years. In response, counsel submitted another letter dated April 27, 2002 from the beneficiary's Syrian employer. This letter is from the same individual and gives the same employment information as that presented in the previous letter. The petitioner also submitted a letter from one of the beneficiary's neighbors stating that the beneficiary used to work as a manager of kids' games from 1985 to 1991.

The director determined that the evidence failed to satisfactorily establish that the beneficiary possesses the requisite two years of past management experience and denied the petition. The petitioner appealed the director's decision to this office. On appeal, counsel resubmitted copies of the employment letters from Syria and maintained that the director did not give sufficient weight to these attestations. This office determined, in

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<sup>1</sup> This office notes that the beneficiary set forth her credentials on Form ETA 750B and signed her 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, she represented that she worked as the manager of [REDACTED], a retail children's and women's clothing store. 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. 582, 591-592 (BIA 1988).

part, that further investigation was warranted to verify the beneficiary's claimed employment. The matter was remanded to the director to conduct further investigation.

The director issued his decision on May 10, 2005. He informed the petitioner regarding the results of an investigation conducted by CIS in Syria. He stated:

On February 6, 2005, a [CIS] investigation conducted in Homs, Syria revealed that the beneficiary has no management experience. [REDACTED], a partner in the company, confirmed that the beneficiary worked there between 1985 and 1991. She sold children's toys and holiday decorations, participated in stocking inventory and bookkeeping. The beneficiary never managed staff work or gave instructions to employees, she was the only employee.

Thus, the director determined that the beneficiary did not meet the minimum requirements for the proffered job at the time the request for certification was filed.

In response to the director's Notice of Certification, counsel asserts that the director failed to provide the petitioner with a copy of the investigative report that served as the basis for the director's decision, and that the director failed to provide the petitioner enough information about the investigation to allow the petitioner a chance to meaningfully respond. Counsel cites 8 C.F.R. § 103.2(b)(16)(i) in support of his assertions. However, the cited regulation does not require CIS to provide counsel with a copy of the investigative report. Instead, 8 C.F.R. § 103.2(b)(16)(i) states as follows:

(16) Inspection of evidence. An applicant or petitioner shall be permitted to inspect the record of proceeding which constitutes the basis for the decision, except as provided in the following paragraphs.

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [CIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

CIS advised the petitioner of the derogatory information contained in the investigative report that served as the basis for the director's decision, and gave the petitioner the opportunity to rebut the information and present information in its behalf. Therefore, counsel's argument is without merit.

Further, counsel states that the director failed to provide the petitioner with 12 weeks in which to respond to the alleged adverse evidence prior to the denial.<sup>2</sup> Counsel cites 8 C.F.R. § 103.2(b)(8). However, the cited regulation addresses requests for initial evidence, not denials based on adverse results of an investigation. The petitioner was given ample time to respond to the Notice of Certification.

Counsel also states that the petitioner contacted [REDACTED], and that Mr. [REDACTED] indicated he never told the CIS investigator that the beneficiary did not manage employees. The assertions of counsel do not

<sup>2</sup> Counsel does not state how any additional time to respond would have changed the petitioner's response.

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). The petitioner submits no objective evidence in response to the director's Notice of Certification that resolves the inconsistencies regarding the beneficiary's previous work experience.<sup>3</sup> For example, the petitioner could have submitted employee records for the Syrian employer showing the names, positions and salaries of the employees employed by the employer between 1985 and 1991. The petitioner could have submitted affidavits from the employees that the beneficiary managed. Instead, counsel submits additional letters from the beneficiary's Syrian employer and her neighbor containing information similar to that already contained in the record of proceeding. Therefore, the AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of supervisory experience 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 director's decision on May 10, 2005 is affirmed. The petition remains denied.

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<sup>3</sup> Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).