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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 0 2 2004

LIN03 122 51674

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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, Director
Administrative Appeals Office

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

The petitioner is a dental clinic. It seeks to employ the beneficiary permanently in the United States as a dental assistant. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 or seasonal nature, for which qualified workers are not available in the United States.

Eligibility in this matter turns on whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date. The priority date is the date that the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 4, 2001. The beneficiary's salary as stated on the labor certification is $10.38 per hour or $21,590.40 per year.

The Form ETA 750, as filed with the Immigrant Petition for Alien Worker (petition), certified a dental assistant for 32 hours per week. The director determined that the classification, as a skilled worker, professional, or other unskilled worker, required a full-time worker, defined as one who works 35 hours or more per week for an employer. Since the Form ETA 750 certified a position for only 32 hours per week, the director concluded that the proposed position did not meet the regulatory definition of a full-time worker and that the petitioner was ineligible, as an employer, to file the petition for this classification. Consequently, the director denied the petition.

On appeal, substituted counsel (counsel) submits a brief, advertising, and an "attorney certified copy of the retroactively amended application for labor certification submitted by [the petitioner] on April 4, 2001." Counsel refers to the "Correction Approved by Regional Office" (correction) on a copy of the Form ETA 750, dated April 30, 2004.

Counsel cites *Matter of Katigbak*, 14 I&N Dec. 45 (Comm. 1971) and urges on appeal:

> Please note that Paragraph 10 of Form ETA 750A has been retroactively corrected to accurately reflect Petitioner's intention to employ the beneficiary on a full time (36 hour/weeks) [sic] basis. This correction has been rendered *nunc pro tunc* and accurately reflects the petitioner's intention, indicated in its RIR [reduction in recruitment] advertising and on its Internal Posting Notice.
>
> . . .
>
> Finally, we enclose copy of the advertising which supported the original labor certification application, confirming that the prospective position was intended 36 hours per week.

Matter of Katigbak, at 49, holds that the petitioner must establish the elements for the approval of the petition at the priority date. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time.

Counsel suggests that *Katigbak* applies because the correction of the Form ETA 750 is *nunc pro tunc* or retroactive. Neither the correction, the original Form ETA 750, nor any other proceeding contains such words. No authority supports the claimed retroactivity of the correction or the resultant request to reopen any applications *sua sponte*.

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).

The petitioner offers the correction and advertising to demonstrate that its Notice of Job Opening, dated January 30, 2001 (job posting), and its offer of employment, dated September 2, 2003 (job offer) implied a "(36 hour/weeks) basis." To the contrary, they state only a 35-hour week and contradict the 36-hour week.

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

Counsel avers that the petitioner's intention for a 36-hour week is clear in advertising that supported the original labor certification. The advertising appeared in a newspaper page dated Friday, May 3, 2002 and could not support the filing of the labor certification or the job posting. The job posting, first submitted on appeal, is, also, unpersuasive because it contradicted the provision of Form ETA 750 for 32 hours per week.

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.

If Citizenship and Immigration Services (CIS), formerly the Service or the INS, fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F.Supp.2d 7, 15 (D.D.C. 2001).

The petitioner tenders evidence that it offered employment to the beneficiary for 35 hours per week at $10.38 per hour in a letter dated September 2, 2003. This letter wholly fails to establish acceptable evidence of the regulatory requirement that it post the position and give notice to the employees or collective bargaining agent of the relevant job opportunity before the priority date.

The Form ETA 750 stated a relevant job opportunity for 32 hours, less than full time employment. *See* 20 C.F.R. § 656.20(g)(3)(ii). Collateral evidence is unpersuasive to the extent that it projects contradictory intentions of the petitioner. In evaluating the beneficiary's qualifications, Citizenship and Immigration Services (CIS), formerly the Service or INS, 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).

Counsel, moreover, asserts that the director based the denial of the petition solely on clerical errors regarding hours of employment. The petitioner's proof reflects a confusion of 32, 35, and 36 hours per week, but no proof designates clerical errors. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The Form ETA 750, Part A, in block 10, indicated that the petitioner offered a position for 32 hours per week, but the job posting for 36 hours contradicted it. Later, the petitioner decided to offer only 35 hours. As of the priority date, the petitioner's Form ETA 750 did not establish a full-time worker, did not meet the regulatory definition of an employer, and did not establish the petitioner's eligibility to classify the beneficiary as a skilled worker, professional, or other worker. The petitioner has not overcome the director's decision.

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.