(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: DEC 27 2012 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Rachel M Thio
for
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a franchise donut store. It seeks to permanently employ the beneficiary in the United States as a manager. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1]

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is June 4, 2003. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum two years of experience in the job of manager required to perform the offered position by the priority date.

The record shows that the appeal is properly filed 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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) 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

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[1] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

Dec. 401, 406 (Comm. 1986). *See also Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION
Grade School: 0 years
High School: 0 years
College: 0 years
College Degree Required: None
Major Field of Study: N/A
TRAINING: None Required.
EXPERIENCE: Two (2) years in the job offered.
OTHER SPECIAL REQUIREMENTS: None.

The labor certification states that the beneficiary qualifies for the offered position based on experience as: 1) a sales representative with [redacted] in Chicago, Illinois working 40 hours per week from 1999 until the present; and 2) a manager with [redacted] in Karachi, Pakistan working 40 hours per week from June 1994 until September 1996. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury on May 26, 2003.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

> 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.

The record contains an undated experience letter from on letterhead, stating that the company employed the beneficiary as a manager from June 6, 1994, to September 30, 1996. The record contains an experience letter dated March 21, 2009 from owner, on letterhead, stating that the company employed the beneficiary as a manager from June 6, 1994 until September 30, 1996. The record contains an experience letter dated March 24, 2009 from president, on letterhead, stating that the company employed the beneficiary as an assistant manager from 1999 until 2003.

In addition, the record of proceeding contains an undated Form G-325A, Biographic Information, signed by the beneficiary and submitted in support of a Form I-485, Application to Register Permanent Resident or Adjust Status, received on May 21, 2004, on which the beneficiary claims to have worked for from 1999 to the present as well as for and from 2003 to the present.

The letter from fails to give title and also fails to state whether the job was full-time or part-time. The letter from fails to state whether the job was full-time or part-time. The AAO notes that the beneficiary would have been fifteen years old on the date employment began and that it is unusual for a fifteen year-old to hold a management position responsible for marketing, inventories, ordering supplies, preparing the daily record of transactions, and maintaining the books as is claimed by both letters from Further, the beneficiary sets forth on the Form ETA 750 at Part B, Question 11 that he was a high school student at in Karachi, Pakistan from 1995 to 1996 during the same time period in which he claims on the Form ETA 750 that he was working 40 hours per week as a manager. The evidence in the record is not sufficient to resolve these inconsistencies as to how the beneficiary attended high school and was simultaneously employed full-time as a manager at the age of fifteen.

USCIS may reject a fact stated in the petition if it does not believe that fact to be true. 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 letter from with states that the beneficiary held the job of assistant manager, being responsible for employee scheduling, inventory ordering and management, reconciling cash at the end of the day, preparing bank deposits, as well as employee training and supervision. However, the beneficiary set forth his credentials on the Form ETA 750 and stated that he worked for in the position of sales representative, which was responsible for assisting customers with purchases, operating the cash register, and managing inventory. The AAO notes that the positions and job duties of assistant manager and sales representative are different and that the petitioner has not resolved the inconsistency created by these conflicting claims.

Matter of Ho, 19 I&N Dec. 582, 591 (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." Further, *Ho* states that, "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."

In the instant case, the record does not contain independent, objective evidence resolving the inconsistencies between the letters of experience and the representations on the Form ETA 750. Further, the evidence has cast doubts on the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

On appeal, counsel asserts that the evidence is credible and contains sufficient proof of the beneficiary's employment experience in the job of manager. Counsel states that the director is in error for questioning the credibility of the experience letter from on the basis that the description of the job duties too closely mirrors the description of job duties of the proffered position on the Form ETA 750. Counsel states that the job duties of a bakery manager and those of a doughnut shop manager are similar. In addition, counsel submits a DOL report stating that the legal age for employment in shops, commerce, industry, and at sea in Pakistan is fourteen. Counsel also asserts that it is not unusual in Pakistan for a teenager to be trusted with a managerial position and that needed someone he could trust. Since he knew the beneficiary's family, could trust the beneficiary and knew he could teach him to perform the job.

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 AAO notes that the legal minimum age for employment is fourteen in Pakistan as is stated in the report. However, the statements of counsel regarding the beneficiary's employment in Pakistan are not evidence. The AAO further notes that several inconsistencies in the record have not been resolved and have raised doubt as to the reliability of the petitioner's remaining evidence.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

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.