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

(b)(6)

U.S. Citizenship and Immigration Services

Date: MAR 30 2012

Office: TEXAS 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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 landscaping business. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. As required by statute, the petition is accompanied by a labor certification application 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 denied the petition accordingly.

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.

As set forth in the director's April 29, 2008 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. The director determined that the petitioner failed to demonstrate that the beneficiary had two years of experience as a landscape gardener prior to the priority date.

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 labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). Here, the labor certification application was accepted on April 30, 2001.

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.[1] No evidence of the beneficiary's experience was submitted with the initial filing of the Form I-140. On March 4, 2008, the director issued a Request for Evidence (RFE) requesting a letter from the beneficiary's current or former employer(s) stating the beneficiary's job title, job duties, and dates of employment. The beneficiary's claimed qualifying experience 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 beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A).

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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). 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 April 15, 2008, counsel submitted a letter from dated November 9, 2006, listing title as superintendent and claiming that the beneficiary worked for from February 1988 to November 1991. The letter was not on company letterhead and contained no contact phone number. Additionally, the dates of the claimed employment on the letter conflicted with the dates listed on the ETA Form 9089 at Section K. The director subsequently denied the petition for failure to establish that the beneficiary met the experience requirements of the ETA Form 9089.

On appeal, counsel submits copies of Forms W-2, Wage and Tax Statement for income paid by to the beneficiary in 1988, 1989, and 1990, as well as copies of the beneficiary's Forms 1040A, U.S. Individual Income Tax Return for 1988, 1989, and 1990. Counsel also submits two Forms W-2 for income paid by an unrelated company, to the beneficiary which, since has not been shown to be related to is of no probative or relevant value concerning the beneficiary's employment experience at No other experience letters from any other employers were provided.

Counsel asserts that the conflicting dates of employment were due to a typographical error and that a new letter will resolve the issue. However, the AAO notes that no additional letter of employment was submitted. Counsel also asserts that the Forms W-2 and the Forms 1040A demonstrate that the beneficiary worked for and that beneficiary has the required two years of experience as a landscape gardener as stated on the ETA Form 9089.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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 Dec. 401, 406 (Comm'r 1986). *See also*, *Madany 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). According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. The ETA Form 9089 at Section J.21. states that the alien did not gain any of his qualifying experience with the petitioner in a position substantially comparable to the job opportunity. On the ETA Form 9089 at Section K. which elicits information of the beneficiary's work experience, he represented that he worked 40 hours per week for the petitioner starting on September 15, 1992, and that he worked 40 hours per week for from January 5, 1988, to September 14, 1992. He does not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
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> (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.
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> (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.

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience based on the evidence submitted into this record of proceeding. In the instant case, the AAO notes that the beneficiary's claimed employment dates at [redacted] listed on the ETA Form 9089 conflict with the dates on the employment letter. Doubt cast on any aspect of an applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. It is incumbent upon an applicant 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, 591-92 (BIA 1988).

The AAO also notes that the Forms W-2 from [redacted] for 1988 and 1989 reflect income of $1,716, and $6,510.50 respectively, which indicate pay at a rate equating to less than 40 hours per week as claimed on both the employment letter and the labor certification. According to the State of California Department of Industrial Relations website, the minimum wage in California was increased from $3.35 to $4.25 on July 1, 1988, and was not raised again until 1996. *See* https://www.dir.ca.gov/iwc/MinimumWageHistory.htm (accessed February 17, 2012). Therefore, an individual working 40 hours per week earning minimum wage in California in 1988, 1989, and 1990 would have earned a minimum of $7,904 per year in 1988 ($3.35 x 40 hours x 26 weeks = $3,484; $4.25 x 40 hours x 26 weeks = $4,420; $3,484 + $4,420 = $7904) and $8,840 per year in 1989 and 1990 ($4.25 x 40 hours x 52 weeks). Thus, it is clear that the beneficiary did not work 40 hours per week for [redacted] as claimed on the labor certification and on the experience letter dated November 9, 2006.[2] The Form W-2 from 1990 indicated wages paid of $9,756.06 which by itself fails to corroborate the claim to have acquired two years of full-time employment experience.

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[2] Pursuant to Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has

Thus, as the representations made on the labor certification conflict with those made in the letter of experience and the Forms W-2, and it has further been demonstrated that the beneficiary did not gain two years of experience working 40 hours per week with the prior employer, 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.

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sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible." *See also* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation which states that: "If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate." A willful misrepresentation of a material fact occurs is one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961). If the petitioner pursues this matter any further, resolution of this issue should be addressed. The AAO notes that further inquiries into the facts and circumstances of the instant case may be made at a later date.