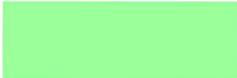




**U.S. Citizenship
and Immigration
Services**

(b)(6)

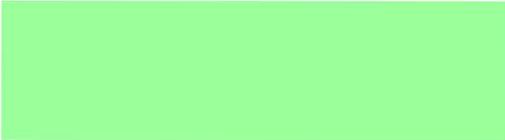


Date: **MAY 07 2012** Office: TEXAS SERVICE CENTER FILE: 

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 employment-based immigrant 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 seeks to permanently employ the beneficiary in the United States as a lay out worker. On Form I-140, Immigrant Petition for Alien Worker, the petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(i).

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.

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

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL). The labor certification states that only one year of experience is required for the offered position. As is noted above, in order to qualify for classification as a skilled worker, the labor certification must state that the offered position requires at least two years of training and/or experience. Therefore, the instant petition cannot be approved in the requested classification.

There is no provision that permits the AAO to readjudicate a petition under a different visa classification once the decision has been rendered by the director.¹ A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

¹ On November 5, 2007, the director issued a request for evidence (RFE), instructing the petitioner to submit a replacement Form I-140 with the correct classification requested to support the labor certification. The petitioner did not address the director's instruction to request a new classification on Form I-140. The director denied the petition on March 4, 2008 because the petitioner failed to provide sufficient evidence to establish its ability to pay the proffered wage from the priority date and because the petitioner failed to submit a copy of Form I-140 requesting a different classification in Part 2. The AAO also concurs with the director's assessment that the petitioner failed to establish its ability to pay the proffered wage from each year from the priority date.

The evidence submitted does not establish that the labor certification requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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 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).

In the instant case, the labor certification states that the offered position requires one year of experience as a lay out worker. On the labor certification, signed by the beneficiary on April 4, 2004, the beneficiary claims to have worked as a lay out worker for [REDACTED] in Mexico from September 1990 to October 1991. However, the record contains a letter signed by [REDACTED] which states the beneficiary was employed as a bricklayer assistant from September 1990 to October 1991.

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). 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. *Id.* at 591.

There is no independent, objective evidence in the record that explains or reconciles this inconsistency. Therefore, for the reasons explained above, the evidence in the record does not establish that the beneficiary possessed the one year of experience in the offered position as of the priority date as required by the terms of the labor certification.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.