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: FEB 05 2013 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 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,

Elizabeth M'Cormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The approval of the employment-based immigrant visa petition was revoked by the Director, Texas Service Center. A subsequent appeal was rejected as untimely by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen/reconsider. The motion will be dismissed.

The petitioner claims to be a gas station and convenience store. It seeks to permanently employ the beneficiary in the United States as a manager. The petitioner requests classification of the beneficiary as a skilled worker or professional pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).[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 is August 21, 2001, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

After initially approving the petition on October 31, 2008, the director issued a Notice of Intent to Revoke (NOIR) the petition on September 9, 2009. In the NOIR, the director noted that the only evidence provided to establish the beneficiary's qualifications is an experience letter from signed by the beneficiary's spouse, who was the company's director, and that the beneficiary was the company's manager. The NOIR instructed the petitioner to submit additional evidence to establish the beneficiary's claimed employment experience while working for his own company and to resolve an inconsistency in the record concerning the location of the offered employment.

On November 5, 2009, the director revoked the approval of the petition.[2] The Notice of Revocation (NOR) states that the evidence submitted in response to the NOIR did not establish the beneficiary's qualifications and, therefore, failed to overcome this reason for denial stated in the NOIR. On April 15, 2011, the AAO rejected, as untimely, counsel's appeal of the director's decision which was received by U.S. Citizenship and Immigration Services (USCIS) on May 3, 2010, 179 days after the decision was issued.

The AAO noted that on the Form I-290B, Notice of Appeal or Motion, the petitioner stated that it would submit additional evidence to the AAO within 30 days; that, since the filing of the appeal, counsel made multiple requests for additional time to submit additional evidence. However, as of the date of dismissal of the appeal, the AAO had not received any additional evidence; and, therefore, found an insufficient basis to remand the late filed appeal as a motion to reopen or reconsider.

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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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

[2] Section 205 of the Act permits the director to revoke the approval of a petition "at any time, for what he deems to be good and sufficient cause."

On motion to reopen/reconsider, counsel states that the petitioner finally obtained supporting documentation from Pakistan to establish the beneficiary's work experience. Counsel submits additional documentation.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. 8 C.F.R. § 103.5(a)(3). In addition, a motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The record shows that the motion to reopen is properly filed and timely, and makes an allegation of error in the law or facts. On motion, the petitioner submits additional evidence in an attempt to establish the beneficiary's employment experience. The AAO will approve the petitioner's motion to reopen. The appeal will be dismissed.

The petitioner has 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)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 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 Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm. 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).

In the instant case, the Form I-750, Application for Alien Employment Certification, states that the offered position requires the beneficiary to manage an automobile service station and Mini Mart. Specifically, the beneficiary will be responsible to:

> Plan, develop, and implement policies for operating the station, such as hours of operations, and prices for products and services; hire and train workers, prepare work schedules, and assign workers to specific duties; direct, coordinate, and participate in performing customer service activities, such as pumping gasoline, checking engine oil, tires, battery, and washing windows and windshield. Notify customers when oil is dirty or low, tires are worn, hoses or fanbelts are defective, or evidence indicates battery defects, to promote sale of products and services; reconcile cash with gasoline pump meter readings, sales slips, and credit card charges; order, receive, and inventory gasoline, oil, automotive accessories and parts; perform automotive

maintenance and repair work, such as adjusting or relining brakes, minor tune-ups, valve grinding, and changing and repairing tires.

The labor certification requires two (2) years retail sales management experience.

On the labor certification, the beneficiary claims to qualify for the offered position based on experience as the manager of [redacted] located in [redacted], Pakistan, from March 1999 to September 2001. The beneficiary states that his job duties as the manager of [redacted] were to: 1) handle public relations and customer service; and, 2) train and supervise about 30 staff/employees.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains the following:-

1) A September 4, 2007 letter of experience from [redacted] Director of [redacted] stating that the applicant had been employed as Manager of the company from March 12, 1999, until September 2001, and that his duties included Public Relations and handling of 30 workers. The record reflects that [redacted] is the applicant's wife and the director of the [redacted] company of which the beneficiary is the manager.

2) Nineteen (19) letters from individuals in Pakistan stating that they have known the applicant to be employed as Manager of [redacted] during the years 1991 to 2001. It is noted however, that these letters lack relevant detail.

3) Several documents (submitted on motion to reopen), including a mineral lease with effective dates of 1980 – 1982; a second mineral lease dated 1982-1983; a license to possess and sell explosives from 1993-2000 and from 2001-2011; a power of attorney in favor of the beneficiary to negotiate a caterpillar excavator through customs, dated 1995; shipping documents pertaining to equipment shipments to Pakistan in 1995, 1996, and 1997; purchase receipts for equipment parts dated February 2002; a Distribution Agreement, dated October 14, 1993, naming the beneficiary as a distributor of explosives; and, Field Service Reports from [redacted] dated June 1999 and May 2000.

4) An affidavit of the beneficiary, dated May 18, 2011, stating that he leased mineral rights to extract stone in 1980, and managed his lease business; thereafter, he was a distributor of explosives; and thereafter, managed his wife's [redacted] business.

The beneficiary indicates that he has three decades of managerial in mineral leasing and as an explosives distributor. However, he does not explain why such experience was not listed on the Form ETA 750B. In *Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence

offered in support of the application. *Matter of Ho,* 19 I & N Dec. 582, 591-592 (BIA). Further, the record does not establish that the beneficiary's experience as a mineral lessor and distributor of explosives gave him any retail management experience.

The evidence provided does not establish the beneficiary's retail management qualifications. The beneficiary's spouse's letter of experience is self-serving and does not provide independent, objective evidence of the beneficiary's prior work experience. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The letters from the 19 individuals state generally that the beneficiary was the manager of during the period from 1999 to 2001, but do not provide sufficient details such as to indicate how they date their acquaintance with the beneficiary as the company's manager; details of their business dealings with the beneficiary; how frequently they had contact with him as manager. It is also noted that the letters do not indicate whether the applicant has any retail management experience. These letters are, therefore, not probative of the applicant's retail managerial experience.

Regarding the evidence submitted on motion, described in number (3) above, the petitioner does not describe how such evidence establishes the beneficiary's retail service managerial experience. The AAO, therefore, cannot discern the beneficiary's qualifications for the position in these documents.

The beneficiary's affidavit describes his managing of his lease business, his distributorship of explosives, and the managing of his wife's business, but does not indicate any retail management experience.

There is no regulatory-prescribed evidence in the record of proceeding demonstrating that the beneficiary is qualified to perform the duties of 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.

(D) *Other workers*. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The petition is for a skilled worker and the job requires 24 months/years of managerial experience in the proffered position, yet the record of proceeding does not contain evidence reflecting that the beneficiary has 24 months/years of qualifying employment experience conforming to the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has failed to establish that the beneficiary is qualified for the offered position.

Upon review the motion to reopen is granted and the appeal is dismissed.

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.