

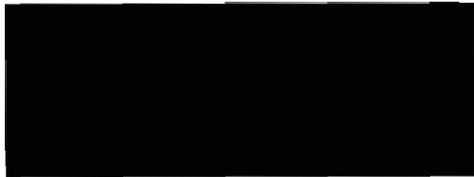
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U.S. Citizenship
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FILE: EAC 06 086 51029 Office: NEBRASKA SERVICE CENTER Date: OCT 14 2008

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner purports to be a construction company. It seeks to employ the beneficiary permanently in the United States as a carpenter pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the job requirements were insufficient for the classification sought and that the beneficiary did not satisfy the minimum experience stated on the labor certification.

On appeal, counsel submits a statement from the petitioner requesting that the petition be considered under a lesser classification and a new experience letter. For the reasons discussed below, we uphold the director's decision.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --

(A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

(i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.**

¹ After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

Citizenship and Immigration Services (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 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). CIS must examine “the language of the labor certification job requirements” in order to determine what the job requires. *See generally Madany*, 696 F.2d at 1015. The only rational manner by which CIS 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). CIS’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 application form].” *Id.* at 834 (emphasis added). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, “Offer of Employment,” describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education: None listed
Major Field of Study: None listed

Experience: **Two years in job** offered or related occupation.

Block 15: Blank

On July 7, 2006, the director advised that the record did not reveal that the beneficiary or the position qualified for classification pursuant to section 203(b)(2) of the Act and inquired as to whether the petitioner wished the petition to be considered under a lesser classification. The petitioner’s response did not include such a request. Thus, the director considered the petition under

the classification requested on the petition and concluded that the job requirements did not merit consideration under section 203(b)(2) of the Act.

On appeal, both counsel and the petitioner request that the petition be considered under a lesser classification. Counsel provides no legal authority, and we know of none, that would allow a petitioner to amend a petition to seek a lesser classification or request consideration under more than one classification. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). Thus, the director did not err in considering the petition under the classification originally requested.

Regarding the beneficiary's experience, the regulation at 8 C.F.R. § 204.5(g)(1) provides, in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The beneficiary indicated on the Form ETA 750B, signed on March 12, 2002 under penalty of perjury, that he had worked for the petitioner as a carpenter since September 2000, for Mills Remodeling as a carpenter from June 1998 through August 2000 and as a construction worker for Subcontracting from May 1997 to June 1998. The initial submission included no evidence of this experience.

On July 7, 2006, the director requested evidence that the beneficiary had the necessary experience. The director's letter stated:

Evidence of experience must be in the form of letter(s) from current or former employer(s) giving the name, address, and title of the employer and a description of the experience of the alien, including specific dates of the employment and specific duties.

In response to the director's request for evidence of the beneficiary's experience, the petitioner submitted a brief signed statement from [REDACTED] asserting that the beneficiary worked with him for "approximate [sic] one year, (1999-2000)." Below the statement are copies of checks issued by Mills Remodeling, Inc. to the beneficiary dated August 6, 1999 and August 25, 2000. [REDACTED] asserts that these checks are the beneficiary's first and last paychecks. [REDACTED] does not indicate the nature of the beneficiary's work for him and the letter is not on company letterhead. As part of the petitioner's evidence to establish its ability to pay the proffered wage, the petitioner also provided Forms 1099 Misc. reflecting income paid from the petitioner to the beneficiary in the years 2001 through 2005. While the Form 1099 issued to the beneficiary in 2001 lists the petitioner's Federal Employer Identity Number (FEIN), the remaining Forms 1099 all list the sole proprietor's

social security number as the payer's federal identification number even though the sole proprietor continued to list a separate FEIN for the petitioner on his Internal Revenue Service (IRS) Form 1040 U.S. Individual Income Tax Return, Schedule C.

The director noted that the dates provided by ██████████ did not correspond with the beneficiary's claim on the Form ETA 750B and that ██████████ had not established the nature of the beneficiary's employment with him. Thus, the director concluded that the petitioner had not submitted the necessary evidence to establish that the beneficiary has the experience required for the position as stated on the alien employment certification.

On appeal, the petitioner submits a new letter from ██████████ asserting that the beneficiary worked for Mills Remodeling 40 hours a week as a carpenter from August 1999 to August 2000. In addition, the petitioner submitted its own letter asserting that the beneficiary has worked full-time as a carpenter for the petitioner as of September 2000.

The petitioner was put on notice of required evidence, specifically what information an employment letter must contain, and was given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director. We concur with the director that the record before him contained unresolved inconsistencies regarding the dates of the beneficiary's experience with Mills Remodeling² and that the evidence submitted did not conform to 8 C.F.R. § 204.5(g)(1).

Even if we were to consider the new evidence, the petition would not be approvable under any classification. The petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Regl. Commr. 1977). We attempted to verify that either the petitioner or the sole proprietor has acquired a Virginia contracting license at the state's official "LicenseLookup" site, <http://www.dpor.virginia.gov/regulantlookup/> (accessed September 19, 2008.) We were unable to confirm that the petitioner or the sole proprietor is a licensed contractor. Thus, any future petition filed under the correct classification would need to document that the petitioner can make a realistic job offer for a carpenter through the submission of evidence either that the petitioner possesses the necessary license to engage in construction as claimed on the Form ETA 750 or that no such license is required in the State of Virginia.

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.

² 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).

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ORDER: The appeal is dismissed.