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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: NOV 17 2005
EAC-02-241-54439

IN RE: Petitioner: [REDACTED]
Beneficiary [REDACTED]

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:

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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a landscaper. It seeks to employ the beneficiary permanently in the United States as a mason. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary was qualified for the proffered position and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 issue to be discussed in this case is whether or not the petitioner established the beneficiary's qualifications for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is April 19, 2001. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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, *Mandany 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 Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of mason. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	Blank
	High School	Blank
	College	Blank
	College Degree Required	Blank
	Major Field of Study	Blank

The applicant must also have two years of experience in the job offered in order to perform the job duties listed in Item 13, which are incorporated into the record of proceeding and will not be recited here. Item 15 indicates that there are no special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury on April 16, 2001. On Part 15, eliciting information of the beneficiary's work experience, he listed the following:

- a. [The petitioner], mason, from December 1998 to the present.
- b. [redacted] mason, from May 1998 to December 1998.
- c. [redacted] from May 1998 to December 1998.
- d. [redacted] mason, from May 1995 to May 1998.
- e. [redacted] for a jeweler, from May 1992 to May 1995.

With the initial petition, the petitioner submitted 10 signed and notarized affidavits, 8 of which were signed by the same friend of the beneficiary verifying the beneficiary's represented employment history with various employers in various locations, and 2 from the petitioner's owner verifying the beneficiary's current employment with the petitioning entity.

Because the evidence was insufficient, the director requested additional evidence concerning the evidence of the beneficiary's qualifications on May 14, 2003. The director noted that the affidavits submitted from friends did not constitute credible evidence of the beneficiary's experience and requested evidence that the beneficiary had qualifying employment experience prior to the priority date. The director stated that such evidence could include, but are not limited to, "copies of payroll documentation showing the dates he has worked for your company and the number of hours he was employed each week."

In response to the director's request for evidence, the petitioner submitted a letter in English on Pasaje Farms letterhead, Ecuador, confirming the beneficiary's work as a mason at the farm from May 1995 to May 1998 for 40 hours a week. The letter, in duplicate, is signed by [redacted] as a "co-worker and manager," is notarized, and provides [redacted] address information. Another letter is [redacted] letterhead and confirms the beneficiary's work as a mason for [redacted] from May 1998 to December 1998 for 40 hours per week. The letter, in duplicate, is signed by [redacted] as "manager," is notarized, and provides Mr. Boni's address information. A final letter is on Luciano Landscaping letterhead and confirms the beneficiary's employment as a mason for that business from May 1998 to December 1998 for 40 hours per week. The letter, in duplicate, has an illegible signature whose title is "manager," is notarized, and provides an address of the signatory.

The director denied the petition on January 27, 2004 noting that corroborating evidence was not submitted of the beneficiary's employment, and that two affidavits describe overlapping full-time employment from May 1998 to December 1998 and another letter is signed by "an individual residing in the United States who was reportedly the former manager for that company in Ecuador, but there is no evidence in the record to support this claim. In addition, even though the [sic] this individual states that he is no longer with that company, the affidavit is on company 'letterhead'." The director also noted inconsistencies in employment history representations made on the beneficiary's Form G-325 (Form G-325), Biographic Information sheet, submitted with an application to adjust status to lawful permanent resident. Thus, the director determined that due to the number of inconsistencies in the evidence and factual assertions concerning the beneficiary's qualifying employment experience, the petitioner failed to establish that the beneficiary is qualified to perform the duties of the proffered position.

On appeal, counsel asserts that if the director wanted independent corroborating proof that [REDACTED] was the manager of Pasaje Farm, then she should have asked for it in a request for evidence. Counsel asserts that Pasaje Farm “was and is still owned by the [beneficiary’s] uncle and located in a third world country where it is no common practice to keep detailed record of employment.” Counsel asserts that the beneficiary was supervised by [REDACTED] who was authorized by the beneficiary’s uncle to “sign on behalf of the farm on the farm letterhead, even though [REDACTED] currently resides in the United States.” Counsel states that had “CIS required independent evidence of this managerial capacity, it should have been requested since the [beneficiary’s] uncle, and current owner of Pasaje Farm would have easily supplied it.” Additionally, counsel asserts that the beneficiary did work 80 hours per week from May 1998 to December 1998, working in the morning for Bill McCanghern and in the afternoon until nighttime for Luciano Landscaping. Counsel states that the beneficiary was paid in cash for those jobs.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for “skilled workers,” states the following:

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.

Thus, for petitioners seeking to qualify a beneficiary for the third preference “skilled worker” category, the petitioner must produce evidence that the beneficiary meets the “educational, training or experience, and any other requirements of the individual labor certification” as clearly directed by the plain meaning of the regulatory provision.

Additionally, 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.

The AAO affirms the director's decision. The director's doubts about the credibility of the evidentiary submissions and factual representations are reasonable. On his Form G-325, signed by the beneficiary on September 12, 2002 above a penalty warning for knowingly and willfully falsifying or concealing a material fact, the beneficiary represented that he worked for the petitioner in Connecticut as a mason/landscaper from March 1999 to the present date, and prior to that worked in cleaning for a business in Georgia from May 2000 "to the present time," and cooking at various business entities in Connecticut during unrepresented timeframes. For his last occupation abroad, he represented that he was a jeweler in Ecuador from 1995 to 1998.

Because the petitioner's initial evidentiary submissions failed to conform to the regulatory requirements of 8 C.F.R. § 204.5(l)(3), the director was reasonable to request additional and corroborating evidence of the beneficiary's qualifications and provided notice to counsel and the petitioner that the affidavits submitted initially with the petition lacked credibility. In her decision, the director correctly noted and explained the following inconsistent factual representations: the date the beneficiary commenced employment with the petitioner¹; omission of masonry jobs on Form G-325²; and raised the question of the possibility of completing overlapping concurrent full-time employment as well as a resident in the United States signing a letter on an Ecuadorean business entity's letterhead.

If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. 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). *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "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." *Matter of Ho*, 19 I&N Dec. at 591-592 also 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."

In addition to the director's observations, the AAO notes the following inconsistencies among factual representations made by the beneficiary concerning his background: last occupation in Ecuador and the timeframe of that employment on the Form G-325³; omission of cooking and cleaning positions on Form ETA 750B⁴; cleaning for a

¹ Counsel explains in her brief that the beneficiary did actually start working for the petitioner in 1998, left for the winter months, and returned in 1999. She later explains that he took time off from the petitioner at the end of 2000 and the first few months of 2001. The petitioner, in response to the director's request for evidence, explained that the beneficiary commenced employment in December 1998 and took time off in early 2001. The petitioner did not state that the beneficiary took time off in between 1998 and 1999.

² The directions on the form direct the applicant to list his employment for the last five years, which would have required information detailing back to September 1998, which according to his Form ETA 750B, would have included masonry jobs in the United States.

³ Omission of employment as a mason at Pasaje Farm in Ecuador as his last occupation on the Form G-325 while it is listed chronologically as the last occupation on the Form ETA 750B.

⁴ The director noted that these jobs could have preceded the beneficiary's employment with the petitioner. No additional details concerning these jobs as a cook was provided on appeal, and counsel stated that experience was irrelevant to the beneficiary's qualifications for the proffered position. While the beneficiary's experience as a cook is irrelevant to the proffered position, apparent inconsistencies and misrepresentations concerning the beneficiary's employment history and chronology is at issue. Additionally, the Form ETA 750B, Item 15, specifically directs all applicants to "List *all* jobs held during the last three (3) years. Also, list any other jobs

business in Georgia from May 2000 to September 12, 2002 while he was also working full-time for the petitioner at the same time in Connecticut, as represented on the Form G-325; omission of cleaning job from Form ETA 750B; representation of employment timeframe at Joyeria Villa from 1995 to 1998 on the Form G-325 while representing the timeframe as 1992 to 1995 on the Form ETA 750B; and representation of employment capacity at Joyeria Villa as a clerk on the Form ETA 750B but as a jeweler on the Form G-325.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). Counsel stated that corroborating evidence of Mr. Guzman's authority to use Pasaje Farm letterhead and sign in his capacity as manager was easy to obtain and should have been requested by the director. The director was under no obligation to issue an additional request for evidence. The AAO notes that no additional evidentiary submissions were made on appeal to overcome the director's determinations. Additionally, as noted above, the petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Thus, her assertions about the beneficiary's employment at Pasaje Farms, the beneficiary's ability to work 80 hours per week for 3 months, the actual commencement date of employment of the beneficiary with the petitioner, details about and relevance of the beneficiary's cooking and cleaning jobs, and Mr. Guzman's authority and relationship to Pasaje Farm do not qualify as independent and 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. 1998). Furthermore, evidence that the petitioner creates after CIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence.

Due to the insufficiently unexplained inconsistencies in the factual representations made in this matter, the AAO is unable to ascertain the truth pertaining to the beneficiary's employment history. The evidence contained in the record of proceeding fails to conform to the regulatory requirement of 8 C.F.R. § 204.5(I)(3), or lack credibility for the detailed reasons set forth by the director and the AAO in the foregoing decision and thus probative value. Thus, the petitioner has failed to provide sufficient evidence that the beneficiary is qualified for the proffered position with two years of experience as delineated as a requirement on the ETA 750A.

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.

related to the occupation for which the alien is seeking certification . . ." (Emphasis added). Thus, by the clear directions on the Form ETA 750B, the beneficiary was to list *all* of his employment from April 1998 to the date he signed the form in 2001, which apparently included his cleaning job and may have included the cooking jobs.