

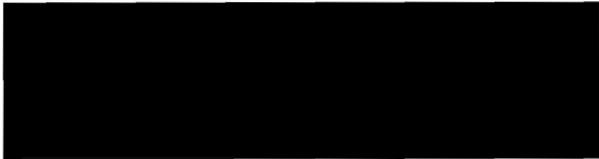
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: JUL 30 2007

WAC-05-033-51411

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:

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

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a first-line supervisor/manager of construction trades (electrician (construction) foreman). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary had met the minimum requirements of the job offer at the time that the request for certification was filed, and therefore, the beneficiary was not qualified for the proffered position. The director denied the petition accordingly.

The record shows that the appeal is properly filed,¹ 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 March 28, 2006 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 prior to the priority date of the visa petition.

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 Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 12, 2001.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal². On appeal counsel

¹ The instant appeal was filed on April 27, 2006 by the petitioner through its counsel ██████████ of Korenberg & Abramowitz with a Form G-28, Notice of Entry of Appearance, properly executed by both counsel and the petitioner's authorized representative. On June 11, 2007, ██████████ of ASK Law Group wrote a letter claiming that his office represents ██████████ with regards to the instant petition and submitted a new Form G-28 signed by ██████████, the beneficiary of the instant petition. Citizenship and Immigration Services (CIS)' regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B). The record does not contain a Form G-28 properly executed by Thomas J. Stefanski of ASK Law Group and the petitioner's authorized representative. Therefore, the AAO considers ██████████ of Korenberg & Abramowitz as counsel in this matter.

² 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).

submit a brief, a letter from the petitioner detailing the duties the beneficiary will perform, an affidavit of the beneficiary regarding his employment with [REDACTED]'s Construction Firm at Tayug, Pangasinan, Philippines and copies of experience letters from [REDACTED] Construction Firm. Other relevant evidence in the record includes two certifications of employment from [REDACTED] of Lilagan's Construction Firm. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, the petitioner asserts that with the letters from [REDACTED]'s Construction Firm submitted with the initial filing and in response to the director's request for evidence (RFE) and the affidavit of the beneficiary submitted on appeal, the petitioner submitted evidence that the beneficiary is qualified for the offered position.

To determine whether a beneficiary is eligible for an employment based immigrant visa, 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 electrician foreman. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|--------------------|---------|
| 14. | Experience | |
| | Job Offered | 3 years |
| | Related Occupation | Blank |

The duties are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements but Item 17 indicates that the beneficiary will supervise 2 employees.

The beneficiary set forth his credentials on Form ETA-750B and signed his name on March 17, 2001 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has been unemployed since January 2000. Prior to that, he represented that Lilagan's Construction Firm, a construction firm in Tayug, Pangasinan, Philippines, employed him as a full time electrician from March 1993 to September 1999; and that Onda Button, Peoples Technology Complex Phills, Inc., a fabrication company in Carmona, Cavite, Philippines, employed him as a full time electrician from August 1988 to May 1999. He does not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(g)(1) states 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.

With the petition, the petitioner submitted a copy of a certification dated September 25, 1999 from [REDACTED] Personnel Manager of [REDACTED] Construction Firm at Tayug, Pangasinan, Philippines. This certification is on letterhead of Engr. [REDACTED] Construction Firm, and was signed on behalf of the beneficiary's former employer by [REDACTED] as the personnel manager. It states in pertinent part that:

This is to certify that [the beneficiary] has been employed with [REDACTED] Construction Firm at Tayug, Pangasinan.

He had been with the company since March 8, 1993 to September 15, 1999 and was assigned as electrician (foreman).

However, this certification does not include the writer's and the company's address and other contact information as required by the regulation. Nor does the certification include a specific description of the duties the beneficiary performed. Therefore, the certification issued by [REDACTED] on September 25, 1999 does not meet the requirements set forth by the regulation at 8 C.F.R. § 204.5(g)(1) and thus cannot be considered as primary evidence to establish the beneficiary's requisite qualifications for the proffered position.

The record of proceeding contains another certification issued by [REDACTED] submitted in response to the director's RFE dated December 14, 2005. [REDACTED]'s second certification was issued on February 14, 2006 on a different letterhead of Engr. Lilagan's Construction Firm. [REDACTED] added two paragraphs in his second certification after reconfirming that the beneficiary worked for [REDACTED] Construction Firm as electrician foreman from March 8, 1993 to September 15, 1999. The new paragraphs state as follows:

[The beneficiary's] duties are plan wiring layouts, electrical fixtures, and control equipment. Plan new or modified installation to avoid hazardous wiring, consistent with all codes. Prepare schematics showing location of wiring and equipment. Ensure concealed wiring is installed prior to completion of walls, floors and/or ceilings through installation of correct conduit. Pull wire and install control and distribution apparatus. Connect to lighting and outlet fixtures and test circuits. Design and load calculations, special lighting design. And also supervise and coordinate activities of workers; hire and train employees, prepare their work schedules; resolve any work problems and inspect their works.

He also worked Monday thru Friday; 5 days in a week; 8:00 A.M. to 5:00 P.M. or 40 hrs. per week.

This second certification appears to meet the regulatory-prescribed requirements when it is reviewed and considered alone. However, considering all the other relevant documents submitted in the record, it provides inconsistent information pertinent to the beneficiary's experience and duties. First of all, it is noted that the letterhead of the company [REDACTED] used for his second certification is different from the one he used for his first certification. Secondly, as his first one, [REDACTED] did not provide his or the company's address and any other contact information, and therefore, CIS or other government agencies cannot verify Mr. [REDACTED]'s certifications. Third, the part describing the beneficiary's supervising duties is exactly the same as the one in Item 13 of the Form 750A job description but not supported by the description from the beneficiary

on the Form 750B, Item 15b. Counsel did not explain the inconsistency between the two descriptions from the beneficiary and the employer, especially pertinent to the supervising duties. It appears that the writer tailored the description of the duties the beneficiary performed during his employment with [REDACTED] Construction Firm to the description of duties of the proffered position. Fourth, [REDACTED] second certification verifies that the beneficiary worked Monday through Friday, 5 days a week, 8:00 am to 5:00 pm from March 1993 to September 1999, however, the beneficiary claimed on the Form ETA 750B that he worked for Lilagan's Construction Firm from March 1993 to September 1999 and for [REDACTED] Peoples Technology Complex Phills., Inc. from August 1988 to May 1999. The record does not contain any explanation how the beneficiary managed two full time jobs in two different cities in the same time during the 6 years from March 1993 to May 1999. Finally, [REDACTED] signature in the second certification appears different from the one in his first certification. This raises a question whether or not the second certification is from the beneficiary's former employer. 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. 582, 591 (BIA 1988). 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. *Id.* at 591-592. The record does not contain any objective evidence to resolve these inconsistencies. 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). Therefore, [REDACTED] second certification cannot be considered as sufficient evidence to establish that the beneficiary possessed the requisite experience prior to the priority date and is qualified to perform the duties described in Item 13 of the Form ETA 750A.

On appeal counsel submits an affidavit of the beneficiary regarding his employment experience with [REDACTED] Construction Firm. In the affidavit dated May 22, 2006, the beneficiary claimed that [REDACTED] Construction Firm is no longer in business and I am unable to locate the Personnel Manager, [REDACTED] " However, the beneficiary did not indicate when the company went out of business, and the record does not contain any evidence to support the beneficiary's assertions. 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The regulation allows other documentation relating to the alien's experience or training to be considered only if a regulatory-prescribed experience letter from a former or current employer is unavailable. In the instant case, the petitioner failed to demonstrate that such an experience letter is not available.

Although the regulation at 8 C.F.R. § 204.5(g)(1) states that the director may consider other documentation relating to the alien's experience if a letter from a current or former employer is unavailable, it still requires that other documentation meet certain evidentiary standards. An affidavit from the beneficiary to verify his own employment cannot be considered as primary evidence to establish the beneficiary's qualifications even if it is proven that the former employer was out of business and an experience letter from the former employer is not available. In the instant case, the beneficiary's self-verification is submitted without solid objective evidence. The affidavit did not come with any documentary evidence to support its contents. 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As previously discussed, [REDACTED] second certification was issued on February 14, 2006, and three months later on May 22, 2006 the beneficiary claimed in his affidavit that the company would be no longer in business and he could not locate the personnel manager. The beneficiary did not indicate when the company went out of business, and whether the second certification was issued before or after the company stopped running its business. Without solid objective evidence, the beneficiary's statement casts doubt on the reliability of the beneficiary's affidavit. "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 582.

Therefore, the petitioner did not establish with regulatory-prescribed evidence the beneficiary's prior three years of experience as an electrician foreman, and further failed to establish that the beneficiary is qualified for the proffered position. The petitioner's assertions on appeal fail to overcome the ground of denial in the director's decision.

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.