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U.S. Citizenship  
and Immigration  
Services

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**JUN 12 2007**

FILE: WAC 05 021 53775 Office: CALIFORNIA SERVICE CENTER

Date:

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 fine jewelry and diamond setting business. It seeks to employ the beneficiary permanently in the United States as a diamond setter and appraiser. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position because he did not have the requisite two years of relevant work experience stipulated on the Form ETA 750. The director based his decision on the results of an investigation undertaken by the U.S. Embassy in Beirut that identified discrepancies between the Form ETA 750, Part B, and the beneficiary's previous work experience in Beirut. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 February 6, 2006 denial, the single issue in this case is whether the beneficiary is qualified to perform the duties of the proffered position.

In the instant petition, the petitioner submitted the I-140 petition identifying the beneficiary's classification as skilled worker. 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 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 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 March 4, 2002.

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 appeal<sup>1</sup>. On appeal, counsel submits a brief with copies of three letters of work verification signed by [REDACTED]

Beirut, Lebanon. These letters are dated October 6, 2001, October 11, 2004, and November 17, 2005. The earlier two letters written in 2001 and 2004 described the beneficiary's work as a setter from April 1988 to September 1999. The November 2005 letter written by [REDACTED] described the beneficiary's work as administrative manager starting from April 1988 to September 1999. The record also contains an original translation of a letter dated June 7, 2005 from [REDACTED] owner and general manager, [REDACTED] Beirut, Lebanon submitted to the record in response to the director's request for further evidence dated May 16, 2005. In this letter [REDACTED] stated that the beneficiary worked for him for eleven years from April 1988 to September 1999 as a diamond setter.

The record also contains copies of two checks from [REDACTED]s, dated May 28, 1999 and July 30, 1999 and signed by [REDACTED] the beneficiary's claimed previous employer in Lebanon. These checks are in the amount of \$1,200 and \$1,250 respectively. In his decision the director commented on these two checks and noted that based on the U.S. Embassy investigation report, [REDACTED] stated that he had provided the paychecks to the beneficiary in October 2004, and that they were never given to or cashed by the beneficiary and were provided with the sole purpose to help the beneficiary gain employment outside Lebanon. The record also contains a memo from the U.S. Embassy, Beirut, Lebanon with regard to the actual investigation undertaken with regard to the instant petition. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the statements made by [REDACTED] to the U.S. Embassy investigator did not contradict, but rather supported his earlier statements that the beneficiary had over eleven years of experience as a diamond setter. Counsel asserts that based on [REDACTED] letters, the beneficiary was employed exclusively as a diamond setter from 1986 to 1988, and that this experience alone fulfills the requisite amount of work experience stipulated on the Form ETA 750. Counsel then asserts that the beneficiary continued serving as a diamond setter while maintaining a "concurrent" role as a manager with [REDACTED] company from 1988 to 1999. Counsel also states that the fact that [REDACTED]'s company was not registered with the Lebanese government did not mean that the experience gained by the beneficiary while employed by [REDACTED] could not be considered the requisite work experience stipulated on the Form ETA 750. Counsel finally asserts that the checks written by the Beirut jewelry company were not intended to deceive Citizenship and Immigration Services (CIS) but rather to support the fact that the beneficiary was gainfully employed with the company for a decade.

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*,

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<sup>1</sup> 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).

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 diamond setter. In the instant case, item 14 describes the requirements of the proffered position as requiring no education. The applicant must only have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision.

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 Part 11, eliciting information about schools, colleges and universities attended, including trade or vocational training, the beneficiary did not indicate that he had attended any schools. In Part 15, the beneficiary stated that he had worked for [REDACTED] Beirut, Lebanon as a diamond setter from April 1988 to September 1999 on a fulltime 40-hour workweek basis.

In the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes two years of work experience as a diamond setter. However, as previously stated, the beneficiary's claimed employer in Beirut, Lebanon submitted two letters describing the beneficiary's work as a diamond setter from 1988 to 1999. A later letter then described the beneficiary's work as an administrative manager from April 1988 to September 1999. Contrary to counsel's assertions on appeal, this discrepancy is a material one, as the record contains two versions of the beneficiary's work duties. Counsel's assertion that the beneficiary served as a diamond setter and manager concurrently is not persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). There is no evidence in the record to support counsel's assertions that the beneficiary worked "concurrently" as a diamond setter and administrative manager. Thus, with regard to the beneficiary's duties throughout the claimed period of employment, the record is inconsistent. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) 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."

Furthermore, counsel's assertions with regard to the two checks dated 1999 and provided to the beneficiary in 2004 from [REDACTED] submitted to the record are without merit. At best, the two checks represent the payment of money on two specific dates in 1999 from [REDACTED] to the beneficiary. They in no way establish that the beneficiary worked as a diamond setter for the requisite two years stipulated on the Form ETA 750. Based on the U.S. Embassy report, these checks were written on a check format in use by the Lebanese bank for only two years as of 2004. This fact further undermines any evidentiary weight to be given to these documents. Finally, counsel in no way explains the discrepancy between his assertions as to the evidentiary proof provided by the checks and [REDACTED]'s explanation of why he gave the two checks to the beneficiary.

Counsel's assertions on appeal cannot be concluded to outweigh the results of the U.S. Embassy investigation and other evidence in the record, as to the beneficiary's qualifications for the proffered position as of the day the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted does not establish that the beneficiary was qualified to perform the duties of the proffered position beginning on the March 2002 priority date.

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.