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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship  
and Immigration  
Services

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File:

SRC 08 024 53966

Office: TEXAS SERVICE CENTER

Date:

JUN 22 2009

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:

SELF REPRESENTED

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

  
John F. Grissom

Acting Chief, Administrative Appeals Office

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

The petitioner operates a jewelry business. It seeks to employ the beneficiary permanently in the United States as a jeweler. As required by statute, the petition is accompanied by a Form ETA 9089, Application for Permanent Employment Certification, certified by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary possessed the requisite experience as of the priority date of the visa petition. The director denied the petition accordingly.

The record demonstrates that the appeal was properly filed, was timely, and made 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 denial dated August 26, 2008, the single issue in this case is whether or not the beneficiary possessed the requisite experience as of 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 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA 9089 was accepted on May 7, 2007 and certified on August 21, 2007. The proffered wage as stated on the Form ETA 9089 is \$13.48 per hour (\$28,038.40 per year). The Form ETA 9089 states that the position requires two years of experience in the proffered position as a jeweler.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2006<sup>2</sup> and to employ five workers currently. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the Form I-140 petition were \$78,604.00 and \$798,542.00 respectively. On the Form ETA 9089, signed by the beneficiary on October 9, 2007, the beneficiary did not claim to have worked for the petitioner.

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 May 7, 2007. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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, 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).

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.

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reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>2</sup> The AAO notes that a review of the status of Versaly Jewellery Inc. at the New York Division of Corporations' website maintained by the New York Department of State indicates that this organization was founded in 2004. *See* [http://appsext8.dos.state.ny.us/corp\\_public/CORPSEARCH.ENTITY\\_SEARCH\\_ENTRY](http://appsext8.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_SEARCH_ENTRY) (last accessed June 22, 2009). The reason for the difference between the date on the Form I-140 petition and the New York state incorporation date is unclear.

(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 Form ETA 9089 states that the position requires two years of experience in the proffered position. The job duties as stated on the Form ETA 9089 Section H.11 are as follows:

Design, fabricate, adjust, repair, or appraise jewelry, gold, silver, other precious metals, or gems. Do casting and modeling of molds, casting metal in molds, or setting precious and semi-precious stones for jewelry and related products.

On the Form ETA 9089, the beneficiary states that he was self-employed as a jeweler in New York, NY from January 2005 to January 2007. The beneficiary did not list any other work experience in the United States or abroad.

The petitioner submitted letters from [REDACTED] and [REDACTED] to document the beneficiary's prior work experience.

Letter from [REDACTED], Ramat Gan, Israel, dated June 12, 2008;<sup>3</sup>

Position title: not listed;

Dates of employment: "from the year 1998 till the year 2000;"

Description of duties: "was our worker and employee in diamonds setting, gold, and silver from the year 1998 till the year 2000."

Letter from [REDACTED], Huntington, NY, dated October 10, 2004;

Position title: Jeweler;

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<sup>3</sup> The letter was submitted in another language with a translation. However, the submitted translation of the beneficiary's work experience did not comply with the terms of 8 C.F.R. § 103.2(b)(3):

*Translations*. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

In the present case, the translator failed to certify that the translation is complete and accurate, and that he is competent to translate from the foreign language in question into English.

Dates of employment: dates not listed, letter states employed, "on a full time basis;"  
Description of duties:

He performed the following duties and responsibilities; Fabricated & repaired jewelry articles and forms model of article from wax or metal. Cut, sawed, filed and polished article. Soldered pieces together. Repaired broken clasps, pins, rings. Reshaped and restyled old jewelry following designs or instructions & used hand tools and machines such as lathe and drill.

AAO finds the June 12, 2008 letter submitted by [REDACTED] to lack the title of the employer, who signed the letter, the beneficiary's job title, the exact dates in which the beneficiary worked there, as well as sufficient job duties for the beneficiary. The letter states that the beneficiary worked there from 1998 to 2000,<sup>4</sup> but it does not list the months of employment or whether the beneficiary was employed on a full-time or part-time basis.<sup>5</sup> Thus, the letter fails to accurately document that the beneficiary had the full two years of required experience as a jeweler as required by 8 C.F.R. § 204.5(l)(3)(ii)(A). Therefore, the letter is insufficient evidence and not acceptable to document that the beneficiary has the qualifying experience as required by the proffered position. The AAO further notes that the beneficiary did not indicate on the Form ETA 9089 that he worked for [REDACTED]. See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 9089, lessens the credibility of the evidence and facts asserted.

The October 10, 2004 letter from A La Mode Inc. is insufficient as it does not list the beneficiary's dates of employment, and would therefore not document that the beneficiary had the required two years of experience. See *Matter of Leung*, 16 I&N Dec. at 2530.

On appeal, the petitioner resubmitted the letter from [REDACTED] with the same deficiencies noted above, as well as a new letter from [REDACTED]. The new letter from [REDACTED] stated the following:

Letter from [REDACTED], Huntington, NY, dated September 18, 2008;  
Position title: Jeweler;  
Dates of employment: "On a full time basis from June 2, 2002 till September 30, 2004;"  
Description of duties:

<sup>4</sup> The AAO notes that an original letter was submitted with the initial filing and a copy was submitted on appeal.

<sup>5</sup> Based upon the record of proceeding, it appears that the beneficiary who was born on March 13, 1982, may have been attending school during the dates of his employment with [REDACTED] and thus may not have been able to have worked on a full-time basis.

He performed the following duties and responsibilities; Fabricated & repaired jewelry articles and forms model of article from wax or metal. Cut, sawed, filed and polished article. Soldered pieces together. Repaired broken clasps, pins, rings. Reshaped and restyled old jewelry following designs or instructions & used hand tools and machines such as lathe and drill.

While this letter has been corrected to address the dates that the beneficiary was employed, the petitioner and beneficiary failed to list this experience on the Form ETA 9089. *See Matter of Leung*, 16 I&N Dec. at 2530. Additionally, the record contains Form G-325A, signed by the beneficiary on March 28, 2005, and submitted in conjunction with the beneficiary's Form I-485 application for a prior filing. Form G-325A requires that an applicant list his last five years of employment. The beneficiary listed his prior employment "none." He did not mention any work for either A La Mode Inc., or self-employment, both of which would be wholly or partially encompassed within the five year time period prior to March 28, 2005.

*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.

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.

On appeal, the petitioner asserts that the beneficiary did have the required two years of experience. The petitioner asserts that as the beneficiary lacked a social security number, he was self-employed, and, therefore, the petitioner submitted prior letters of employment.

The beneficiary's listed self-employment as a jeweler from January 2005 to January 2007 was not confirmed or evidenced by any documentation, and would not evidence that the beneficiary has the required two years of prior experience. 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 petitioner then claims that it merely omitted information regarding the beneficiary's other work experience rather than providing inconsistent information, and that the law does not state, "that the failure to list all qualifying experience will result in denial of the labor certification or immigrant petition." The petitioner also cites *Matter of Lendy Muller* 98-INA-237 (1999 BALCA) and states that illegal employment may be counted toward the experience requirements of the Form ETA 9089. The petitioner does not state how the DOL's Bureau of Alien Labor Certification Appeals (BALCA)

precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

As noted above, in *Matter of Leung*, 16 I&N Dec. at 2530, the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's labor certification would lessen the credibility of the evidence and facts asserted. Additionally, Form ETA 9089 states in Section K, "Alien Work Experience," to list "all jobs the alien has held during the past 3 years. Also list any other experience that qualifies the alien for the job opportunity for which the employer is seeking certification." Accordingly, the petitioner should have listed the beneficiary's prior employment with [REDACTED] or [REDACTED] on Form ETA 9089. Further, Form G-325 submitted with a prior application conflicts as it fails to state that the beneficiary worked in any of the asserted prior positions. *See Matter of Ho*, 19 I&N Dec. at 591-592.

The petitioner did not submit any other letters or evidence to document that the beneficiary met the terms of the certified labor certification. The petitioner has not demonstrated that the beneficiary possesses the requisite experience for the proffered position.

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.