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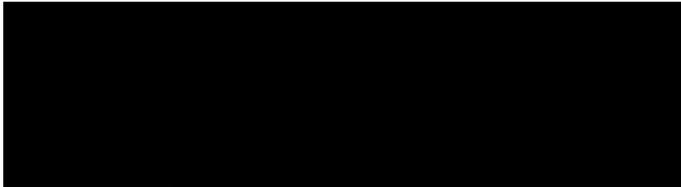
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:

LIN 06 270 52760

Office: NEBRASKA SERVICE CENTER

Date:

APR 07 2010

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.

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a manufacturer and distributor of lighting products. It seeks to employ the beneficiary permanently in the United States as a warehouse supervisor. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. 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 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. The director determined that the petitioner did not establish that the beneficiary was qualified to perform the duties of the proffered position. Specifically, the director noted that the experience letter submitted by the beneficiary's former employer, [REDACTED] did not establish that the beneficiary had experience required by the proffered position.

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 labor certification application, 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 labor certification application was accepted on July 16, 2004.

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.¹ On appeal, counsel submits an additional employment experience

¹ 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

letter dated March 12, 2008 from the beneficiary's previous employer, [REDACTED]. Other relevant evidence in the record includes an experience letter from the same employer dated September 11, 1997. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the beneficiary's work experience qualifies him to perform the duties of the proffered position.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, 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). According to the plain terms of the labor certification, the beneficiary must have two years of experience in the job offered.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he has 14 years of work experience as a warehouse supervisor. The beneficiary states that he has been employed by the petitioner from October of 2003 until the date the labor certification was signed (July 12, 2004). He further indicates that he was employed by [REDACTED] from April of 1992 until September of 2003, and by [REDACTED] from April of 1992 until September of 2003. The duties for these employers were detailed by the beneficiary as follows:

Directed and coordinated workers' activities in a distribution warehouse. Reviewed bills of lading for incoming merchandise and customer orders. Assigned workers to specific warehouse duties, such as verifying amounts of and storing incoming merchandise. Established operational procedures for verification of incoming and outgoing shipments, handling and disposition of merchandise, and keeping records of warehouse inventory. Coordinated activities of warehouse with activities of sales, record control, and purchasing departments to ensure availability of merchandise.

While the duties listed by the beneficiary for the petitioner and U.S. Energy are identical to the duties required of the proffered position in section 13 of the ETA Form 750, neither employer submitted a statement verifying the beneficiary's experience in this regard.

He does not provide any additional information concerning his employment background on that form.

newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of qualifying work experience from the evidence submitted into this record of proceeding. While the beneficiary indicated on the labor certification that he had 14 years of experience as a warehouse manager, he submitted only employment letters from [REDACTED] supporting that assertion. Thus, only that evidence will be considered.

According to the employment letter, the beneficiary was employed by [REDACTED] from December of 1989 until March of 1992. The experience noted in the [REDACTED] letter states that the beneficiary was in charge of that organization's production line and involved in all phases of production. Specifically, it is noted that the beneficiary supervised, directed and oversaw the activities of workers regarding all phases of production. The beneficiary also kept operational records regarding inventory stock and product availability for distribution.

The duties of the proffered position, however, are not those of a production manager, but those of a warehouse manager. As set forth on the ETA Form 750, the beneficiary's duties are as follows:

The applicant of this position will be required to direct and coordinate the activities of workers in a distribution warehouse. The applicant will be required to review bills of lading for incoming merchandise and customer orders. [The applicant w]ill be responsible for assigning workers to specific warehouse duties, such as verifying amounts of and storing incoming merchandise. [The applicant m]ust be able to establish operational procedures for verification of incoming and outgoing shipments, handling and disposition of merchandise, and keeping records of warehouse inventory. [The applicant m]ust coordinate activities of [the] warehouse with activities of sales, record control, and purchasing departments to ensure [the] availability of merchandise.

While the beneficiary's work experience is managerial in nature, it is that of a production manager,

not of a warehouse manager, and is not the type of experience required for the proffered position. The beneficiary must have qualifying experience that coincides with the duties of the position set forth on the ETA Form 750. For example, the record does not establish that the beneficiary has experience with bills of lading, verifying receipt of merchandise pursuant to those bills of lading, or coordinating warehouse activities with sales departments, purchasing departments or record control. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of 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.