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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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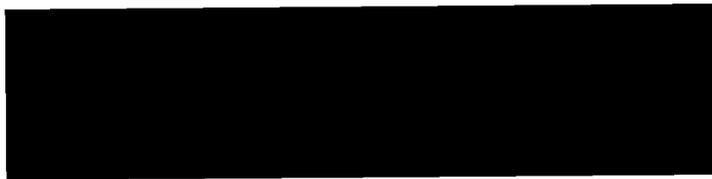
Petitioner:

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 Director subsequently denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a food and convenience store. It seeks to employ the beneficiary permanently in the United States as a store manager. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). Based on the results of an inquiry made by the U.S. consulate in India to one of the beneficiary's claimed previous employers, the director cited *Matter of Ho*, 19 I&N Dec. 582, 582, 591 (BIA 1988) and stated that the results of the Consulate inquiry cast doubt on the petition and the remainder of the evidence submitted to the record. 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 November 14, 2007 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.

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 April 30, 2001.<sup>1</sup>

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<sup>1</sup> We note that the case involves the substitution of a beneficiary on the labor certification. The beneficiary in the instant petition is substituted for [REDACTED]. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for

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>2</sup>

Relevant evidence in the record includes a letter signed by [REDACTED] submitted with the initial petition dated August 17, 2005 that states the beneficiary worked as a manager at "our stores" from February 1997 to February 1999, with job responsibilities including store management, administration and marketing. [REDACTED] stated the beneficiary was employed as an assistant manager and later promoted to manager; however, no dates are provided for when the beneficiary worked as an assistant manager. [REDACTED] stated that the beneficiary worked as manager from February 1997 to February 1999, stating her duties included customer sati[s]faction, dealing with sales representatives, inventory control, payments, banking, ordering labor negotiation and entire store maintenance.

The record of proceeding also contains a Form G-325, Biographic Information sheet submitted in connection with the beneficiary's I-485 application to adjust status to lawful permanent resident status based on her spouse's prior I-140 petition. On that form under a section eliciting information about the beneficiary's last occupation abroad, she represented that she had worked as a pharmacist at [REDACTED] [REDACTED] from June 1996 to February 1999, and that from March 1999 to the time she signed the Form G-325A, namely, February 5, 2003, she had been a housewife. She signed this document above a warning for knowingly and willfully falsifying or concealing a material fact.

The director's NOID dated January 30, 2006 identified the discrepancy between the beneficiary's claimed work experience on the ETA Form 750 and her previous claims of employment made on a Form G-325A submitted with her I-485 application as a part of her husband's prior I-140 petition.

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substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services (USCIS) based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

<sup>2</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).

The director cited Section 274C of the Act with regard to falsely making any document for the purpose of satisfying a requirement to obtain an immigration benefit. In response to the director's NOID, counsel submitted the following letters:

A second letter from [REDACTED] dated February 5, 2006. In this letter, [REDACTED] stated that the beneficiary started as an assistant manager on June 1996 and was promoted to manager in "the month of February 1997 due to her hard work and motivation." [REDACTED] states the beneficiary played a pivotal role in transforming our firm and has exceptional skills in customer relationships. This letter is written on a different letterhead with a different telephone number noted for the store.

A letter from [REDACTED] dated March 3, 2006. The letter writer, identified as a partner of this company, stated that the beneficiary worked as a manager at [REDACTED] "dealing with us on behalf of the pr[o]prietors in all matters from Feb. 1997 to Feb. 1999 pertaining to Order, Purchase & Payments for the products from our stock Agency."

A letter from the manager of [REDACTED] dated May 4, 2006. The letter writer states that the beneficiary's "having good banking experience for operations/transaction of our valued customer [REDACTED] from Feb-1997 to Feb-1999.

A letter from an unidentified [REDACTED] dated April 3, 2006 that stated the beneficiary worked on a part time basis as a pharmacist at [REDACTED] [REDACTED] from June 1996 to February 1999. The letter writer states the beneficiary had a good relationship with the patients that used to come to the hospital pharmacy and also trained internee student pharmacists in the evenings.

An undated letter signed by [REDACTED] that states the beneficiary worked as a manager with [REDACTED] with job responsibilities including payroll preparation, human resources, advertising, packaging and preparing invoices for goods sold and banking.<sup>3</sup>

In response to the director's NOID, counsel states that the record contains no fraud or intent to deceive USCIS. Counsel states that the beneficiary, between 1996 to 1999, worked as a pharmacist at [REDACTED] and also managed a local apothecary establishment, [REDACTED]. Counsel states that the beneficiary married in December 1998 and gave up both jobs a few months later in February 1999. Counsel continues that the beneficiary was a fulltime home

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<sup>3</sup> In the petitioner's response to the director's NOID, counsel states that this letter of work verification was not relied upon for the beneficiary's I-140 application since the duties were not managerial, and it was less than twelve months in duration. The AAO notes that the letter of work verification does not identify any specific dates of employment, and the letter would not be given any weight in these proceedings without more specific information.

maker/wife from March 1999 to the end of January 2003, although she briefly worked from March 1999 to February 2000 for [REDACTED] in Kenya. Counsel asserts that the beneficiary listed the [REDACTED] as her employment abroad on the G-324A because she thought the USCIS was asking for the last address and last employment of more than one year, and the [REDACTED] position lasted only ten months.

In his decision dated November 14, 2007, the director referred to a U.S. consulate inquiry in which the U.S. embassy personnel telephonically spoke with two persons connected with [REDACTED], the second individual being the owner, [REDACTED]. The director quoted [REDACTED] as stating “[The beneficiary] worked for two years at [REDACTED], however, it was only to gain experience and was not a compensated job.” The director further stated that [REDACTED] attested to the fact that the beneficiary was not paid a wage or a salary. The director determined that the beneficiary had not been employed as an assistant manager or manager as indicated in the previous letters of work verification. Citing *Matter of Ho*, 19 I&N Dec. 582, 591, 592, (BIA 1988), the director stated that the petitioner’s letter of verification was not factual and cast doubt on the petition and the rest of the evidence submitted in support of the petition.

On appeal, counsel submits an additional statement dated December 4, 2007 from [REDACTED] the owner of [REDACTED]. Mr. [REDACTED] states that the beneficiary worked in his store as an assistant manager from June 1996 to February 1997 and as a manager from February 1997 to 1999, and that an earlier 2006 certificate states the same. [REDACTED] then states the following:

[T]here was a telephone call to me in which the person made an in (sic) quiry regarding her salary, which was denied by me. The reasons are firstly I could not make from whom the call it was, as it was telephone by unknown and uni[de]ntified person without giving his name or other details. Secondly salary was also not mentioned in the certificate issued on 02/05/2006. Thirdly the salary had been settled between [the beneficiary] and me. The salary given is confidential and cannot be disclosed.

Counsel also submits the earlier 2006 letter of work verification that describes the length of the beneficiary’s employment and states the beneficiary’s job duties included “ordering and maintaining inventory for the store, dealing with sales representatives, payments, banking, labor negotiations and store maintenance.” Counsel also submits a copy of a Gujarat State Pharmacy Council document that states the beneficiary has been registered as a pharmacist as of April 6, 1995. He also resubmits a copy of the beneficiary’s diploma in Pharmacy from Gujarat University dated 1994 and her practical training documentation.

On appeal, counsel reiterates his assertions with regard to the beneficiary’s working part-time from June 1996 to February 1997 at [REDACTED] and as a fulltime Assistant Store Manager for [REDACTED]. He also states that she continued these two positions from February 1997 to February 1999. Counsel then asserts that the U.S. consulate investigator did not identify himself or herself to the owner of [REDACTED] and the owner understandably was cautious in answering any of the investigator’s questions. Counsel states that as a professional pharmacist, it is

only natural that the beneficiary would have held a management post, especially while working at a drug store and medical equipment supplier.

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 applicant must have two years of experience in the job offered or two years as a store manager in any retail environment.

The beneficiary set forth her credentials on the labor certification and signed her 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, she represented that she has been employed in the following positions:

Employer: [REDACTED]  
Title: [REDACTED]  
Dates : January 2003 to the date the beneficiary signed the ETA Form 750, Part B. September 6, 2005.  
Duties: First-line supervisor for a shift of retail convenience store workers. Manage shift team in handling cash, ordering inventory, auditing sales, preparing payroll and other related functions.

Employer: [REDACTED]  
Title: [REDACTED]  
Dates: January 2003 to the date she signed the ETA Form 750, September 6, 2005  
Duties: Member of sales/marketing team at a wholesale jewelry distributor.

Employer: [REDACTED]  
Title: [REDACTED]  
Dates: April 1999 to February 2000  
Duties: Attended customers, responsible for goods and inventory and stock control, dispatched orders and purchased raw materials

Employer: [REDACTED]  
Title: [REDACTED]  
Dates: February 1997 to February 1999  
Duties: customer satisfaction, hiring and firing of staff members, dealing with sales representatives inventory control, payments, banking, ordering, labor negotiations and store maintenance.

She does not provide any additional information concerning her employment background on that form.

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.

In his decision, the director referenced a U.S. Consulate inquiry the contents of which are contained in email correspondence in the record. The correspondence indicates that a U.S. consulate staff person, describing the calls as “pretext” calls, called two individuals associated with [REDACTED]. The first individual confirmed that he knew the beneficiary and that she used to come to work to the store many years ago, but did not know when the beneficiary had begun working or finished working for the store. The correspondence indicates that this individual stated that the beneficiary worked “as pharmacy” at the medical store. The first individual then gave the Consulate staff person [REDACTED] cellphone number. The email correspondence states that [REDACTED], when called by the Consulate staff person, confirmed that the beneficiary worked for two years at [REDACTED]. He also stated that he did not remember the exact year of the beneficiary’s joining and leaving the job when asked, but that he mentioned that he did not pay any amount of money as salary to her because she worked two years to just get the experience.

The AAO notes that the director in his decision did not accurately quote the contents of the email correspondence or any other materials in the record, although his paraphrased quote appears accurate. The AAO also notes that the comments of the first individual called by the U.S. consulate staff are either not clear or his or her comments are mistyped. It is also conceivable that neither individual working with [REDACTED] would answer in great detail if the caller did not identify himself or herself as an employee of the U.S. Consulate. The AAO also notes that based on the U.S. consulate inquiry, [REDACTED] was not asked or did not comment on the actual job duties of the beneficiary while she worked at [REDACTED].

Further, [REDACTED] letter submitted on appeal with regard to his conversation with the U.S. consulate staff does not establish that he paid the beneficiary any wages. He asserts only that such wage

payments are between him and the beneficiary and are confidential. Of more probative weight would be actual evidence of any wages paid to the beneficiary while she was allegedly employed by [REDACTED]

Beyond the question of the accuracy of the director's description of the U.S. consulate inquiry and the discrepancy noted by the director in his decision, the AAO notes that the record remains confused with regard to when the beneficiary worked at [REDACTED] and what job duties she performed there. On the ETA Form 750, the beneficiary stated that she worked there from June 1997 to June 1999 while [REDACTED] in two letters submitted to the record stated that the beneficiary worked for [REDACTED] from 1996 to June 1999. *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." Thus even within the I-140 petition and accompanying documentation, the petitioner has not provided consistent evidence with regard to the beneficiary's claimed past work experience as a store manager for two years prior to the 2003 priority date.

The AAO further notes that counsel's assertions with regard to the beneficiary's understanding of how to fill out the G-325 Form, or his assertion with regard to working two jobs during the same period of time do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, counsel's conjecture that the beneficiary filed her I-485 application without beneficiary of an attorney or immigration para-professional, and that the application may have been handwritten is not supported by the record. The beneficiary's I-485 application and Form G-325A are both typewritten. The former document indicates that [REDACTED]

New York prepared the beneficiary's I-485 application. The record contains no correspondence with regard to ineffective counsel by former counsel. The AAO finds that the information contained on the G-325-A Form and the discrepancy that it represents has not been overcome by any evidence submitted to the record.

Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of relevant work experience from the evidence submitted into this record of proceeding.

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.