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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  
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**MAR 16 2010**

FILE:

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Office: NEBRASKA 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.

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 stone and marble refinishing business. It seeks to employ the beneficiary permanently in the United States as a concrete stone finisher. 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.

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 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>

Relevant evidence in the record includes two letters from the petitioner dated July 31, 2006; an employment letter July 1, 2002, with its translation from the Municipal President of Yuriria, Guanajuato, Republic of Mexico; a letter from counsel dated August 22, 2007; a statement that the beneficiary was employed by the petitioner “since January 2001 to present (i.e. August 22, 2007);” an employment reference letter with its translation dated August 22, 2007, from the Municipal President of Yuriria, Guanajuato, Republic of Mexico; and, as submitted on appeal, an employment reference letter with its translation dated December 9, 2007, from the Municipal President of Yuriria, Guanajuato, Republic of Mexico..

On appeal, counsel asserts the director did not give the proper weight to the consideration that the beneficiary commenced working in 2001. Counsel further contends that the beneficiary’s two years of employment experience was an amended description of the job duties, and that a typographical error in the Form ETA 750 B was “substantially explained” by the evidence submitted.

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.

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 was employed as a concrete stone finisher by Casa de la Cultura, Ciudad de Yuriria, located in the Estado de Guanajuato, Mexico, whose business was stated as stone and marble finishing, from December 15, 1998, to December 15, 2000. The only other employment experience stated on the labor certification was with the petitioner from June 1998, to the present (i.e. June 24, 2001), as a concrete stone finisher. As is evident, these two employment experiences are inconsistent since, as the director noted, the beneficiary could not be employed both in Mexico and the United States at the same time.

Counsel has submitted approximately 61 pages of the petitioner’s Wage and Tax Statements (Forms W-3 and W-2) for 2000 and 2001. The beneficiary’s name does not appear in the petitioner’s W-2

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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 at 8 C.F.R. § 103.2(a)(1).

Statements in 2000 but does appear on a 2001 W-2 Statement from the petitioner. The 2001 W-2 Statement states that the petitioner paid the beneficiary \$44,954.59. The petitioner submitted a letter dated August 22, 2007, stating that the beneficiary commenced working from January 2001 to present (i.e. August 22, 2007).

Counsel has attempted to explain the above discrepancies found in the labor certification by making assertions without sufficient evidence to explain why the beneficiary stated that he had two employment experiences in the offered job in two separate countries during approximately the same time period.

The beneficiary provided a sworn statement according to the terms of the Form ETA 750 that from December 15, 1998, to December 15, 2000, he was employed fulltime in Ciudad de Yuriria, Estado de Guanajuato, Mexico, but at the same time also employed fulltime from June 1998, to June 24, 2001, with the petitioner in Waldorf, Maryland. Counsel explains that the beneficiary's statement of the date "June 1998" was a typographical error, and, by implication should have been written "January 2001." However, the record is devoid of objective, credible evidence explaining how, exactly, such a mistake could have been made. If USCIS fails to believe that a fact stated in the petition is true, USCIS 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).

Accordingly, the AAO finds that there are the parallel statements of the beneficiary's occupational experience that cannot be reconciled by the evidence presented. For this reason, the petitioner has not proved by a preponderance of the evidence submitted that the beneficiary has a minimum of two years in the offered position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis).

Furthermore, the evidence submitted, even if credible, fails to establish eligibility for the benefit sought. 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 26, 2001.<sup>2</sup> The Form ETA 750, Part A, Item 13 provides a description of the job duties of concrete stone finisher. It states:

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<sup>2</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

Finishes ornamental stone facings and surfaces of concrete structural products: Fills holes with grout or mix to repair imperfections in structural panels, floor and roof slabs, highway dividers, grave markers, and ornamental flowerpots, using sponges, trowel, chisel, and hammer. Cuts out damaged areas and drills holes for reinforcing rods, using power saw and drill. Positions reinforcing rods and builds wooden mold around area to be repaired, using hand tools. Mixes cement, aggregate, and coloring by hand and fills mold to match specifications of product being finished, using trowel, tamper, and scraper. Polishes stone facings to lustrous finish, using polishing machine [STONE POLISHER, MACHINE (stonework)], or applies acid solution to stone facing to remove excess facing mix around stones, using brush. Smooths [sic] rough spots on stone facing, using hand chisel and abrasive stone. Washes facing with water to remove excess acid and abrasive, using hose.

As set forth in the director's denial, the evidence submitted by the petitioner including the responses to the director's request for evidence (RFE) dated June 12, 2007, were insufficient to overcome the director's initial findings that the beneficiary's employment experience was not substantiated with sufficient evidence.

As properly noted by the director, the employment references from the Municipal President of Yuriria, Guanajuato, Republic of Mexico only referenced a small portion of the Form ETA 750 job duties, and therefore was insufficient evidence of the beneficiary's qualifications to perform the job as described. The director also correctly noted that the beneficiary was employed in Mexico for Casa de la Cultura, not for a municipality, and that all the employment references from the Municipal President of Yuriria, Guanajuato, Republic of Mexico are not sufficiently probative of the beneficiary's qualifications. Accordingly, since the employment references are not from the beneficiary's Mexican employer but from a third party, and fail to sufficiently describe the beneficiary's duties, the employment letters are contrary to the requirements of the regulation at 8 C.F.R. § 204.5(l)(3). 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 director also found that, despite the fact that this deficiency was raised in the director's RFE of June 12, 2007, the petitioner failed to submit additional evidence substantiating the beneficiary's employment experience in Mexico, including pay vouchers, year-end earning statements, payroll records, or other objective evidence. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Finally, the AAO notes that the job duties set forth by the beneficiary for each of the positions above described are almost identical with that found in Form ETA 750, Part A, Item 13. As the director correctly noted, the job duties recited in the labor certification are very comprehensive whereas prior employment references only covered part of the offered job duties. Once again, if USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the

Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. INS*, 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).

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

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.