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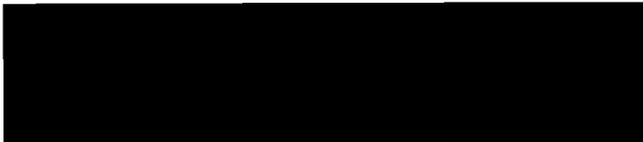


FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **MAY 27 2010**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 Commercial Painting Contractor. It seeks to employ the beneficiary permanently in the United States as a Cost Estimator. 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 January 31, 2008 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 evidence submitted by the petitioner in a response to a request for evidence contradicted all of the evidence previously submitted. Furthermore, the director was not convinced of the authenticity of the submitted documentation. As such, the director found that the petitioner has not demonstrated that the beneficiary met the minimum requirements of having two years experience as a Cost Estimator at the time the request for certification was filed.

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 December 29, 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 a brief and an expert opinion

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

evaluation. Other relevant evidence in the record includes an employment letter from the petitioner, an employment letter from [REDACTED] a Duties and Responsibilities statement from [REDACTED], payroll reports for [REDACTED] daily time records for [REDACTED] [REDACTED] a statement from a project manager, a staff performance evaluation report, a statement from the petitioner's president, earnings statements for the beneficiary, and a 2004 W-2 Form. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that United States Citizenship and Immigration Services (USCIS) disregarded the evidence submitted in response to the Notice of Intent to Deny. Counsel asserts that the beneficiary worked as a Cost Estimator from January 1999 to August 2001 for [REDACTED] [REDACTED] and from April 2004 to the present time for the petitioner. Counsel further asserts that the beneficiary's degree as a civil engineer qualifies him as a Cost Estimator.

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. 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 worked as an Estimator for the petitioner from October 2004 to the present time, as a Structural Steel Detailer from March 2003 to September 2004 for Ex-Steel Engineering Corporation, and as a Project Engineer from April 1994 to August 2001 for [REDACTED] [REDACTED]. He does not provide any additional information concerning his employment background on that form.

The record of proceeding also contains a Form G-325, Biographic Information sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form under a section eliciting information about the beneficiary's last occupation abroad, he represented that he worked as a Project Civil Engineer for [REDACTED] in Makati, Philippines above a warning for knowingly and willfully falsifying or concealing a material fact.

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 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 experience from the evidence submitted into this record of proceeding. The record includes a statement from the petitioner's president stating the beneficiary has been employed by the petitioner as a Cost Estimator since April 2004. Earnings statements included in the record for the beneficiary show that in 2004, the petitioner paid him \$15.00 an hour. According to the W-2 Form for 2004, the petitioner paid the beneficiary a total of \$20,400.00. Based on his hourly pay, the beneficiary thus worked 1360 hours (\$20,400.00 divided by his hourly pay of \$15.00) which equates to 34 weeks (1360 hours divided by a 40 hour work week). The AAO finds that the earnings statements and W-2 Form for 2004 included in the record confirm the statement from the petitioner's president indicating that the beneficiary worked for the petitioner since April 2004 as a Cost Estimator. As the priority date is December 29, 2004, the beneficiary has eight months experience working for the petitioner as a Cost Estimator.

Counsel asserts that the beneficiary also worked as a Cost Estimator for [REDACTED] from January 1999 to August 2001. In support of this assertion, the record includes a statement from the Project [REDACTED] Inc. dated December 15, 1998 stating the beneficiary shall be re-assigned as Cost Estimator (from Civil Engineer) from January 1999 to August 2001. The record also includes payroll reports from [REDACTED] showing the beneficiary was paid as a Cost Estimator from January 1, 1999 to February 15, 1999 and from May 1, 2001 to June 30, 2001. The record also includes Daily Time Records from [REDACTED] showing the beneficiary as a Cost Estimator from January 1, 1999 to February 15, 1999 and from May 1, 2001 to June 30, 2001. The AAO notes that these documents were submitted on October 24, 2007 in response to the Notice of Intent to Deny.

The AAO notes that the beneficiary did not list any experience as a Cost Estimator at [REDACTED] on the ETA Form 750 where he was required to list all his relevant, qualifying work experience. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976)(where the BIA notes that if the beneficiary's claimed qualifying experience is not listed by the beneficiary and certified by the DOL on the labor certification application, this undermines the credibility of the assertion that the beneficiary has such experience.)

Moreover, these documents contradict information provided by the beneficiary on the ETA Form 750 and the Form G-325 which indicates that the beneficiary's only work experience in the proffered position of Cost Estimator is for the petitioner. The Form G-325 specifically lists the beneficiary's position at [REDACTED] as that of "Project Civil Engineer" and not Cost Estimator.² This letter is also inconsistent with the first experience letter submitted in that the first letter indicates the beneficiary's duties and responsibilities at [REDACTED] and [REDACTED] as a Project Civil Engineer. These discrepancies cast doubt on the authenticity of the experience statement in response to the Notice of Intent to Deny submitted by the petitioner.

Doubt cast on any aspect of the proof submitted by a petitioner may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon 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. *See Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

This office finds that the beneficiary's experience letter submitted into the record is not probative in this matter. Regarding the payroll reports and Daily Time Records from [REDACTED], even if the AAO were to find these documents to be independent, objective evidence to overcome the discrepancies in the record, it notes that it only documents the beneficiary as having been a Cost Estimator from January 1, 1999 to February 15, 1999 and from May 1, 2001 to June 30, 2001. As such, the beneficiary would have been employed as a Cost Estimator for three-and-a-half months for [REDACTED]. When added to the eight months of experience already established for the petitioner, the beneficiary still does not have the required 2 years experience in the job offered.

Counsel's assertion that the beneficiary's degree meets the experience requirements is incorrect. 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

² The petitioner must resolve inconsistencies in the evidence by providing independent, objective proof of where the truth lies, and attempts to merely explain inconsistencies without such independent evidence will not suffice. *See Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). The petitioner did not state on the ETA Form 750 that the candidate could use experience in any alternate, related occupation to qualify for the proffered position.

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, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification application form].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

The Form ETA 750 does not provide that the requirements of two years of experience in the job offered might be met through a combination education and professional work experience or some other formula other than that explicitly stated on the Form ETA 750.

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.