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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:



Office: NEBRASKA SERVICE CENTER

Date: **NOV 05 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew

Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center (director), denied the immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is in currency exchange services. It seeks to employ the beneficiary permanently in the United States as a manager pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, a Form ETA 750 Application for Alien Employment Certification (Form ETA 750) approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of experience stated on the labor certification. Specifically, the director determined that the petitioner failed to demonstrate that the beneficiary possessed two years of experience in the job offered as required by the certified Form ETA 750 prior to the priority date. Accordingly, the petition was denied

As set forth in the director's February 9, 2010 denial, the primary issue in this case is whether or not the petitioner has demonstrated that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date, and thus, is qualified to perform the duties of the proffered position.

The record shows that the appeal is properly and timely filed, 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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

Section 203(b)(3)(A)(i) of 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 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on February 9, 2005.

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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 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). However, counsel did not submit any additional evidence but a brief.

To determine whether a beneficiary is eligible for an employment based immigrant visa, U.S. 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).

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education: eight years of grade school and four years of high school

Experience: two years of experience in the job offered

Block 17: Alien will supervise three employees

The beneficiary set forth his credentials on Form ETA-750B and signed his name on February 1, 2005 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting names and addresses of schools, colleges and universities attended, he represented that he attended Kathiawar High School in Karachi, Pakistan from June 1974 to June 1988 and received a diploma, and that he also attended National College in Karachi, Pakistan majoring business from January 1987 to April 1990. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked 38 hours per week as a manger for Fashion Spot in Chicago, Illinois from January 2001 to March 2003, and that he was not currently working. He did not provide any additional information concerning his employment background on that form.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on February 9, 2005.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains three letters from the beneficiary's former employers regarding his requisite experience submitted as evidence of the beneficiary's qualifications.

The first letter is dated November 5, 2004 and signed by [REDACTED] President of Fashion Spot located at [REDACTED] (the November 5, 2004 letter). This letter verifies that the beneficiary was employed as a manager from March 2, 2002 to October 15, 2003. This letter is on the company's letterhead and includes a specific description of the duties performed by the beneficiary. However, this letter only verifies the beneficiary's experience for 19.5 months without confirmation of the beneficiary's full-time employment. The duty description does not include major duties described in Item 13 of the Form ETA 750A, and thus, it is not clear whether the beneficiary's experience as a manager in a detail store qualifies him to perform the duties set forth for a manager in currency exchange company. Further, the letter contains inconsistent information regarding the period the beneficiary worked for this company with the beneficiary's statement on the Form ETA 750B under the penalty of perjury. The beneficiary stated on the Form ETA 750B that he worked for Fashion Spot from January 2001 to March 2003. *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." The record does not contain any independent objective evidence to resolve the inconsistency. Moreover, the record kept in the Illinois Secretary of State official website shows that [REDACTED] was incorporated as an Illinois domestic corporation on March 25, 1993 with [REDACTED] as president of the company at [REDACTED], however, the corporation was involuntarily dissolved on August 1, 2003. The underlying letter was written on November 5, 2004 by [REDACTED] as the president. Neither counsel nor the author explained how a person issued an employment verification letter on the company's letterhead as the president of the company more than three months after the corporation was dissolved, or how the beneficiary could work for that corporation for two and a half months after the date of dissolution. 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. See *Matter of Ho*, 19 I&N Dec. 582, 591. Therefore, the November 5, 2004 letter from Fashion Spot, Inc. does not meet the

requirements set forth at 8 C.F.R. § 204.5(g)(1), and the AAO cannot be accepted it as evidence of the beneficiary's qualifications.

The second letter is dated January 30, 2005 and signed by [REDACTED] as the president of [REDACTED] in Chicago, IL (the January 30, 2005 letter). This letter verifies that the beneficiary was employed as a manager from January 2001 to February 2002. This letter is on the company's letterhead and includes a specific description of the duties performed by the beneficiary. However, this letter only verifies the beneficiary's experience for 13 months without confirmation of the beneficiary's full-time employment. Similar to the first one, the second letter also contains inconsistent information regarding the period the beneficiary worked for this company. The beneficiary stated on the Form ETA 750B, under penalty of perjury, that he worked for Fashion Spot from January 2001 to March 2003, however, this letter verifies that the beneficiary worked for [REDACTED] Currency Exchange from January 2001 to February 2002. The record does not contain any independent objective evidence to resolve the inconsistency. Without independent objective evidence, such as personnel records, W-2 or 1099 forms, paystubs from [REDACTED] or the beneficiary's tax returns showing his income from this company for the period, the AAO cannot accept the January 30, 2005 letter as primary evidence to establish the beneficiary's requisite two years of experience in the job offered.

The third experience verification document submitted in the record is an undated letter from [REDACTED] as the president of [REDACTED] in Dubai, United Arab Emirates (the Reems Exchange letter). The [REDACTED] letter verifies that the beneficiary was employed as a manager from January 1996 to April 1998 but without confirmation of the beneficiary's full-time employment. This letter is on the company's letterhead and includes a specific description of the duties performed by the beneficiary. However, the experience verified in this letter is not listed on the beneficiary's Form ETA 750B, and thus, it is inconsistent with the beneficiary's statement on the Form ETA 750B under the penalty of perjury. Therefore, the AAO cannot give a full evidential weight to this letter. *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 750B lessens the credibility of the evidence and facts asserted. In addition, the petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a manager position. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). The [REDACTED] letter appears to be the petitioner's effort to make a deficient petition conform to the director's requirements. Furthermore, because the petitioner already provided two inconsistent experience letters and the record does not contain any independent objective evidence to resolve these inconsistencies, doubt cast on the two previously submitted experience letters may lead to a reevaluation of the reliability and sufficiency of this third letter in response to the director's request for evidence. 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). Therefore, without independent objective evidence, such as personnel records, W-2 or 1099 forms, paystubs

from [REDACTED] or the beneficiary's tax returns showing his income from this company for the period or his overseas working records, the AAO cannot accept the [REDACTED] letter as primary evidence to establish the beneficiary's requisite two years of experience in the job offered.

The underlying labor certification specifically requires two years of experience in the job offered. As discussed above, the petitioner failed to establish the beneficiary's requisite two years of qualifying experience with regulatory-prescribed evidence. Thus, the petitioner failed to establish that the beneficiary met the job requirements on the labor certification. Counsel's assertions on appeal cannot overcome the ground of denial in the director's February 9, 2010 decision. Therefore, the petition may not be approved.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified additional grounds of ineligibility and will discuss these issues. 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

As previously discussed, the underlying labor certification requires eight years of grade school and four years of high school as the minimum level of education requirement for the proffered position. The beneficiary set forth his credentials on Form ETA-750B that he attended Kathiawar High School in Karachi, Pakistan from June 1974 to June 1988, and that he also attended National College in Karachi, Pakistan from January 1987 to April 1990. However, the record does not contain any documentary evidence showing that the beneficiary met the minimum educational requirements prior to the priority date.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). 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 failed to establish that the beneficiary met the minimum education requirement on the labor certification. Therefore, the petition may not be approved.

In addition, the petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence.

The job offer in this matter consists of the name of job title “manager” set forth at Item 9, the duties of “directs and coordinates ..., hires, trains, and fires employees” set forth at Item 13, and that the beneficiary will supervise three employees set forth at Item 17. The petitioner claimed that it had three employees on the petition. However, the petitioner did not submit any documentary evidence, such as its personnel records, payroll records or Form 941 Quarterly Tax Returns, showing that the petitioner had at least three employees for the beneficiary to supervise at the time the job offered to the beneficiary and has continued to have these employees to the present. The petitioner’s tax returns in the record show that the petitioner paid salaries and wages of \$51,720 in 2005, \$50,880 in 2006, \$42,880 in 2007 and \$31,200 in 2008. However, the amounts of salaries and wages the petitioner paid each year cannot establish that the petitioner had at least three employees excluding its shareholder(s). Therefore, the petitioner failed to demonstrate that it has had at least three employees from the priority date to the present and thus, failed to establish that the job offer to the beneficiary was realistic as of the priority date and that the offer remained realistic until the present. Therefore, the petition cannot be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.