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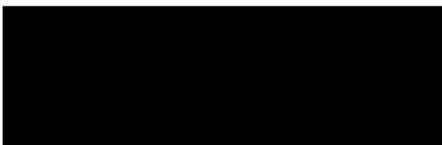
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B6



FILE:



Office: TEXAS SERVICE CENTER

Date:

FEB 28 2011

IN RE:

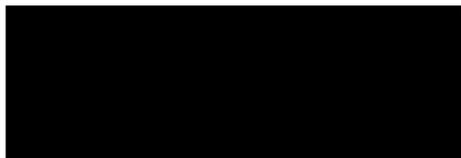
Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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, with a fee of \$630. 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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a meat market. It seeks to employ the beneficiary permanently in the United States as a butcher and meat cutter. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).

The director determined that (1) that the petitioner¹ introduced evidence of the beneficiary's prior employment not listed when the labor certification was certified, contrary to the decision of *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976); (2) the petitioner did not submit evidence according to the regulation at 8 C.F.R. § 204.5(i)(3) for the other employer listed on the labor certification; and (3) the petitioner had not demonstrated by sufficient evidence that the beneficiary is qualified to perform the duties of the offered position of butcher and meat cutter.

The issues are stated by the director in his decision.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).²

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on July 12, 2007. The ETA Form 9089 states that the position requires one year of experience in the occupation of butcher and meat cutter. The Immigrant Petition for Alien Worker (Form I-140) was filed on April 3, 2009.

The beneficiary under penalty of perjury stated in the ETA Form 9089 that he was employed fulltime as a butcher and meat cutter (35 hours per week) by the petitioner from December 18, 2006. From March 9, 2002, to May 14, 2005, the beneficiary stated that he was employed fulltime (35 hours per week) by [REDACTED] located at [REDACTED].

The beneficiary's job duties descriptions in each of the two positions are exactly the same as stated in the job duties of the offered position in the labor certification.

¹ The petitioner is a New York State corporation organized as Pellegrini Meats, Inc. on May 13, 1974, according to the New York State corporation informational website.

² The submission of additional evidence on appeal is allowed by the instructions to 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).

There is no employment experience stated in the labor certification for the time period to May 14, 2005 to December 18, 2006. No other employment experience is listed on the labor certification.

The labor certification describes the job duties of butcher and meat cutter as follows:

Cut, trim, or prepare consumer-sized portions of meat for use or sale in retail establishments.

The regulation at 8 C.F.R. § 204.5(1)(3) provides in pertinent part:

(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.

* * *

(D) Other workers. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The director issued a request for evidence (RFE) to the petitioner on April 15, 2009, requesting *inter alia*, that the petitioner submit evidence that the beneficiary obtained the required twelve months of experience in the job offered before July 12, 2007, according to the regulation at 8 C.F.R. § 204.5(1)(3). In response, counsel submitted a letter from [REDACTED]

[REDACTED] dated May 5, 2009, indicating that the beneficiary was employed by the company from December 1999, to February 2002 as a meat cutter with the beneficiary's job duties generally the same as the descriptions stated above. According to an undated statement from [REDACTED] and the petitioner are separate companies.⁴

Since this job information [REDACTED] was not stated in the labor certification certified on February 3, 2009, it is an attempt to amend both the labor certification and the petition filed April 3, 2009, after the fact. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services' (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Further, in *Matter of Leung*, 16

³ According to a document in the record of proceeding, [REDACTED] was incorporated [REDACTED] on August 17, 1989.

⁴ A corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980).

I&N Dec. 2530 (BIA 1976), the Board in *dicta* notes that the beneficiary's experience, without such fact certified by the DOL on the labor certification lessens the credibility of the evidence and facts asserted.

The AAO will not accept the letter from [REDACTED] as credible evidence of the beneficiary's work experience because this employment experience was not listed on the ETA Form 9089. The ETA Form 9089 specifically directs the beneficiary to list any experience "that qualifies [the beneficiary] for the job opportunity." As the beneficiary did not list this experience with [REDACTED], and offers no evidence for this omission, the experience will not be accepted. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

No prior employment verification according to the above cited regulation was provided for the job experience at "C Town Supermarket" which was stated in the labor certification. Although counsel on appeal claims that the "previous employers" are no longer working for "C" Town Supermarket, this does not excuse the petitioner from meeting its burden of proof.

Therefore, there are insufficient statements, or no statements as the case may be, submitted in the record concerning the beneficiary's qualifications according to the regulation at 8 C.F.R. § 204.5(1)(3) to demonstrate that the beneficiary is qualified to perform the duties of the proffered position. There is no other evidence in the record submitted concerning the beneficiary's qualifications to meet the requirements of the labor certification.

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.