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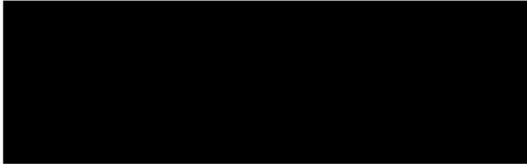
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: **MAR 17 2011**

IN RE:

Petitioner:



Beneficiary:

Petition: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 construction company. It seeks to employ the beneficiary permanently in the United States as a construction carpenter. 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 the petitioner had not established that the beneficiary met the experience requirements of the ETA Form 9089. The director denied the petition accordingly.<sup>1</sup>

The record shows that the appeal is properly filed, 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 denial, the issue in this case is whether or not the beneficiary meets the one year experience requirement in the proffered position required by the labor certification.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The petitioner submitted the beneficiary's W-2 Forms for 2007 and 2008, its 2007 Form 1120S, its 2008 Form 940, and its 2008 Forms 941 for the last two quarters of the year in support of its ability to pay the proffered wage from the priority date onward. The documentation submitted satisfies the petitioner's burden of proof with regard to its ability to pay the proffered wage.<sup>2</sup>

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<sup>1</sup> The director specifically noted in his decision that the petitioner submitted requested evidence concerning the petitioner's ability to pay the proffered wage from the priority date onward, but failed to submit any evidence of the beneficiary's required experience, which the request for evidence also requested.

<sup>2</sup> The director noted in his decision that the petitioner "submitted the required evidence of ability to pay" the proffered wage, and stated generally that the petitioner must establish its ability to pay from the priority date onward. The petitioner's ability to pay was not in issue. The petitioner resubmitted evidence of its continued ability to pay on appeal. The AAO agrees with the director's assessment that the petitioner has established its ability to pay the proffered wage from the priority date onward.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful

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>3</sup>

On the petition, the petitioner claimed to have been established in 1999 and to currently employ 15 workers. On the ETA Form 9089, signed by the beneficiary on November 3, 2008, the beneficiary claimed to have worked for the petitioner since March 4, 2007.

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 May 12, 2008.

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permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, 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 ETA Form 9089 was accepted on May 12, 2008. The proffered wage as stated on the ETA Form 9089 is \$21.21 per hour (\$44,116.80 per year). The ETA Form 9089 states that the position requires 12 months experience in the proffered position.

In the instant case, the petitioner submitted documentation which shows that it paid the beneficiary the full proffered wage from the 2008 priority date. The petitioner submitted a copy of the beneficiary's 2008 W-2 Form which shows that the petitioner paid wages (\$59,054.98) to the beneficiary in 2008 which exceed the proffered wage (\$44,116.80). The petitioner also submitted its Form 1120S for 2007 and quarterly wages paid for 2008 to meet the requirement at 8 C.F.R. § 204.5(g)(2). The petitioner has, therefore, maintained its burden of proof and established its ability to pay the proffered wage during the applicable time frame. The petitioner also submitted a copy of the beneficiary's 2007 W-2 Form which shows that the petitioner paid the beneficiary \$56,882 in that year, an amount which exceeds the proffered wage. Although 2007 is before the priority date, the evidence submitted shows a pattern of paying wages exceeding the proffered wage.

<sup>3</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).

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 one year 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 had over four years experience in the proffered position. The beneficiary stated on the ETA Form 9089 that he worked as a carpenter for the present petitioner from March 4, 2007 through the signature date of the ETA Form 9089 (November 3, 2008), and for [REDACTED] from August 3, 2003 until October 28, 2006. He does not state any additional work experience on the ETA Form 9089.

The regulation at 8 C.F.R. § 204.5(1)(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.

The director denied the petition stating that the petitioner failed to submit evidence establishing that the beneficiary met the 12 month experience requirement of the labor certification.

In the director's May 28, 2009 request for evidence, the director requested, in part, that the petitioner submit evidence that the beneficiary obtained 12 months experience in the proffered position as required by the ETA Form 9089. The director specifically noted that proof of experience should be in the form of letters from current or former employers giving the name, address, and title of the employer, a specific description of the beneficiary's duties, and the beneficiary's dates of employment.

The petitioner submitted, on appeal, an experience letter from [REDACTED], signed by [REDACTED] Manager/Director, which states that the beneficiary was employed by that organization from 1998 to 2003 "in the capacity of builder/carpentry/joinery." The petitioner, however, did not list this employment on the ETA Form 9089. 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. Absent additional independent, objective evidence to verify this experience, the letter

will not be accepted. 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. 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 (BIA 1988).

The petitioner also submitted an experience letter dated August 7, 2009 from Stephanie Thomas,<sup>4</sup> Owner of the petitioner, Cowboy Carpentry, which stated that the beneficiary had worked for the petitioner from March 2007, and that the beneficiary was then working for the petitioner as a construction carpenter earning \$31.00 per hour. 20 C.F.R. § 656.17(h) relates to *Job duties and requirements*:

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

- (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
- (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

- (i) The term "employer" means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
- (ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

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<sup>4</sup> Elsewhere identified as [REDACTED]

The U.S. Department of Labor frequently asked questions at <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#Perm Program> (accessed March 15, 2011) states the following:

Under what circumstances may the foreign worker use experience gained with the employer as qualifying experience?

If the foreign worker already is employed by the employer, the employer can not require U.S. applicants to possess training and/or experience beyond what the foreign worker possessed at the time of initial hire by the employer, including as a contract employee: (1) unless the foreign worker gained the experience while working for the employer in a position not substantially comparable to the position for which certification is sought; or (2) the employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

NOTE: A substantially comparable job or position means a job or position requiring performance of the same duties more than 50 percent of the time.<sup>5</sup>

As the petitioner has not submitted a letter from [REDACTED] and the experience from [REDACTED] was not listed on the ETA Form 9089, the petitioner would seek to rely solely on the beneficiary's experience with the petitioner. The record does not establish that the beneficiary the gained required experience while working for the petitioner in a position that was not substantially comparable to the position for which certification is sought. Nor has the petitioner established that it is no longer feasible to train a worker to qualify for the position. As such, the petitioner has not established that the beneficiary met the experience requirements of the ETA Form 9089 as of the priority date.

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 met that burden.

**ORDER:** The appeal is dismissed.

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<sup>5</sup> For purposes of determining whether the foreign worker gained experience with the employer, an employer is "an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3."