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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

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U.S. Citizenship  
and Immigration  
Services

[REDACTED]

B6

Date **NOV 04 2011** Office: NEBRASKA SERVICE CENTER

File: [REDACTED]

IN RE: Petitioner:  
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:

[REDACTED]

**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, reopened on motion and again denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retail business. It seeks to employ the beneficiary permanently in the United States as a manager of a convenience store and gas station. 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 May 12, 2008 denial, the 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 information contained in the employment letter received from [REDACTED] was inconsistent and contradictory to the information provided by the beneficiary in the Form G-325A, Biographic Information; and that the petitioner had failed to establish the beneficiary's eligibility at the time of filing. The Forms W-2 submitted to the director indicate that the beneficiary worked for [REDACTED] from 2003 onwards, which is after the priority date.

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 19, 2003.

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>

On appeal, counsel asserts that the beneficiary qualifies as a manager, and that as such the I-140 petition should be approved. Counsel submits additional letters of employment. Other relevant evidence in the record includes the initial letter of employment from [REDACTED] IRS Forms W-2 for 2003 through 2006, and the beneficiary's Form G-325A, signed under penalty of perjury on June 29, 2007.

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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). 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, the consideration of new evidence on appeal does not equal an acknowledgement that said evidence is credible.

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 beneficiary must have two years of experience in the job offered, manager of a convenience store and gas station. The beneficiary's duties are described in box 13 of the Form ETA 750 as:

Oversee convenience store and gas station. Sell foods, groceries, and gasoline. Responsible for ordering, marketing, purchasing and vendor dealings. Reconcile all accounts, prepare various reports. Maintain inventory and equipment.

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.

To meet the qualifications, the employment letter must include the following: the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A).

The record of proceeding contains the following evidence:

- A letter dated May 19, 2008 from the owner of [REDACTED] located in Baytown, Texas who stated that the company employed the beneficiary as a manager from January 1, 1999 to November 30, 1999.

- A letter dated May 20, 2008 from the owner of [REDACTED] located in Houston, Texas who stated that the company employed the beneficiary as a manager from December 1, 1999 to December 31, 2000.
- A letter dated May 21, 2008 from [REDACTED] Kingwood, Texas, who stated that the company employed the beneficiary as a manager from January 1, 2001 through July 30, 2001.
- A letter dated February 11, 2007 from [REDACTED] located in Seguin, Texas, who stated that the company employed the beneficiary as a manager from August 2001 through February 2007, the date the letter was signed.
- Form W-2 for 2003 from [REDACTED] showing wages paid to the beneficiary in the amount of \$7,000.00. The petitioner submitted other Forms W-2 indicating continued employment after the priority date.

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 was employed as is indicated in the letters above. However, contrary to the beneficiary's statements on the Form ETA 750B, he stated under penalty of perjury on the Form G-325A, which he signed and dated June 29, 2007, in the space provided for his employment history that he has been "Self Employed" from January 2001 through June 2007, the date he signed the Form G-325A. On the Form I-485, the beneficiary answered "none" to the query in Part 3 asking for his occupation. The petitioner has not provided a plausible explanation for this contradiction.

The beneficiary also stated on the Form G-325A that he resided in San Antonio, Texas from January 2000 through June 2007. It is noted by the AAO that according to the distance calculator, [REDACTED] located in Baytown, Texas, where the applicant indicated that he was employed, is 209 miles away from where he indicated that he lived in San Antonio, Texas. According to the distance calculator, [REDACTED] located in Houston, Texas, where the applicant indicated that he was employed, is 185 miles away from where the beneficiary indicated that he lived in San Antonio, Texas. According to the distance calculator, [REDACTED] located in Kingwood, Texas, where the applicant indicated that he was employed, is 224 miles away from where the beneficiary indicated that he lived in San Antonio, Texas. It is noted that the above noted company addresses were also indicated on the company letterheads that were submitted by the company representatives. It is unlikely that the beneficiary, as a convenience store manager, would travel such great distances each day to work.

The AAO further notes that although the evidence provided by [REDACTED] indicates that the company employed the beneficiary from August 2001 through February 2007, the wage amount on the Form W-2 for 2003 (\$7,000.00) does not demonstrate that the beneficiary was employed on a full-time basis; therefore, there is insufficient proof in this evidence to demonstrate his two years of experience in the job offered.

The numerous inconsistencies and contradictions in the petitioner's evidence cast doubt on the petitioner's proof. Doubt cast on any aspect of the petitioner's proof 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 lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

In addition, the late submission of the employment letters casts doubt upon the authenticity and veracity of the evidence. Here, the employment letters do not establish that the beneficiary has the two years experience necessary to perform the duties described in the Form ETA 750. The vague employment statements cast doubt on the petitioner's proof. *Matter of Ho, supra*. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification. See generally *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). Accordingly, it has not been established that the beneficiary has the requisite two years of experience and is thus qualified to perform the duties of the proffered position. 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A).

Beyond the decision of the director, the petitioner has failed to show that it has the continuing ability to pay the proffered wage in 2007, in that it has failed to provide corporate tax returns or audited financial statements, although the director requested such evidence in the Request for Evidence dated March 12, 2008.

Beyond the decision of the director, under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000). It appears that the petitioner and beneficiary may be in a familial or financial relationship that could preclude the existence of a valid employment relationship. Accordingly, if the appeal were not being dismissed for reasons set forth herein, this would call into question the bona fides of the job offer.

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. There has been no plausible explanation given for the numerous inconsistencies found in the record, surrounding both the beneficiary's experience and the purported payment of wages to the beneficiary. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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