



U.S. Citizenship
and Immigration
Services

(b)(1)

Date: **APR 09 2012**

Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

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:

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,

Kumar S. Poulos for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner filed three subsequent motions to reopen and reconsider. Each of those motions was granted and each reaffirmed the initial decision of the director. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retail store. It seeks to employ the beneficiary permanently in the United States as a manager. 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 the beneficiary was qualified to perform the duties of the proffered position. The director denied the petition accordingly.

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 September 18, 2008 denial and subsequent decisions dated November 24, 2008, February 19, 2009 and April 15, 2009, 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 record contained a number of inconsistencies regarding the beneficiary's experience which the petitioner did not resolve. Thus, the director determined that the petitioner did not establish that the beneficiary had the experience required by the labor certification.

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 (Acting Reg'l Comm'r 1977). Here, the labor certification application was accepted on May 5, 2004.

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.¹ On appeal, counsel submits no new evidence. Relevant evidence in the record includes the following items:

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). Counsel indicated on Form I-290B that a brief and/or additional evidence would be submitted within 30 days. To date, the AAO has received nothing further from counsel or the petitioner regarding the instant appeal.

1. An undated letter from [REDACTED] signed by [REDACTED] stating the beneficiary worked for him as a store manager from April 2001 to May 2005.
2. A letter dated February 17, 2009 from [REDACTED] signed by [REDACTED] stating the beneficiary worked for him as a store manager from April 2001 to May 2004 on a full time basis and then continued working on a part time basis until May 2005.
3. An Internal Revenue Service (IRS) Form W-2 issued by [REDACTED] to the beneficiary for 2001 showing total wages earned of \$4000.
4. An IRS Form W-2 issued by [REDACTED] to the beneficiary for 2002 showing total wages earned of \$15,600.
5. An IRS Form W-2 issued by [REDACTED] to the beneficiary for 2003 showing total wages earned of \$5,000.
6. 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 employment for the previous five years, he stated that he worked at [REDACTED] as a manager from April 2001 until May 2004, that he worked at the petitioner as a manager from May 2004 until April 2005, and that he began work at [REDACTED] as a manager in April 2005.
7. A letter dated October 10, 2008 from [REDACTED] in India with an illegible signature stating the beneficiary worked at [REDACTED] as a manager from January 1, 1994 to December 31, 1995.
8. A letter dated October 10, 2008 from [REDACTED] in India with an illegible signature stating the beneficiary worked at [REDACTED] as a manager from January 1, 1991 to December 31, 1993.
9. An affidavit from the beneficiary dated December 19, 2008, stating:

In April 2001, I got the job with [REDACTED] I was working on full time basis with them till May 2004 when I also started working with [REDACTED] I continued working with [REDACTED] till May 2005 on part time basis. At the time of filing I-485, I mentioned my employment with [REDACTED] only for the period when I was working for them on full time exclusive basis. I did not incorporate my period of my part time employment with them. It was my impression, that I have to mention period of full time employment only.

On appeal, counsel asserts the director disregarded the overall evidence.

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'r 1986). See also, *Madany 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 worked at [REDACTED] as a manager for 40 hours per week from April 2001 until the time he signed the labor certification on April 20, 2004. He does not provide any additional information concerning his employment background on that form.

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.

(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 in the proffered job from the evidence submitted into this record of proceeding. The two letters from [REDACTED] are inconsistent with other information in the record. One letter states that the beneficiary worked for [REDACTED] as a store manager from April 2001 to May 2005, and the other letter states that the beneficiary worked for [REDACTED] as a store manager from April 2001 to May 2004 on a full time basis and then continued working on a part time basis until May 2005. However, the beneficiary's IRS Forms W-2 issued by [REDACTED] indicate that the beneficiary received \$4,000, \$15,600 and \$5,000 in 2001, 2002 and 2003, respectively. These payments are not consistent with [REDACTED] assertions that the beneficiary worked as a full-time manager each of those years. In an effort to explain the wage disparity, counsel in his letter dated May 30, 2008, asserts that due to factors beyond the beneficiary's control, the beneficiary, as an undocumented worker, was not able to get the market rate wages and that Forms W-2 do not always reflect the total compensation. However, counsel's explanation does not address why there is such a disparity of wages in 2002. Moreover, the assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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Further, the letters from [REDACTED] are inconsistent with the beneficiary's G-325, which states that the beneficiary worked at [REDACTED] as a manager from April 2001 until May 2004, that he worked at the petitioner as a manager from May 2004 until April 2005, and that he began work at [REDACTED] as a manager in April 2005.

The two letters from [REDACTED] are inconsistent with other information in the record and as such, doubt is cast on all of the evidence related to the beneficiary's prior work experience. While the petitioner has been given an opportunity to provide independent, objective evidence to resolve the inconsistencies, it has not done so. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

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 further states:

[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Id. at 591-592.

Although the petitioner submitted two additional experience letters from [REDACTED] in India and [REDACTED] in India, the beneficiary did not include such experience on the labor certification and thus, the DOL has not certified it. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), 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.

Lastly, as to the beneficiary's December 19, 2008 affidavit, it is self-serving and does not provide independent, objective evidence of his prior work experience. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The petitioner has failed to resolve the inconsistencies in the record regarding the beneficiary's work experience with independent, objective evidence. 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.