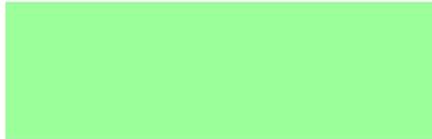




U.S. Citizenship
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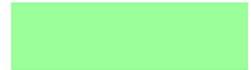


DATE:

AUG 29 2012

OFFICE: TEXAS SERVICE CENTER

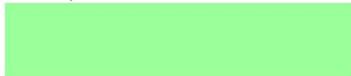
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IN RE:

Petitioner:

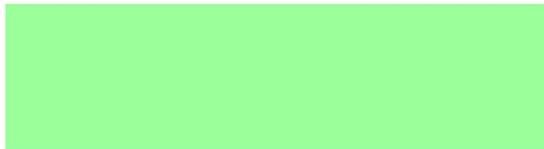
Beneficiary:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a construction materials wholesaler.¹ The petitioner seeks to permanently employ the beneficiary in the United States as a factory manager. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).²

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is December 6, 2004. See 8 C.F.R. § 204.5(d).

As set forth in the director's March 3, 2009 denial, the single issue in this case is whether or not the beneficiary possessed the minimum experience required to perform the offered position by the priority date.

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.

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.³

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's*

¹The petitioner submitted a business brochure which states the petitioner is Florida's leading natural stone supplier and serves the marble and granite industry. The brochure lists its products as marble, granite, limestone, travertine, slate, and onyx. The brochure also states that not only does the petitioner have the lowest prices and the best selection, but it also has minimal delivery times and full control of a project from quarry to building completion.

² Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

Tea House, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate about the beneficiary’s qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: 6 years.

High School: 4 years.

College: 2 years.

College Degree Required: No.

Major Field of Study: Not applicable.

TRAINING: None Required.

EXPERIENCE: Two (2) years in the job offered of factory manager.

OTHER SPECIAL REQUIREMENTS: None.

The labor certification states that the beneficiary qualifies for the offered position based on the following experience:

1. Self-employment as a manager in the export/import business from 2002 until November 26, 2004, the date the beneficiary signed the labor certification. The beneficiary does not list the name of his business. This experience conflicts with the beneficiary’s Form G-325A signed by the beneficiary on April 14, 2008 and filed in conjunction with his application to adjust

(b)(6)

status (2008 Form G-325A) because the beneficiary does not list this self-employment, but rather lists that he was working as a director at [REDACTED] from February 1999 until April 14, 2008. This inconsistency is not explained.⁴

Additionally, this experience conflicts with the experience as listed by the beneficiary on a Form G-325A signed by him on June 5, 2002 (2002 Form G-325A) and other documents in the record.⁵ On these documents, the beneficiary listed his last employment as being with [REDACTED] ending in December 1998. The beneficiary listed no employment after December 1998. This inconsistency is not explained.⁶

2. As a distribution/financial manager with [REDACTED], an import/export wholesale distributor, in [REDACTED] Florida from February 1999 until January 2002. This experience conflicts with the beneficiary's 2008 Form G-325A wherein he states that he was working for [REDACTED] as a director from February 1999 until April 14, 2008. This inconsistency is not explained.⁷

Additionally, this experience conflicts with the beneficiary's 2002 Form G-325A wherein he does not list an employment with [REDACTED]. This inconsistency is not explained.⁸

3. A manager with [REDACTED] a bank/financial corporation, in Colombia, South America from October 1984 until December 1998.

No other experience is listed on the labor certification.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

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.

Therefore, an examination of the experience letters is necessary to determine whether the beneficiary had the required two years of experience as a factory manager. As noted above, the beneficiary listed

⁴It 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

⁵The Form G-325A requires an applicant to list employment for the previous five years. Thus when the beneficiary signed his 2002 Form G-325A on June 5, 2002, he was required to list all of his employment going back to June 5, 1997.

⁶*Matter of Ho*, 19 I&N Dec. at 591-592.

⁷*Id.*

⁸*Id.*

three different periods of employment on the labor certification, only two of which are supported by experience letters.

The record contains an undated experience letter from [REDACTED] (the beneficiary's wife) as president of [REDACTED] on company letterhead stating that it employed the beneficiary as a financial and distribution manager from February 1999 until January 2002. The letter states it is an import/export and distribution concern that primarily deals with the importation and distribution of wholesale products from South America. The letter does not state if the job was full- or part-time. The letter lists the beneficiary's duties as follows:

develop and implement operating methods designed to eliminate operating problems and improve product quality through supervisory coordination; develop and implement a budget, cost controls, quality control standards. Obtain, analyze, and implement data referring to type, quantities, specifications, and delivery dates of products imported and distributed to clientele. Review and analyze production, maintenance, and company operational reports; revise production, and exportation schedules as a result of operational problems.

As noted above, this position of financial and distribution manager conflicts with the position of director as listed on the beneficiary's 2008 Form G-325, which the petitioner has not explained.⁹ Additionally, there is an inconsistency between the labor certification and the beneficiary's 2002 Form G-325A, which petitioner has not explained. Therefore, because the petitioner has not resolved the inconsistencies with independent, objective evidence of the beneficiary's employment with [REDACTED] such as payroll documents, paystubs or paychecks, the petitioner has not established that the beneficiary was employed as a factory manager by [REDACTED]

The record also contains an October 25, 2004 letter from [REDACTED] signed by [REDACTED] whose title is Coordinator in the Human Resources department. The letter indicates that it is a bank and states that the beneficiary worked at [REDACTED] from October 19, 1984 until December 30, 1998, first as a professional, then as a branch manager at four different branches. The letter lists a number of duties consistent with banking. The letter does not indicate if the beneficiary's employment was full- or part-time. There is also a letter dated November 10, 1998 on [REDACTED] letterhead signed by [REDACTED] as personnel manager indicating the beneficiary worked there since 1984 for the first four years as an agronomic engineer and from 1988 until the date of the letter as a financial general manager of [REDACTED]. This letter does not indicate if the beneficiary's employment was full- or part-time. It appears that [REDACTED] and [REDACTED] are the same company. Based on these letters, the petitioner has not established that the beneficiary's experience at this employer was ever as a factory manager.

⁹*Id.*

On appeal, counsel asserts that the minimum requirement for experience is contained in field 14 of the labor certification and even though the labor certification specifically requires two years of experience in the job offered of factory manager, the petitioner intended to require two years of experience in financial management and accounting instead. Counsel also asserts that the beneficiary's work experience at [REDACTED] is substantially similar to the duties outlined for the instant position.

Although counsel asserts that the petitioner's intent was to accept experience in a field other than factory management, 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). There is no evidence in the record of proceeding, such as the petitioner's job advertisements and recruiting activities, indicating that the petitioner intended to accept any experience other than two years of factory management experience as listed on the labor certification. As noted above, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements.

Counsel's other assertion is that the beneficiary's experience at [REDACTED] is substantially similar to the duties outlined on the labor certification. However, as stated above, the petitioner has not provided independent, objective evidence to establish that the beneficiary worked as a factory manager at [REDACTED]

Therefore, the petitioner has not established that the beneficiary has the required two years of experience as a factory manager.

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.