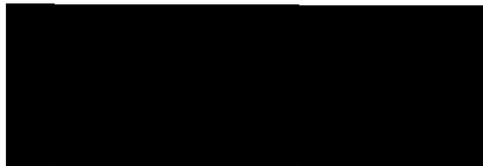


U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

B6



DATE: **DEC 17 2012** OFFICE: TEXAS SERVICE CENTER

FILE:



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:** On October 26, 2005, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The director of the Texas Service Center (the director) denied the immigrant petition on December 23, 2009, and the petitioner subsequently appealed the director's decision. The appeal will be dismissed.

The director stated that the denial fell under Section 205 of the Immigration and Nationality Act (the Act) 8 U.S.C. § 1155, which provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [s]he deems to be good and sufficient cause, revoke the approval of any petition approved by h[er] under section 204." Although not raised by counsel, as this case did not involve the revocation of an approval of a petition, Section 205 would not apply. Nonetheless, the petitioner must provide evidence to demonstrate eligibility for the immigrant category for which it applied. Section 291 of the Act, 8 U.S.C. § 1361. As a result, the director's denial will be considered under that provision under the AAO's *de novo* review authority.

The petitioner is a dry cleaner. It seeks to employ the beneficiary permanently in the United States as an assistant manager pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).<sup>1</sup> As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification.<sup>2</sup> As stated earlier, this petition was denied on December 23, 2009. The director determined that the petitioner failed to follow the U.S. Department of Labor (DOL) recruitment

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<sup>1</sup> Section 203(b)(3)(A)(i) of 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.

<sup>2</sup> We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the Department of Labor at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to USCIS based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007, and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

procedures in connection with the approved labor certification application and that the petitioner failed to demonstrate that the beneficiary had the required experience as of the priority date. On appeal, an additional issue has arisen concerning the petitioner's ability to pay the proffered wage.

On appeal, counsel for the petitioner<sup>3</sup> contends that the director has improperly denied the petition. Specifically, counsel asserts that the petitioner followed all recruitment guidelines and that former counsel substituted the beneficiary onto a previously approved Form ETA 750 without first obtaining the petitioner's permission.<sup>4</sup>

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The Administrative Appeals Office (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>5</sup>

The director indicated that the petitioner did not conduct good faith recruitment. The AAO disagrees. Although the petitioner did not submit evidence of its recruitment in response to the director's May 13, 2009 Notice of Intent to Deny (NOID), it submitted the requested information on appeal and stated that the delay in submission was due to a delay in receiving a response to its FOIA request. The record does not show inconsistencies or anomalies in the recruitment process that would justify a denial of the petition. Therefore, the director's conclusion that the petitioner did not comply with DOL requirements is withdrawn.

Concerning the beneficiary's qualifications for the position, the record does not currently establish that the beneficiary had the requisite work experience in the job offered before the priority date. Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

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<sup>3</sup> Current counsel of record, [REDACTED] will be referred to as counsel throughout this decision. Previous counsel, [REDACTED] will be referred to as former counsel or by name. The AAO notes that [REDACTED] was suspended from the practice of law before the Immigration Courts, Board of Immigration Appeals (BIA), and Department of Homeland Security (DHS) for a period of three years from March 1, 2012 to February 28, 2015.

<sup>4</sup> The AAO acknowledges the petitioner's statement that it was unaware that [REDACTED] substituted the beneficiary into a labor certification application previously filed by the petitioner. However, the petitioner did sign the petition in the instant case and has not provided any indication that it wishes to withdraw the petition.

<sup>5</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 a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. 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, *Madany v. Smith*, 696 F.2d, 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).

Here, the Form ETA 750 was filed and accepted for processing by the DOL on April 30, 2001. The name of the job title or the position for which the petitioner seeks to hire is "ass't mgr." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, "Will assist the manager on a daily basis." Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered.

On the Form ETA 750, part B, signed by the beneficiary on October 6, 2005, he represented that he worked 40 hours a week at Lavanderia Brasilia Ltda in Brazil as a supervisor. He did not indicate any dates of his employment with this company. Thus, the AAO is unable to adequately assess whether the beneficiary possessed the minimum qualifications for the position. 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. In addition, the evidence in the record does not establish that the beneficiary possessed the minimum experience required. The record includes a March 8, 2001 letter from [REDACTED] stating that the beneficiary worked as a laundry manager from November 20, 1992 to April 30, 1998. The letter included a CNPJ<sup>6</sup> number of [REDACTED]

As the director stated in the NOID, the CNPJ number provided does not match the information found in the CNPJ database. The CNPJ database states that the number provided is invalid. As a result, an inconsistency exists in the record as to whether Lavanderia Brasilia Ltda is a business that has operated in Brazil and, as a result, whether the beneficiary could have gained the two years of experience required by the terms of the labor certification by working for that company. It 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. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

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<sup>6</sup> Businesses that are officially registered with the Brazilian government are given a unique CNPJ number. CNPJ (Cadastro Nacional da Pessoa Juridica) is similar to the federal tax ID or employer ID number in the United States. The Department of State has determined that the CNPJ provides reliable verification with respect to the adjudication of employment-based petitions in comparing an individual's stated hire and working dates with a Brazilian-based company to that Brazilian company's registered creation date.

Although the director stated in his decision that the letter containing an invalid CNPJ number amounted to fabricated evidence intended “to circumvent the immigration laws to obtain benefits,” the petitioner submitted no evidence on appeal to overcome the discrepancy. The record does not contain independent, objective evidence of qualifying employment to overcome the noted inconsistencies in the evidence of the beneficiary’s employment, such as the beneficiary’s official work book, social security or tax records, payroll taxes or the like. Thus, the AAO agrees that the record does not establish the beneficiary’s qualifications for the proffered position.

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner’s ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>7</sup> If the petitioner’s net income or net current assets is not sufficient to demonstrate the petitioner’s ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner’s business activities. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg’l Comm’r 1967).

In the instant case, the petitioner did not pay the beneficiary the full proffered wage each year, and its net income and net current assets, when added to the wages paid to the beneficiary, were not equal or greater to the proffered wage for 2001. No financial evidence for any other year was submitted. Further, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets.

Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

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.

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<sup>7</sup> *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff’d*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff’d*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

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**ORDER:** The appeal is dismissed.