

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 26 2012** OFFICE: TEXAS 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)

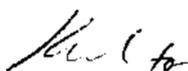
ON BEHALF OF PETITIONER:

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 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,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was approved by the Director, Texas Service Center. The director subsequently revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an auto reclamation business. It seeks to employ the beneficiary permanently in the United States as an auto reclamation supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to establish that the beneficiary is qualified for the proffered position. The director accordingly revoked approval of the petition.

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 May 28, 2009 decision, an issue in this case is whether or not the petitioner established that the beneficiary is qualified for the proffered position.

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 Form ETA 750, Application for Alien Employment Certification, 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). The priority date is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on September 3, 2002. The Form ETA 750 states that the position requires two years of experience in the job offered as an auto reclamation supervisor. On the Form ETA 750, signed by the beneficiary on September 25, 2001, the beneficiary did not claim to have worked for the petitioner.

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>

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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 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).

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's 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 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 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered as an auto reclamation supervisor. On the labor certification, the beneficiary claims to qualify for the offered position based on his prior experience, which includes working as an auto reclamation inventory manager for [REDACTED] from unlisted months in 1994 through 2001.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(1)(3)(ii)(A). The petitioner submitted a letter from [REDACTED], regarding the employment of the beneficiary from February 1994 through November 2001. The letter indicates that the beneficiary worked there on a part-time basis. The letter does not delineate the beneficiary's regular work hours or schedule.

In the director's May 28, 2009 decision, he cited an interview conducted by a consular officer with the beneficiary. The interviewer stated that the beneficiary could not list many details about his prospective employment during his overseas interview with the U.S. government, including his duties, the number of employees working for the petitioner, or his future salary. The interviewer noted that the beneficiary demonstrated weak English speaking skills, yet his position duties as listed on the labor certification require negotiation for the sale of used auto parts. After considering the petitioner's prior response to the director's March 25, 2009 Notice of Intent to Revoke (NOIR), the director concluded that the petitioner failed to demonstrate that the beneficiary was qualified for the offered position.

On appeal, counsel for the petitioner asserts that the beneficiary has been working for Shiraz Used Parts, Co. in Shiraz, Iran part-time (approximately 23 hours per week) since February 1994. The beneficiary instead stated in his interview that he worked there 36 hours per week. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), 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.

Counsel also submitted an unsigned and undated letter from the beneficiary to explain the consular interview. The petitioner submitted no additional documentary evidence to counter the consular officer's assertions.

Counsel states that the beneficiary was nervous during his interview. Counsel claims that the beneficiary will be able to perform his job duties despite his English language speaking limitations, as he does not need to be fluent, just to be able to communicate with workers dismantling wrecked autos, to direct removal of the parts, and to inspect parts. Counsel concedes that the beneficiary may initially have some difficulty in negotiating the sale of used auto parts, but states that the beneficiary should be given some time in order to improve those skills. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *See Matter of Katigbak*, 14 I&N Dec. at 49. The AAO does not find counsel's assertions to be persuasive regarding the beneficiary's possession of all of the requirements for the proffered position as of the priority date.

Accordingly, the petitioner failed to demonstrate credibly that the beneficiary possessed two full years of experience as an auto reclamation supervisor before the September 3, 2002 priority date.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner failed to establish that the beneficiary is qualified for the offered position.

In the director's May 28, 2009 decision, he noted that the owner of the petitioner's company, [REDACTED] is the beneficiary's brother-in-law. 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). The AAO finds, in light of the beneficiary's lack of experience and skills required for the proffered position as of the priority date, that the legitimacy of the job offer from the petitioner is questionable.

Therefore, the AAO finds that the petitioner failed to show that a valid employment relationship existed and that a *bona fide* job opportunity was available to U.S. workers.

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.