

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: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker 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 denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes its business as one involving the sale of photographic accessories. It seeks to employ the beneficiary permanently in the United States as a sewer. As required by statute, the petition is accompanied by a ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary met the experience requirements of the ETA Form 9089. 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 December 20, 2011 denial, the issue in this case is whether or not the petitioner has established that the beneficiary has 24 months of experience in the proffered position as required by the ETA Form 9089.

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.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089, 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 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on October 15, 2008. The proffered wage as stated on the ETA Form 9089 is \$12.00 per hour (\$25,792 per year). As noted above, The ETA Form 9089 states

that the position requires two years of experience in the proffered position and experience with industrial sewing machines.

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. 1986). *See also Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *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.

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 the petition, the petitioner claimed to have been established on January 1, 2006 and to currently employ two workers. The beneficiary does not claim to have previously worked for the petitioner.

The petitioner lists the following prior experience on the ETA Form 9089:

[REDACTED]

As previously noted, the director denied the petition finding that the petitioner had not established that the beneficiary had two years of experience in the proffered position as required by the ETA Form 9089. Specifically, the director refused to consider the letter from [REDACTED]

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). 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).

[REDACTED], which claimed the beneficiary was employed there from 1993 to November 1994, as evidence of the beneficiary's work experience because that employer was not listed on the ETA Form 9089 as a previous employer of the beneficiary.³ Additionally, as noted by the director, the experience letter was in a foreign language and not accompanied by an English language translation as required by 8 C.F.R. § 103.2 (b)(3):

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

On appeal, the petitioner submitted an experience letter from a former employer of the beneficiary listed on the ETA Form 9089 ([REDACTED]) which stated that the beneficiary was employed by that organization from April 1, 1991 to June 1, 1997. The letter further stated that, in 2005 [REDACTED] decided to change the company's name to [REDACTED] [REDACTED] where we are operating at the moment." That letter would state sufficient experience to meet the experience requirements of the ETA Form 9089. However, experience letters must include 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 referenced experience letter submitted on appeal in this instance does not contain the title of the author and does not, therefore, comply with 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). The letter further indicates that [REDACTED] changed its name in 2005 to [REDACTED] [REDACTED] (the previous claimed employer who submitted an experience letter that was not accompanied by an English translation) and implies that [REDACTED] [REDACTED] is the successor to [REDACTED]. Despite the director's notation in the decision that the other experience letter was not translated in accordance with the regulations, this letter submitted, and "translation" from [REDACTED] submitted on appeal, lacks the requisite certification in compliance with 8 C.F.R. § 103.2 (b)(3) that the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. Additionally, and more importantly, nothing in the record explains why, if [REDACTED] changed its name to [REDACTED] [REDACTED] in 2005, the prior letter states conflicting dates of employment for the beneficiary from 1993 to November 1999 and not the dates listed on the subsequent letter, or dates on the labor certification. All of these issues must be resolved by independent objective evidence based on the discrepancies and verified by relevant government ministry employment or wage records, before either letter can be accepted. It 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. 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

³ See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) in which 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.

visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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.