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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:

FEB 22 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 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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner filed a motion to reopen and reconsider. The director affirmed the decision on motion and the petition remained denied. The petitioner appealed and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a marine contracting company. It seeks to employ the beneficiary permanently in the United States as a supervisory mechanic. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to establish that the beneficiary had the requisite experience as of the date the labor certification was filed. 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 December 28, 2007 and February 6, 2008 denials,¹ the issue in this case is whether or not the beneficiary had the required experience as of the priority date, the date that the labor certification was filed.

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 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.²

In examining the issue of the beneficiary's experience, USCIS must look to the job offer portion of the alien 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, Mandany 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). A labor certification is an integral part of this petition, but the issuance of an ETA Form 9089 does not mandate

¹ Following the director's December 28, 2007 decision, the petitioner filed a motion to reopen and reconsider. Upon reconsideration, the director again denied on February 6, 2008.

² 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 approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's 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. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). Here, the priority date is April 10, 2006. The Form I-140 states that the petitioner was established in 1987 and has five employees.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii) specifies for the classification of a skilled worker that:

(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

(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 regulations for the skilled worker classification contain a minimum requirement that the position require at least two years training or experience. The ETA Form 9089 requires four years of experience in the job offered as a supervisory mechanic and does not provide for experience in any related occupation. The ETA Form 9089 also requires specific skills in Part H, Box 14: "proficien[cy] in the use of all tools related to the vocation of supervisory mechanics" and states in Box 11 that the position job duties involve "supervis[ion of a] team of mechanics who work on engine projects servicing and maintaining various engines on tug boats (gas and diesel), hydraulic pumps, welding equipment, generators, cranes and gas water pumps."

On the ETA Form 9089, signed by the beneficiary on April 4, 2006, the beneficiary indicated that he worked from September 1, 1993 to October 1, 1997 for [REDACTED], located at [REDACTED], a vehicle service and repair center, as a supervisor, and from January 1, 1990 to August 1, 1993 for the company, at the United Kingdom address listed, as a mechanic. The job duties were first as a mechanic repairing diesel and gas engines and then as a supervisory mechanic for diesel and gas engines. The petitioner submitted two letters, dated October 7, 2005 and September 12, 2007, respectively, from [REDACTED] former managing director of [REDACTED] and the beneficiary's father.³ The address listed on the letters was [REDACTED] with a phone number in the United Kingdom. The October 2005 letter stated that the beneficiary worked for [REDACTED] from 1990 to 1997 as a mechanic repairing

³ Counsel states in his "Statement in Support of Appeal" filed with the Form I-290B dated January 21, 2008 that [REDACTED] was the owner of the mechanic garage in Trinidad and Tobago where his son was employed . . ."

diesel and car engines and then stated that the beneficiary worked from September 29, 1993 to October 2, 1997 as a supervisor. The letter stated his salary as “TT\$36,000,” which was increased to “TT\$48,000” when he was promoted to supervisor.⁴ The September 2007 letter stated that the beneficiary worked for the company from 1990 to 1993 (no specific month was provided for the start or end) as a mechanic repairing gas and diesel engines, hydraulic pumps, alternators and starts, and servicing injectors, and from 1993 to 1997 (no specific month was provided for the start or end) as a mechanical supervisor.

The director found in his initial decision that the petitioner did not demonstrate that the beneficiary had experience with the specific mechanics required on the ETA Form 9089 including experience with tug boats and that there was an issue concerning the existence and location of [REDACTED]. The director stated that the [REDACTED] was the residence of [REDACTED] and not a vehicle service and repair center, and that it was unclear whether the business continued despite the claim that the business stopped operations in 1997.

On appeal, counsel stated that the specific duties of the prior position were specified in the letter submitted in response to the request for evidence. The September 12, 2007 letter from [REDACTED] stated that the beneficiary “manag[ed] a staff of 5 mechanics, schedul[ed] mechanical jobs, plan[ned] customer appointments, review[ed] completed jobs, [and] recruit[ed] direct[ed] & train[ed] new mechanics.”

To address the issue regarding whether the beneficiary’s experience in mechanics as a supervisor for vehicle repair applied to boats, the petitioner, with its motion to reopen, submitted a letter from [REDACTED] the owner operator of [REDACTED] explaining that he has twenty years of experience as a mechanic for automobiles and boats. [REDACTED] states that:

Mechanically speaking, one who has experience working for seven years as a mechanic for a mechanic shop – which is located on land, and as a Supervisor of four other mechanics for four of the last seven years, **clearly** has the requisite experience to fill the open position with [the petitioner] to supervise the work of other mechanics (non-supervisory) on engines whether located on land or on a vessel in water.

[REDACTED] explains that “an engine, gas or diesel, or hydraulic pumps or welding equipment or generators or cranes or gas water pumps are basically the same types of engines that are serviced, whether they are located on a marine vessel, boat, on a dock or in a mechanic shop near the water or far from the water.”

In the decision dated February 6, 2008, the director explained that the letters in the record from [REDACTED] did not include specific details concerning the type of work done by [REDACTED] or the beneficiary in his position with that company, or the amount of work done by [REDACTED] in that time. The director addressed the letter from [REDACTED], stating that the original decision did

⁴ The unit of currency in Trinidad and Tobago is the Trinidad and Tobago dollar (TT\$).

not deny the petition based on perceived differences between car and boat engines but instead that the denial was based on the petitioner's failure to establish that the beneficiary had experience in the specific duties required by the terms of the ETA Form 9089. The director also noted that the evidence submitted did not support the assertions of Mr. Reed and his opinion that the beneficiary has the required experience to fill the position with the petitioner. Specifically, the director stated:

A second letter from [REDACTED] dated September 12, 2007 was received and the beneficiary's duties between 1993 and 1997 as a mechanical supervisor were described as: managing a staff of 5 mechanics, scheduling mechanical jobs, planning customer appointments, review of completed jobs and recruiting, directing and training new mechanics. Nowhere in the evidence does it [sic] indicate there is an indication that the beneficiary has any experience supervising a team of mechanics who work on engine projects servicing and maintaining various engines on tug boats (gas and diesel), hydraulic pumps, welding equipment, generators, cranes and gas water pumps. It is not known what type of mechanics the beneficiary was supervising between 1993 and October 2, 1997. It is not known what types of mechanical jobs were scheduled between 1993 and October 2, 1997. It is not known what type of customer appointments were planned between 1993 and October 2, 1997. It is not known what types of jobs were reviewed by the beneficiary between 1993 and October 2, 1997. It is not known what type of mechanics were recruited, directed and trained by the beneficiary between 1993 and October 2, 1997. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The AAO finds that the job duties described in the letters of [REDACTED] are relevant in that, if the beneficiary engaged in such duties, he would qualify for the proffered position. The AAO, however, finds that the letters are not reliable evidence to document the beneficiary's work experience. In the director's December 28, 2007 decision, he noted that [REDACTED]

supposedly went out of business in 1997. However, the address of [REDACTED] is listed as [the same as that for [REDACTED]]. Therefore, it is unclear whether the company is out of business. It is also unclear whether [REDACTED] exists in the form indicated by the letters from [REDACTED]. If the company is out of business then [REDACTED] appears to be a residence and not a once operating mechanic shop as indicated by the letters from [REDACTED]."

The director cited *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988), requiring the petitioner to resolve inconsistencies in the record by independent objective evidence and *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972), and supporting documentary evidence to support the assertions in the letters.

The instructions for Form 9089 state that the address of the employer should be provided for each employer and that the job details as well as the employer's phone number and name of the alien's supervisor be set forth in Section 9. On appeal, the petitioner did not address the inconsistency noted by the director, that the listed location of the beneficiary's employment for [REDACTED] in the United Kingdom was a residence and not a vehicle service and repair location, and did not submit independent, objective evidence resolving the doubt about the beneficiary's qualifying employment. As such, the AAO finds that the letters do not credibly establish the beneficiary's qualifying experience.

Moreover, the records submitted by [REDACTED] about the company where the beneficiary stated that he gained his experience indicate that the company was in Trinidad and Tobago during the qualifying years that the beneficiary claimed to be a mechanic supervisor from 1993-1997. The records state that [REDACTED] was incorporated on August 14, 1987 in Trinidad and Tobago and that the company was operational as of November 3, 1997 when a letter was sent to the Board of Inland Review challenging the tax liability of the company. [REDACTED] letters indicate that the beneficiary was paid in Trinidad and Tobago currency during his seven years of employment at the [REDACTED]. There is no evidence that this company ever did business in London, United Kingdom. At Section K of the Form ETA 9089 the beneficiary clearly lists the location of his qualifying employment with [REDACTED] at [REDACTED]. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Because the evidence of the beneficiary's qualifying employment is not reliable or credible, the petitioner has failed to establish that the beneficiary was qualified to perform the services of a supervisory mechanic as of the priority date.

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.