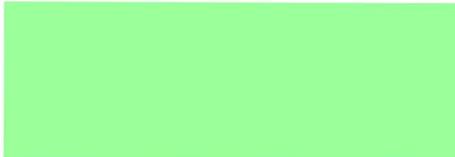


(b)(6)

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



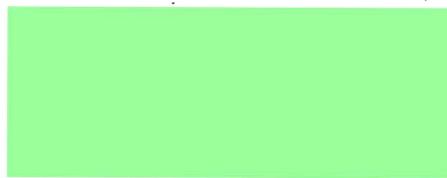
DATE: **JUL 19 2012** Office: NEBRASKA SERVICE CENTER

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: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an expatriate services company. It seeks to employ the beneficiary permanently in the United States as a human resources assistant expatriate services. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined the petitioner had failed to establish it had the continued ability to pay the beneficiary the proffered wage. 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 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

The instant petition (receipt number [REDACTED] was filed on July 3, 2007. This petition was filed while a nearly identical petition (receipt number [REDACTED] was pending. Both petitions were filed by the instant petitioner, and both were handled by the same counsel. We note that even though the instant petition was filed subsequent to the first petition, the petitioner stated on Part 4, Item 6 of the petition that no other immigrant petitions had been filed on behalf of the instant beneficiary. This inconsistency cannot be reconciled with the record of proceedings.

It bears noting at the outset, that the petitioner has the burden of proof in visa petition proceedings. Section 291 of the Act, 8 U.S.C. § 1361. Additionally, 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). Furthermore, 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 visa petition. *Id.*

On two separate occasions, the Administrative Appeals Office (AAO) notified the petitioner of inconsistencies in the record, and provided it opportunities to provide competent objective evidence which would remove the doubt cast on the petitioner's evidence by its submission of inconsistent evidence. The petitioner has not provided satisfactory evidence, and consequently has not met its burden in this case.

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

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).

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.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 (1st Cir. 1981). According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered as a human resources assistant.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he has three years of experience as a human resources assistant, gained concurrently with [REDACTED] and [REDACTED] from September 2000 to August 2003. The beneficiary also claims to have worked for the petitioner from March 1, 2004 to October 16, 2006. He does not provide any additional information concerning his employment background on that form.

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

(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 or the experience of the alien.

In a Notice of Derogatory Information (NDI), issued by the AAO on March 22, 2011, the petitioner was put on notice that the three experience letters provided by the beneficiary were unreliable. In particular, the NDI notes that the letters were gathered from Brazil and Texas, written within a day of each other, and all appeared to be formatted the same. In response, the beneficiary provided a brief affidavit that states he received the letters while he was visiting Brazil. He then provided two new letters. The three letters submitted with the appeal are from:

- [REDACTED] Director, [REDACTED] dated August 22, 2001. This letter bears the addresses of [REDACTED] offices, all of which are in Brazil. It bears a Brazilian telephone number, [REDACTED]. This letter states the beneficiary was employed as an international human resources coordinator assistant manager by [REDACTED] from 1996 to 2000;
- [REDACTED] Manager, [REDACTED] dated August 21, 2001. This letter bears no address. It does contain a Brazilian telephone number, [REDACTED]. It states that the beneficiary was employed as a port agent from 1989 to 1991; and

- [REDACTED] Office Manager, [REDACTED] dated August 21, 2001. This letter bears the address of [REDACTED] which is in Houston, Texas. However, the phone number in the letter, [REDACTED] appears to be from outside the United States.² This letter states that the beneficiary was as an international human resources and travel coordinator employed from 1991 to 1996.

None of the above letters are suitable for establishing the beneficiary's experience. None of these employers were mentioned on the application for labor certification. 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. Further, the letter from [REDACTED] does not provide an address for the employer and does not comply with 8 C.F.R. § 204.5(1)(3)(ii).

In response to the March 22, 2011, NDI, the petitioner provided two new letters. These letters were from:

- [REDACTED] Director, [REDACTED] dated August 16, 2004. This letter provides an address and telephone number in Houston, Texas. According to this letter, the beneficiary was employed by [REDACTED] from 2000 to 2003; and,
- [REDACTED], dated August 19, 2004. This letter provides an address and telephone number in Houston, Texas. This letter states the beneficiary was employed from 2003 to 2004.

We note that while both [REDACTED] and [REDACTED] are listed as previous employers on the application for labor certification, the dates given are inconsistent. On the ETA Form 9089, the beneficiary claimed to work full time for both employers at the same time, September 1, 2000, to August 1, 2003. This unexplained inconsistency prohibits the use of either letter to establish the beneficiary's experience without independent and objective evidence. 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). As noted above, the letter from [REDACTED] fails to provide the title of the author, and fails to comply with the regulation.

As noted in *Matter of Ho*, the petitioner bears the burden of resolving inconsistencies. When asked how the beneficiary got three letters from two different countries within two days, he stated that he received the letters while on a trip to Brazil. This does not explain how he received a letter from Texas and Brazil on the same day. Additionally, he did not address why the letters were so similar, despite being from three different employers, nor did he address the issue of the language in which the letters had initially been drafted.

² Houston area codes, like all U.S. area codes, are only three digits, and include 208, 713, and 832.

³ No title was provided.

Furthermore, he does not state why an employment verification letter from [REDACTED] which is located in Houston, Texas, would have a non-United States telephone number. Nor does the beneficiary explain how he could have worked for [REDACTED] in Brazil from 1996 to 2000, when he alleges on his Form G-325 that the last time he lived in Brazil was in 1991.

It is noted that the instant beneficiary was the beneficiary on a nonimmigrant L-1A visa filed by [REDACTED]. The L-1A classification enables a U.S. employer to transfer an *executive* or *manager* from one of its affiliated foreign offices to one of its offices in the United States. This classification also enables a foreign company which does not yet have an affiliated U.S. office to send an executive or manager to the United States with the purpose of establishing one. The employer must file Form I-129, Petition for a Nonimmigrant Worker, on behalf of the employee. The description of the beneficiary's duties with [REDACTED] in the experience letter is not consistent with the qualifications needed to secure an L-1A visa.

The petitioner has not met its burden of establishing that the beneficiary had the required experience as of the priority date.

As set forth in the director's denial, an issue in this case is whether or not the petitioner has demonstrated that it has the ability to pay the proffered wage in this case. The director determined that the petitioner failed to meet its burden. On appeal, the petitioner provided evidence showing that the beneficiary had been paid wages far in excess of the proffered wage. However, the petitioner's tax returns showed that it paid wages to employees in amount far lower than that received by the beneficiary. This inconsistency led to an inquiry by the AAO.

In response, the petitioner submitted a letter from [REDACTED] from [REDACTED] stating that the beneficiary's wages were included in the officer compensation block.⁵ This was passed off as an accounting error. We find this unpersuasive. We note that there were entries in both "wages and salaries" and "compensation to officers" categories, which suggests that the petitioner was accounting for the wages of some lesser employees in the general wage category. Including the

⁴ A search of the Texas State Board of Public Accountancy's web page revealed that neither [REDACTED] nor [REDACTED] are certified public accountants. Nothing in the record indicates what credentials they possess, and what relationship they have to the petitioner. See <http://www.tsbpa.state.tx.us/php/fpl/frmllookup.php> (last accessed November 3, 2011).

⁵ On IRS Form 1120, the Internal Revenue Service (IRS) instructions require the taxpayer to enter deductible officers' compensation on line 12. On line 13, the instructions require the taxpayer to enter total salaries and wages paid for the tax year, excluding officer compensation. The instructions to line 13 specifically state: "Do not include salaries and wages deductible elsewhere on the return, such as amounts included in officer's compensation..." See <http://www.irs.gov/pub/irs-pdf/i1120.pdf> (accessed November 2, 2011). Consequently, to comply with IRS instructions and reporting obligations, the amounts paid for officer compensation and salaries and wages must be kept separate, and the petitioner should not have included payments at line 12 that were not actual officer compensation payments.

beneficiary's pay in the officer's compensation category seems to be more consistent with what his pay and responsibilities truly were. This conclusion is strengthened by the fact that the beneficiary was previously the beneficiary of a visa category reserved for high level executives and managers.

The AAO noted in its subsequent NDI, dated November 7, 2011, that the beneficiary had also signed regulatory documents, submitted to the Texas Secretary of State, as the petitioner's "president." This raised the question that the alien beneficiary exercised a significant element of control in the hiring process, and consequently that the job opportunity was not truly open to U.S. workers.⁶ Additionally, the Form I-290B filed in this appeal contained the beneficiary's email address in the petitioner's contact information, which further suggest his control over the hiring process.

The AAO also noted that the beneficiary, who was characterized in the immigration process as a "human resources assistant" was paid \$60,957.60 in 2007 (10.7% of the gross receipts), \$65,629.15 in 2008 (6.28% of the gross receipts), \$153,254.52 in 2009 (8.42% of the gross receipts) and \$399,011.53 in 2010 (17.7% of the gross receipts).

Analyzing these figures, it appears that the beneficiary's compensation comprised 52.1% of the total officer's compensation in 2007, 52.1% in 2008, 18.5% in 2009 and 100% of total officers' compensation in 2010. We note that the beneficiary was not paid a regular salary, as one would

⁶ The regulation at 20 C.F.R. 656.17(l)

Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, *i.e.*, the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:

- (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
- (2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
- (3) The financial history of the corporation/ company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and
- (4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
- (5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

expect for a low-level employee such as a human resources assistant. In fact, the beneficiary's Form W-2s for 2007 through 2010 contained significantly different amounts for each year which seem to relate to the success of the business. Furthermore, the beneficiary was paid amounts far beyond what one would expect of a human resources assistant. In fact, the beneficiary was paid far in excess of both what DOL determined to be the prevailing wage and the certified proffered wage of \$35,016.80.

In issuing the second NDI, the AAO asked the petitioner to establish that the beneficiary was not in a position of significant influence and that the proffered job was actually opened to all qualified US workers. The AAO directed the petitioner to provide the requisite signed detailed written report of its reasonable good faith efforts to recruit U.S. workers prior to filing the application for certification. See 20 C.F.R. §§ 656.21(b) or 656.17(e). Under DOL's regulations, it is the responsibility of USCIS to ensure that the labor market test was *in fact* carried out in accordance with applicable law. See 20 C.F.R. § 656.30(d). These materials are necessary to determine if a good faith effort was made to recruit US workers.

In response to the issue of why the beneficiary submitted official documents to the Texas Secretary of State designating the beneficiary as "president," the petitioner stated that his employees use a "variety of unofficial titles" for "marketing purposes," and the beneficiary was not an officer or owner of the corporation. The AAO finds this explanation unpersuasive. We note that the beneficiary was designated as the petitioner's president in official regulatory documents filed with the state government. These documents had no marketing use.

The petitioner also stated that it no longer possessed its recruitment records. Without these documents, the AAO is prohibited from analyzing whether a bona fide job offer is available to U.S. workers. Thus, the petitioner has not satisfied its burden.

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.

ORDER: The appeal is dismissed.