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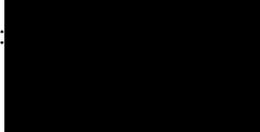
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
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Washington, DC 20529-2090

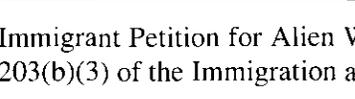


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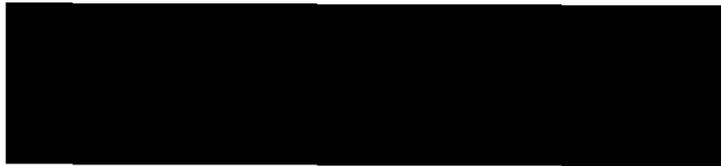
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DATE: **JUL 18 2012** OFFICE: NEBRASKA SERVICE CENTER FILE: 

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 with the field office or service center that originally decided your case by filing a 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,

*Elizabeth McCormack*

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a private individual. She seeks to permanently employ the beneficiary in the United States as a personal secretary.<sup>1</sup> The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the *Immigration and Nationality Act (the Act)*, 8 U.S.C. § 1153(b)(3)(A).<sup>2</sup>

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is August 8, 2003. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date.

The record shows that the appeal is properly filed 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.

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>3</sup>

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<sup>1</sup> This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

<sup>2</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

<sup>3</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 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 beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

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.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: 6 years

High School: 6 years

College: [None Required.]

College Degree Required: [None Required.]

Major Field of Study: [n/a]

TRAINING: [None Required.]

EXPERIENCE: Two (2) years in the job offered.

OTHER SPECIAL REQUIREMENTS: Verifiable References

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a manager [REDACTED] from July 1996 until March 1998; with [REDACTED] Brazil as a manager from January 1995 to July 1996; with [REDACTED] as a manager from February 1993 to December 1994; with [REDACTED] as a manager from October 1989 to February 1993; with [REDACTED] as a manager from May 1983 to

October 1989. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury on January 3, 2007.

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

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.

Pertinent to the beneficiary's qualifying two years of experience in the job offered as a private secretary, the evidence submitted before the director includes a November 21, 2007 letter regarding the beneficiary's experience from [REDACTED] stating that the beneficiary worked as a manager; a November 30, 2007 letter from [REDACTED] stating the beneficiary worked as a manager from May 1983 to October 1989; and a December 4, 2007 letter from [REDACTED] stating that the beneficiary was employed as a manager with the company from February 1993 to December 1994.

As noted by the director, the beneficiary's experience as a manager for each of these companies does not establish the required two years of experience as a private secretary within the terms of the labor certification. The director issued an RFE on April 16, 2008 requesting additional information about the beneficiary's qualifying employment. The director also asked why the beneficiary would accept a position with the petitioner when he currently operated his own business. Because the beneficiary had been working as a manager in his qualifying employment in Brazil, the director specifically requested information about the job duties of other employees working for each of the beneficiary's former employers. The petitioner submitted a response on July 3, 2008. The petitioner included three additional letters addressing the beneficiary's work experience. The petitioner did not submit evidence about duties performed by other employees at his qualifying employment. Counsel states on appeal that the language of the RFE requesting information about duties performed by other employees at the companies in Brazil was confusing. No evidence was submitted on appeal to address this issue. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. The petitioner did not address the director's concerns about the beneficiary's intention to work for the petitioner. *See* 8 C.F.R. § 103.2(b)(14).

On appeal, the petitioner submitted additional letters outlining the job duties involved in the beneficiary's manager position with each company from [REDACTED] dated January 23, 2009; from [REDACTED] Sucell dated January 23, 2009; from Mr. [REDACTED] January 22, 2009; and a sworn affidavit from the beneficiary as the owner of [REDACTED] stating that he worked as an owner-operator from November 1989 to February 1993. These letters state that the managerial role assigned to the beneficiary encompassed secretarial duties including "administer[ing] the daily business of the company, including talking with customers, instructing the sales people, keeping records, and overseeing the inventory. [The beneficiary] monitored the bookkeeping functions of the company . . . answer[ing] the telephone,

[taking] orders for sales, mak[ing] bank deposits, and did a variety of clerical level tasks” according to [REDACTED]. The letter from [REDACTED] stated that the beneficiary “created lists of possible customers, talked with customers about purchases, calculated the employee’s payroll, handled banking records, and monitored the salesmen. . . . [The beneficiary] spent at least 75% of his time in secretarial tasks.” [REDACTED] stated that the beneficiary “helped in administrative services . . . in addition to his principal function of directing the sales department.”

Counsel on appeal states that the beneficiary’s former managerial positions should be viewed in the context of the size of the companies with which he was employed. Because the beneficiary’s former employers were all small companies, employing between 2 and 20 employees, counsel argues that clerical duties would not be separated out from other duties as might be expected in a larger company.

The Form ETA 750 states that two years of experience in the proffered position as private secretary are the minimum requirements for the position and that experience in an alternate profession would not be accepted. The letters submitted by the petitioner do not demonstrate that the beneficiary worked as a private secretary.

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm’r 1971). Because the director questioned the veracity of the beneficiary’s claims that he performed secretarial duties as a manager, the director requested the petitioner to submit evidence from each of the companies where the beneficiary worked as a manager to include the type of work performed by the other employees at the companies. The petitioner failed to submit such evidence in response to the director’s RFE or on appeal. 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). The petitioner’s failure to address the director’s concerns calls into question whether he performed secretarial duties in addition to managerial duties, if in fact the company(ies) where he worked employed one or more secretaries. Nor did the petitioner provide supporting documents to establish that the companies where the beneficiary claims to have worked were small and required the manager to perform secretarial tasks. The petitioner did not submit a certified copy of the beneficiary’s complete Brazilian work and social security book; certified official copies of the payroll tax, Social Security withholdings, and deposits to the Security Fund for Duration of Employment for the beneficiary that completely covers the beneficiary’s employment with each Brazilian firm for which the beneficiary claims to have worked; or other independent evidence to verify the beneficiary’s past employment experience. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

Because the petitioner did not submit independent, objective evidence to demonstrate that the beneficiary had the two years of experience as a personal secretary required by the labor certification

or to overcome the deficiencies specifically noted in the director's decision, the petition may not be approved.

In addition to the issues concerning the beneficiary's experience as outlined above, evidence exists that the position offered may not be a full-time position<sup>4</sup> or may otherwise not be bona fide.<sup>5</sup> As noted in the director's RFE, the beneficiary operates several businesses. Specifically, the beneficiary is listed as

[REDACTED] by the Florida Department of State, Division of Corporations. In response to the director's specific request for an explanation of "why the beneficiary would accept [a] position [with the petitioner] offering a modest wage, when [the beneficiary] currently operates his own business," the petitioner submitted a statement that the prevailing wage is competitive. The petitioner submitted no evidence concerning the beneficiary's role with any of the companies for which he is listed as an officer or director including the number of hours per week that the beneficiary devotes to these companies, remuneration paid by the companies to the beneficiary, or any additional evidence concerning the beneficiary's role and commitment to these companies. Again, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Without evidence that the position offered is a full-time, bona fide position, the petition may not be approved.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled

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<sup>4</sup> The job offer must be for a permanent and full-time position. See 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

<sup>5</sup> An advisory opinion from the Chief of DOL's Division of Foreign Labor Certification states:

The regulations require a 'job opportunity' to be 'clearly open.' Requiring the job opportunity to be bona fide adds no substance to the regulations, but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of regulation 656.20(c)(8). Likewise requiring the job opportunity to be bona fide clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of regulations 656.20.

As quoted in *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 405 (Comm'r 1986).

worker under section 203(b)(3)(A) of the Act.

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.