

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)

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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

[Redacted]

DATE: **JUN 11 2012** Office: TEXAS SERVICE CENTER

[Redacted]

IN RE:

[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:

[Redacted]

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,

Perry Rhew
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 is an IS/IT professional consulting services business. It seeks to employ the beneficiary permanently in the United States as a network engineer. 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 had not established that the beneficiary is qualified to perform the duties of the proffered position with three years of qualifying employment experience. 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 February 9, 2009 denial, the issue in this case is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The director determined that the petitioner failed to demonstrate that the beneficiary had the three years required experience as a network engineer or in a related occupation to perform the duties of the proffered position as of the filing date of the labor certification application.

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 labor certification application, 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 Form ETA 750 was accepted on January 28, 2005.

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.

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

(ii) *Other documentation—*

(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.

(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.

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. 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 three years of experience in the job offered or in a related occupation (computer software developing, consulting, and/or working with networks). The worker must also have the following special requirements: "Technologies: Network protocols (e.g. TCP/IP, DNS, DHCP, Netbios and SNMP), OS (e.g. CISCO IOS, Windows, Linux), H/W (CISCO Hubs, routers, catalytic switches), MS Access, My SQL, Lotus Notes, USRP and so on."

The petitioner indicated in a statement that it employed the beneficiary as a network engineer since June 2004.

The petitioner submitted three statements from Avinash Information Technologies Ltd. in which the technical manager stated that the company employed the beneficiary full-time as a network engineer from June 2002 through April 2003. The declarant described the beneficiary's job duties.

The petitioner submitted a letter from Success Computer Corp. which stated that the company employed the beneficiary from November 2003 through June 2004 as a network engineer.

The director determined that the evidence submitted by the petitioner demonstrated that the beneficiary had a total of 24 months and 27 days (Avinash 10 months, Subex 7 months 27 days, and Success 7 months) of experience which was insufficient to demonstrate that he had 3 years of experience as required by the labor certification.

On appeal, counsel asserts that the petitioner inadvertently failed to submit with the I-140 petition and in response to the director's Request for Evidence (RFE) dated November 24, 2008, additional letters verifying the beneficiary's employment.

The petitioner submitted on appeal a letter from the School of Computer Education, Comp-u-Tech Centre in which the representative stated that the business employed the beneficiary as a network engineer from June 1999 through May 2002.

The petitioner also submitted on appeal a letter from "Hyperactive the Internet Café" which stated that it employed the beneficiary as a junior network engineer from May 1998 through June 1999.

The record does not contain any other evidence relevant to the beneficiary's qualifications.

The beneficiary set forth his credentials on the labor certification application and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On section 15 of the labor certification which elicits information of the beneficiary's work experience, he represented that he was employed as a network engineer for Avinash Information Technologies from June 2002 through April 2003, for Success Computers from November 2003 through June 2004, and for Subex Technologies, Inc. from June 2004 through January 7, 2005, the date signed by the beneficiary. The beneficiary lists the same employment history on his Form G-325A. He does not provide any additional information concerning his employment background on those forms.

Although counsel claims that the petitioner inadvertently failed to submit the employment letters submitted for the first time on appeal, neither the petitioner nor the beneficiary indicated the existence of such employment on the Form ETA 750 or Form G-325A prior to the director's denial. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the BIA noted in dicta that the beneficiary's experience, without such fact certified by the DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

The inconsistencies and contradictions cast doubt on the petitioner's proof. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon 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 lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Furthermore, the declarants fail to specify their titles and a description of the beneficiary's job duties. Therefore, even if the AAO were to accept the two letters submitted on appeal as credible evidence of the beneficiary's work experience, these letters fail to specifically describe his duties and are not sufficient under the regulations. 8 C.F.R. § 204.5(l)(3)(ii)(A); 8 C.F.R. § 204.5(g)(1). Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired three years of experience as of the priority date.

Beyond the decision of the director, USCIS records show that the petitioner has filed multiple immigrant and non-immigrant petitions (269) subsequent to its establishment in 1994; and therefore, the petitioner must establish that it had sufficient funds to pay all the wages from the priority date and continuing to the present. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750B job offer, the predecessor to the ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). Accordingly, even if the instant record established that the beneficiary is qualified for the proffered position, which it does not, the fact that there are multiple petitions would further call into question the petitioner's eligibility for the benefit sought as the job offer may not be continually realistic.

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.