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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

Date: **MAR 15 2012** Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [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:

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The director dismissed the subsequent motion to reopen. The petitioner appealed the dismissal of the motion to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a chief cashier. As required by statute, the petition is accompanied by a labor certification approved by the U.S. Department of Labor (DOL). The director determined that the petitioner had failed to establish that the beneficiary possessed the required two years of experience by the priority date. 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.

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

As set forth in the director's January 22, 2009 denial of the petition and subsequent dismissal of the motion to reopen, at issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the offered position. The director denied the petition because the petitioner did not resolve inconsistencies relating to 1) the beneficiary's dates of employment with his foreign employer, [REDACTED] 2) the beneficiary's dates of employment with his U.S. employer, [REDACTED] and, 3) the dates the beneficiary departed India, and began residing in the United States. Such inconsistencies were found in the employment letter from [REDACTED] and on the Form G-325. Biographic Information, which accompanies a separate family-based immigrant petition filed on behalf of the beneficiary by his sister.

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 (Acting Reg'l Comm'r 1977). Here, the labor certification application was accepted on December 30, 2003.

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 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).

In evaluating the beneficiary's qualifications, U.S. Citizenship and Immigration Services (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.

The labor certification in the instant case requires two years of experience in the job offered or two years of experience in the related occupation of "Managerial/Supervisory Experience."

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 had over two years of managerial/supervisory experience with [REDACTED] and five years of managerial/supervisory experience with [REDACTED] prior to the priority date.

The regulation at 8 C.F.R. § 204.5(1)(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.

On appeal, counsel submits a brief and copies of evidence previously submitted. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the director did not give sufficient weight to the documentation submitted on February 24, 2009, with the petitioner's motion to reopen, and reiterated that the beneficiary's foreign employer is no longer in business, and payroll and other records are unattainable. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute

evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On appeal, instead of submitting primary or secondary evidence of business or payroll records of [REDACTED] and [REDACTED] counsel resubmitted evidence previously submitted with the motion to reopen. This evidence included an affidavit from the beneficiary, and a statement from [REDACTED]. The affidavit from the beneficiary states that he entered the United States in July 1997 without inspection and his passport was not stamped. The affidavit also gave contact information for [REDACTED]. The record does not contain documentary evidence of the beneficiary's employment history with [REDACTED]. The statement by [REDACTED] testifies that [REDACTED] closed down in 2005, and the beneficiary was a full time employee of [REDACTED] as the General Manager from February 1995 to May 1997.

The regulation 8 C.F.R. § 103.2(b)(2)(i) states that if primary and secondary evidence does not exist or cannot be obtained, the petitioner must demonstrate "the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances." In the instant case, counsel did not submit two or more affidavits by persons who are not parties to the petition with direct personal knowledge of the beneficiary's employment with [REDACTED] or his employment with [REDACTED]. The affidavit from the beneficiary is self-serving and is of little evidentiary value. The statement submitted by Vipul Patel is not in the form of an affidavit, and does not give any indication of how he obtained the knowledge he is claiming to have of the beneficiary's employment with [REDACTED].

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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The director also requested the petitioner to explain the inconsistencies in the record between the beneficiary's dates of employment in India, and his dates of employment and residence in the U.S. The employment letter from [REDACTED] and labor certification, signed by the beneficiary under penalty of perjury, state that the beneficiary had acquired his two years of experience with [REDACTED] from February 1995 to August 1997. However, the Form G-325 in the record, also signed by the beneficiary, contained different dates than the labor certification and employment letter. On the Form G-325, the beneficiary stated in the section eliciting information about the beneficiary's residence during the last five years, that he resided at [REDACTED] from August 1996 to July 2000. Additionally, under the section eliciting information about the beneficiary's employment during the past five years, the beneficiary stated he had been employed at the [REDACTED] in [REDACTED] from August 1996 to the present.

In addition, on the Form G-325, in the section eliciting information about the beneficiary's last address outside the United States of more than one year, the beneficiary represented that he lived on [REDACTED] from January 1974 to August 1996. He also represented in the [REDACTED]

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section eliciting information about his last occupation abroad, that he was a "student." The beneficiary did not claim on the G-325 that he was employed by [REDACTED] prior to his departure from India.

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). 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.* at 591. There is no documentary evidence in the record that adequately explains or reconciles these inconsistencies.

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary possessed the required two years of qualifying experience by the priority date. The petitioner failed to resolve the multiple inconsistencies in the record. The beneficiary stated he was living and working in [REDACTED] beginning in August 1996. Therefore, it is not possible for him to have been employed by [REDACTED] from February 1995 to July 1997. Additionally, the beneficiary claimed he was a "student" immediately preceding his departure from India, and not a full-time employee of [REDACTED]. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.