

(b)(6)



U.S. Citizenship
and Immigration
Services

Date: **MAR 27 2012**

Office: TEXAS 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, Texas Service Center (director). The petitioner filed a motion to reopen, and the director denied the motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a wholesale tobacco company. It seeks to employ the beneficiary permanently in the United States as a stock clerk. 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 that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two 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 October 7, 2008 denial, the director determined that petitioner did not demonstrate that the beneficiary was qualified to perform the duties of the offered position, based on a large number of inconsistencies in the record.

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 January 29, 2007.

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

On appeal, counsel submits evidence previously submitted with the motion to reconsider, and asserts that the director's decision was based on an incorrect interpretation of an employment letter submitted for the beneficiary. Counsel also asserts that the discrepancies and/or errors made by the petitioner, beneficiary, and third parties are not material, and constitute only harmless error.

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).

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 24 months of experience in the job offered.

As is noted above, the director concluded that the record contained several inconsistencies. 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). 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.

The beneficiary set forth his credentials on the labor certification. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he was employed as a stock clerk with [REDACTED] from January 2, 1985 to December 31, 1987. The labor certification does not provide any additional information concerning the beneficiary's employment history.

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.

The petitioner submitted a translated letter from the [REDACTED] with the petition. The letter states that the company employed the beneficiary as a sales person from July 1, 1988 until

October 30, 1991. This experience is not in the offered position and therefore it cannot be used to meet the requirements of the labor certification. Further, the translation spells [REDACTED] which undermines its credibility as a faithful translation of the original. Additionally, this letter did not comply with the requirements of 8 C.F.R. § 204.5 (1)(3) because it did not include the address of the writer or provide a specific description of the duties performed by the beneficiary. Finally, the claimed qualifying experience is not listed on the labor certification. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976)(a claim to possess experience that is not listed on the labor certification is less credible).

The petitioner also submitted a letter of [REDACTED] Manager, dated August 10, 2007, stating that the company has employed the beneficiary as a stock clerk for the last eight years. The letter is not on letterhead and does not state the name of the company. However, [REDACTED] is the signatory for the petitioner on the labor certification. DOL regulations prohibit the beneficiary from gaining qualifying experience with the sponsoring employer, with only limited exceptions that have not been argued in this case. *See* 20 C.F.R. § 656.17. Finally, the letter indicates that it was faxed on November 27, 2004, which is prior to the date stated on the letter.

In its response to the director's Request for Evidence, the petitioner submitted an employment letter from [REDACTED] president of the petitioner, stating that the beneficiary had been employed with [REDACTED] "for over four years." It is noted that the name of the petitioner is [REDACTED]. The letter states that the beneficiary "is currently working with our Arab speaking clientele taking orders and collecting delivery money," but does not state that he is working as a stock clerk. In addition, as is noted above, DOL regulations prohibit the beneficiary from gaining qualifying experience with the sponsoring employer. *See* 20 C.F.R. § 656.17.

The RFE response also contained a translated employment letter from the manager of [REDACTED]. This letter stated the beneficiary had been employed by the company as a stock clerk from July 1, 1988 through October 30, 1991. The un-translated version of this letter appears to be a form letter with dates filled by hand. This claimed experience is also not listed on the labor certification. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976).

The petitioner later submitted another employment letter dated October 20, 2008 from [REDACTED]. The letter states that the company changed its name from [REDACTED] in April 1999. This letter also states that the beneficiary had been employed by this company from January 2, 1985 to December 31, 1987. These dates of employment are inconsistent with the dates submitted in the earlier letter from [REDACTED]. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). In addition, the letter appears to have been faxed to [REDACTED] on April 25, 1992, from [REDACTED], with a fax number of [REDACTED]. The 410 prefix is for Maryland.

Finally, the name and date of establishment of the petitioner is inconsistent on different documents in the record. The AAO cannot conclude that the information does not relate to two separate companies.

Therefore, the AAO affirms the director's decision that the petitioner failed to establish that the beneficiary acquired 24 months of experience by the priority date as required by the terms of the labor certification. The record contains multiple inconsistencies. The petitioner must resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner failed to explain or reconcile the inconsistencies and did not submit competent objective evidence pointing to where the truth lies. *See Id.* at 591. Accordingly, the AAO cannot conclude that evidence offered in support of the petition is reliable and sufficient to establish that the beneficiary is qualified to perform the duties of the proffered position.

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

However, the record does not any contain annual reports, federal tax returns, or *audited* financial statements for the petitioner. The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

Accordingly, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

Although not the basis of this decision, it also appears that the beneficiary is ineligible for petition approval based on section 204(c) of the Act, which states:

[N]o petition shall be approved if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws or (2) the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

In *Stokes v. INS*, 393 F.Supp. 24 (S.D.N.Y. 1975), the court set forth procedures for government investigations of fraud. In marriage-based immigrant petitions, this involves separating the spouses and asking the same questions to each spouse separately. The record contains a Form I-485, Application to Register Permanent Residence or to Adjust Status, filed by the beneficiary on November 22, 1995, based upon a simultaneously filed Form I-130, Petition for Alien Relative, filed by the beneficiary's spouse. The beneficiary and his spouse appeared for a Stokes interview on June 4, 1997. The beneficiary's I-485 was denied by the New York District Office on September 10, 1997, which concluded that the marriage was entered into for the sole purpose of gaining an immigration benefit.

Therefore, even if the petitioner had established the beneficiary was qualified to perform the duties of the offered position, it does not appear that the instant petition could have been approved based on Section 204(c) of the Act.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043; *see also Soltane v. DOJ*, 381 F.3d at 145

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial: When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.