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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 27 2012

Office: TEXAS SERVICE CENTER

FILE: [REDACTED]

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 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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a condominium owners association. It seeks to employ the beneficiary permanently in the United States as a painter. 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 and the petitioner failed to establish they had the ability to pay the proffered wage from the priority date pursuant to Title 8, Code of Federal Regulations, § 204.5(g)(2). 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 denial, at issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position, and whether the petitioner has the ability to pay the proffered wage.

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 15, 2003.

In evaluating 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

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).

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 requires two years of experience in the job offered. The labor certification does not permit experience in a related occupation.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a painter with [REDACTED] Turkey from March 1987 until December 1999. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

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

(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 record contains an undated letter, in English, from [REDACTED], signed by [REDACTED] the beneficiary's father and former employer. The letter states that the beneficiary was employed as a master painter from March 1987 to December 1999. The letter lists the duties of the position verbatim from the labor certification.

The record also includes a copy and translation of a civil work document which states the beneficiary was employed as a painter for [REDACTED] from March 1, 1987 to December 10, 1999. However, the director dismissed this evidence because it did not meet the regulatory requirements for a job experience letter.

The record also contains a civil Letter of Recommendation and Certificate of Good Service dated January 20, 2009 which states the beneficiary was employed with [REDACTED] from February 5, 1992 to January 2, 1998. The occupation is listed as "General Decoration (Painting, Tile and Marble Installation and Masonry)." The director dismissed this evidence because the employment was not listed on the labor certification² and did not list the specific duties of the position.³ There is overlap in the beneficiary's claimed dates of employment with [REDACTED]. However, the petitioner provides no explanation for this inconsistency.⁴

Further, there is no indication on any of the documents whether the beneficiary was employed full-time, or, if he was employed on a part-time basis, how many hours per week he was employed.

Therefore, due to the lack of information about the hours worked by the beneficiary and the unexplained overlap in the beneficiary's claimed employment with [REDACTED] 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.

Also at issue in this case is the petitioner's ability to pay the proffered wage, \$31,200 per year, from the priority date of December 15, 2003, and continuing until the beneficiary acquires lawful permanent resident status.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

² 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).

³ See 8 C.F.R. § 204.5(l)(3).

⁴ See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), which states that it "[i]t is incumbent on 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, in fact, lies, will not suffice."

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

On appeal the petitioner submitted a letter signed by [REDACTED], CPA, CFE of [REDACTED] Certified Public Accountants & Consultants of [REDACTED]. The letter indicates the firm represents the petitioner. The letter further states:

Based on its audited financial statements, said condominium association had and still has the financial ability to have paid the proffered wage of \$15.00 per hour for a 40 hour work week for a painter December 2003 to the present.

Pursuant to 8 C.F.R. § 204.5(g)(2), USCIS will accept a statement from a financial officer to establish the ability to pay when that employer employs 100 or more workers. In this case, the Form I-140 filed by the petitioner states it employs six workers, and the signatory is not a financial officer of the petitioner. The record does not contain any annual reports or federal tax returns for the petitioner. In the absence of an acceptable financial officer statement, 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.⁵

⁵ The record contains the following Forms 1099-MISC, which state that the petitioner paid the beneficiary the following amounts:

2004 - \$23,027
2005 - \$23,773
2006 - \$26,640
2007 - \$29,743
2008 - \$32,001

With the exception of 2008, the amounts paid to the beneficiary by the petitioner were less than the proffered wage. Therefore, even considering the totality of the circumstances, including the amounts paid to the beneficiary, the petitioner failed to establish its ability to pay the proffered wage.

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Therefore, the AAO also affirms the director's decision that the petitioner failed to establish its ability to pay the proffered wage from the priority date until the present.

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.