

(b)(6)

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

[Redacted]

Date: **MAR 29 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:

[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 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 lumber company. It seeks to employ the beneficiary permanently in the United States as a sewing machine setter and set-up operator, also known as planer and cut-up machine operator. 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 forty-eight months 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 May 9, 2009 denial, the 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. The director determined that the dates of employment stated on the letter of experience submitted by the petitioner do not match the dates of employment stated on the Form ETA 9089.

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 October 31, 2006.

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 In this case, the record of proceeding contains two letters of experience signed by [REDACTED] owner of [REDACTED]. On appeal the petitioner submitted a sworn statement from its representative, [REDACTED]. No other evidence was submitted.

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 forty-eight months of experience in the job offered, as a sewing machine setter and set-up operator, also known as planer and cut-up machine operator.

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.

The beneficiary set forth his credentials on the labor certification. On Part K of the labor certification the beneficiary represented that he qualifies for the offered position of sewing machine setter and set-up operator (planer and cut-up machine operator) based on his experience as a full-time planer and cut-up machine operator with [REDACTED] from January 1, 1994 to March 1, 1998. No other experience is listed.

In an attempt to establish the beneficiary's qualifying experience for the job offered, the petitioner initially provided a letter dated June 13, 2008, signed by [REDACTED] owner of [REDACTED] attesting to the beneficiary's full-time employment with [REDACTED] from 1994 to 1998. In response to the Request for Evidence (RFE) issued on March 9, 2009, the petitioner submitted another letter from [REDACTED] stating that the beneficiary was a full-time employee of [REDACTED] from January 2, 1994 to December 30, 1998, and that his duties were related to knowledge of all wood machines for wood cuts (trimming), assisting the manufacturing of the wood products. This second letter is dated March 18, 2009.

The period of the beneficiary's employment with [REDACTED] in his March 18, 2009 letter (January 1994 to December 1998) cannot be reconciled with the beneficiary's experience claimed on Form ETA 9089 (January 1994 to March 1998). 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. It 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Furthermore, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

On appeal, based on the sworn statement from the petitioner's representative, counsel alleges that: (i) under foreign labor law the first day of January in most countries, including the U.S. and Honduras, is a holiday; (ii) in some countries it is customary for employers to keep good employees in their payroll for some period of time; and (iii) despite the inconsistency in the dates of employment, the beneficiary's employment with [REDACTED] 1994 to 1998, covers the forty-eight months of qualifying experience. Counsel also asserts that the denial decision mentioned a letter from [REDACTED] dated April 3, 2009, while the only letter submitted was from [REDACTED] dated March 18, 2009.

Regarding the director's reference to a letter from [REDACTED] dated April 3, 2009, upon reviewing the record of proceedings the AAO has determined that even though the reference to [REDACTED] letter in the director's denial is clearly mistaken, it did not affect the analyses of the pertinent the issue in the director's decision.

Although counsel asserts that the beneficiary may have been kept on the payroll beyond the date he actual left employment due to custom, counsel's assertions on appeal are not supported by documentary evidence. No evidence that the beneficiary was actually kept in his previous employer's payroll for nine more months after he purportedly left the company was submitted. AAO does not find counsel's allegations to be persuasive. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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).

With respect to counsel's allegation beneficiary's employment with [REDACTED] establishes the forty-eight months of qualifying experience required by the labor certification, regardless of the existing conflict between the period of time listed on the labor certification and the letter of employment of record, the AAO does not find counsel's argument to be persuasive. 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. It 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired forty-eight months of experience in the job offered from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Beyond the decision of the director it is also noted that the petitioner, the preparer, and the beneficiary did not sign the certified ETA Form 9089 submitted with the petition. USCIS will not approve a petition unless it is supported by an original certified ETA Form 9089 that has been signed by the employer, beneficiary, attorney and/or agent.

20 C.F.R. §656.17(a)(1) provides:

(1) Except as otherwise provided by §§656.15, 656.16, and 656.18, an employer who desires to apply for a labor certification on behalf of an alien must file a completed Department of Labor *Application for Permanent Employment Certification* form (ETA Form 9089). The application must be filed with an ETA application processing center. Incomplete applications will be denied. Applications filed and certified electronically must, upon receipt of the labor certification, be signed immediately by the employer in order to be valid. Applications submitted by mail must contain the original signature of the employer, alien, attorney, and/or agent when they are received by the application processing center. DHS will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent.

The DOL's "Frequently Asked Questions (FAQs)" section on its website contains guidance for how to file the Application for Permanent Employment Certification, ETA Form 9089 as follows:

1. When must applications be signed?

Applications submitted by mail must contain the original signature of the employer, the alien, the preparer, if applicable, when they are

received by the processing center. Applications filed electronically must, upon receipt of the labor certification, be signed immediately by the employer, alien, and preparer, if applicable, in order to be valid.

NOTE: Where the employer provides a copy of an application to a Certifying Officer pursuant to an audit or otherwise, the copy must be signed.

See <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#notefile1> (accessed February 16, 2012).

In addition, Sections L, M, and N of Form ETA 9089 contain the following note:

Note – The signature and date signed do not have to be filled out when electronically submitting to the Department of Labor for processing, but must be complete when submitting by mail. If the application is submitted electronically, any resulting certification **MUST** be signed *immediately upon receipt* from DOL before it can be submitted to USCIS for final processing.

Section L of ETA Form 9089 contains the “Alien Declaration” in which he or she must declare under penalty of perjury that Sections J and K of the labor certification are true and correct. Absence of the beneficiary’s signature renders the ETA Form 9089 incomplete. Failure by the beneficiary to sign Section M of the Form 9089 is not a mere technicality. In the instant case, [REDACTED] the beneficiary, has not acknowledged that knowingly providing false information is a federal crime and that he intends to accept the position offered in Section H of the labor certification.

Section M of ETA Form 9089 contains the “Declaration of the Preparer”, in which he or she must declare under penalty of perjury that the application was prepared at the direct request of the employer listed in Section C and that to the best of his/her knowledge the information contained on the labor certification is true and correct. Absence of the preparer’s signature renders the ETA Form 9089 incomplete. Failure by the preparer to sign Section M of the Form 9089 is not a mere technicality.² In the instant case, [REDACTED] Esquire, has not affirmed on the ETA Form 9089 that he is not knowingly assisting the petitioner or the beneficiary in providing false information. [REDACTED] Esquire, has not acknowledged that he knows that assisting the petitioner or the beneficiary in providing false information is a federal crime.

² See *TLH Construction Corp.*, 2010-PER-688 (BALCA, 2010). “[T]he Section M signature is not a mere validation of the Employer’s attestations. It is an affirmation by the preparer that he or she is not knowingly assisting a party in providing false information, and that the preparer acknowledges that doing so is a federal offense.”

Section N of ETA Form 9089 contains the "Employer Declaration" in which the employer representative declares amongst other things that "[t]he job opportunity has been and is clearly open to any U.S. worker;" and "[t]he U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons." An employer must certify the conditions of employment as listed on ETA Form 9089, the Application for Permanent Employment Certification. *See* 20 C.F.R. § 656.10(c). Absence of the employer's signature renders the ETA Form 9089 incomplete. Failure by the employer to sign Section N of the Form 9089 is not a mere technicality. In the present case, by not signing ETA Form 9089, [REDACTED] did not attest under penalty of perjury that he reviewed the application and to the best of his knowledge the information contained in the application is true and correct. [REDACTED] did not certify to the conditions of the offered employment.

As mentioned above, USCIS will not approve a petition unless it is supported by an original certified ETA Form 9089 that has been signed by the employer, beneficiary, attorney and/or agent. Per DOL regulations, AAO determines that the current Immigrant Petition of Alien Worker is not supported by a valid labor certification.

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2) further provides: "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." (Emphasis added.)

In the present case, the petitioner must establish its ability to pay the proffered wage of \$12.25 per hour, which is \$25,480.00 per year (based on forty hours per week), starting on October 31, 2006, the priority date.

The petitioner failed to submit one of the three types of evidence set on the regulations. Instead, the petitioner elected to submit a statement signed by [REDACTED] Partner of the company, asserting that [REDACTED] employs over 100 employees and was able to pay the beneficiary \$37,814.88 for the year ended December 31, 2006. While [REDACTED] stated that he is the financial officer for the company, this assertion was not supported by any evidence. This issue must be addressed in any future filings, and evidence demonstrating that [REDACTED] is, in fact, a financial officer must be submitted.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. The record contains a copy Form W-2 for the year 2006 issued by the petitioner to the beneficiary, and copies of the beneficiary's federal tax returns for 2006, 2007, and 2008, with the respective IRS transcripts. The record also contains the beneficiary's payroll records with the petitioner.

Even though the beneficiary's 2006 Form W-2 shows that the petitioner paid the beneficiary more than the proffered wage, the AAO cannot accept this evidence as proof of ability to pay. The social security

number indicated on the beneficiary's 2006 Form W-2 does not correspond to the social security number indicated on the beneficiary's federal tax returns for 2006, 2007, and 2008. The director called attention to this fact in the decision that denied the motion to reopen and reconsider filed by the petitioner in its previously denied Immigrant Petition for Alien Worker (SRC 07 119 53147). Despite the fact the petitioner and the attorney of record were cognizant that the numbers do not match, no explanation was provided. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

It 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.

Further research revealed that the social security number listed on Form W-2, and claimed by the beneficiary, has been used by other individuals along with the beneficiary.

The number shown on the beneficiary's tax returns appears to be an individual taxpayer identification number (ITIN) temporarily issued by the IRS to the beneficiary. An ITIN is a tax-processing number issued by the IRS to those individuals who do not have a SSN for filing tax returns and other tax-related documents.³

Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with Social Security number fraud and misuse:

- **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to...*willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. See the website at http://www.ssa.gov/OP_Home/ssact/title02/0208.htm (accessed on April 26, 2011).

³ The instructions to IRS Form W-2 state that an employer should not accept an ITIN for employment purposes. When an employer prepares a Form W-2, it should show the correct SSN for the employee. See <http://www.irs.gov/instructions/iw2w3/ch01.html> (accessed February 16, 2012).

• **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone...*knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.