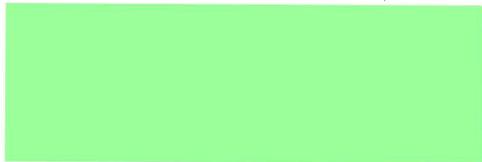


(b)(6)

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

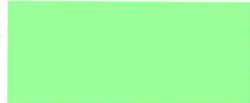


Date:

**MAY 02 2012**

Office: TEXAS SERVICE CENTER

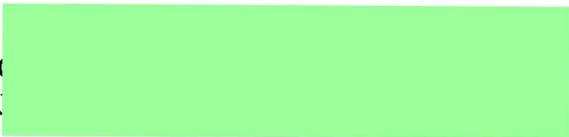
FILE:



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:

SELF-REPRESENTED

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,

*Kerris Pontos for*

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 in the business of the fabrication and sale of residential and commercial awnings. It seeks to employ the beneficiary permanently in the United States as a custom sewer. 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 April 7, 2008 denial, at 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 letters submitted as evidence of the beneficiary's claimed work experience were not sufficient to establish eligibility.

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 July 23, 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.<sup>1</sup> On appeal, the petitioner indicates that the letters in the record adequately support the experience claimed on the labor certification.

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

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<sup>1</sup>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).

(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 duties of the position are to "design, make, alter, repair, or fit custom awnings."

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 worked as a self-employed custom sewer from January 2, 2002 until December 31, 2004. The beneficiary states that in that position he "designed, mad[e], altered, repaired, or fit custom awnings."

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 record contains an October 8, 2007 letter with an accompanying English translation. It is written by [REDACTED] and states in pertinent part that he knew the beneficiary to be a tailor for eight years and that his specialty was sewing shirts, pants, and vests. It also states that the beneficiary "designed, altered, and repaired custom awnings." This letter does not mention how [REDACTED] came to know of the beneficiary or whether he had ever hired him to sew either clothing or awnings. Therefore, the letter is not from the beneficiary's prior employer pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A) and does not establish the beneficiary's two years of experience in the proffered position.

In response to the director's February 13, 2008 request for additional evidence (RFE), the petitioner submitted a second letter from [REDACTED] also dated October 8, 2007. This letter states that the beneficiary worked as a tailor from January 3, 2001 until August 17, 2005. It repeats most of the information set forth in the first letter. Like the first letter from [REDACTED] the second letter is not from the beneficiary's prior employer pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A) and does not establish

the beneficiary's two years of experience in the proffered position. Further, it is noted that the English translation submitted with the second letter is incorrect in parts. The translation states that the letter was written and signed on March 6, 2008. However, the Spanish language letter states that it was written "a los ocho dias del mes de octubre de dos mil siete," which translates to October 8, 2007, not March 6, 2008. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The petitioner has not resolved the inconsistencies in [redacted] s letter and accompanying translation with independent, objective evidence. Furthermore, it appears unlikely that [redacted] would write two distinct letters on behalf of the beneficiary on the same day. 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.

As noted above, the beneficiary indicated that he worked as a self-employed custom sewer in Jalapa, Guatemala from January 2002 until December 2004. He describes that self-employment as only involving the design, fabrication, alteration or fit of custom awnings. He does not mention tailoring shirts, pants and vests. [redacted] letters state that the beneficiary was self-employed until August 2005, and that his specialty was making shirts, pants, and vests. Again, the letters do not indicate that [redacted] ever employed the beneficiary to make clothing or awnings. The record lacks any other independent, objective documentation that the beneficiary was self-employed in the fabrication of awnings, such as tax documents, contracts for fabrication of awnings, receipts for items sold, and/or photographs of his work product, workspace or equipment.

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years 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.

Beyond the decision of the director, the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2).

According to USCIS records, the petitioner has filed nine I-140 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Furthermore, the petitioner has also filed several Form I-129 H-2B petitions for multiple beneficiaries under the name [redacted]

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[REDACTED] with the same employer identification number. Further, the petitioner would be obligated to pay each H-2B petition beneficiary the prevailing wage in accordance with DOL regulations, and the temporary employment certification application certified with each H-2B petition. *See* 20 C.F.R. § 655.22.

Given all of the above, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.