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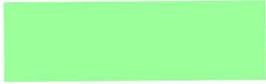
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: **NOV 06 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:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a handmade ceramic tile manufacturer. It seeks to employ the beneficiary permanently in the United States as a sample tile maker. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹

The petition is accompanied by an ETA Form 9089 Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL). The priority date of the petition is May 3, 2006, which is the date the labor certification was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d).² The Immigrant Petition for Alien Worker (Form I-140) was filed on July 13, 2007.

The director's decision denying the petition concluded that the beneficiary did not possess the minimum experience required to perform the offered position as set forth on the labor certification.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The record shows that the appeal is properly filed 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 considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*,

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

² If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

³ 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).

14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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).

Part H, Item 11 of the labor certification describes the duties of the offered position:

Make sample tiles and molds as requested for fine ceramic tile by using hand and power tools. Handsculpt or handcarve original sample tile on plaster block. Handmix and pour ceramic plaster to make master mold and production mold. Create prototype sample Tiles. Use Pugmill Machine and Rampress Machine to mold clay into prototype tiles. Handpaint tiles using pressure air gun. Examine molds and tiles for accuracy. Supervise assistants to assure that they do their job properly.

Part H, Item 14 describes any specific skills or other requirements:

Experience in hand sculpting. Knowledge in hand painting with ceramic glazes.
Knowledge in mixing ceramic plaster and clay.

The required education, training, experience and skills for the offered position set forth at Part H of the labor certification are as follows:

4. Education: Minimum level required: "None" is checked.
5. Is training required in the job opportunity? "No" is checked.
6. Is experience in the job offered required for the job? "Yes" is marked.
- 6.A. If Yes, number of months experience required: 24.

Part K lists the beneficiary's experience and states that the beneficiary was employed by [REDACTED] as a sample tile maker from January 1, 1981 to January 1, 1985. The former job duties are described as: "Handcrafted original tile sample molds. Made the first ceramic tile samples from the original mold. Handpainted ceramic tiles."

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A).

In support of the beneficiary's employment experience, the petitioner submitted a sworn statement signed by [REDACTED] President of [REDACTED] The statement was sworn before a notary

public on June 22, 2007. In the statement, [REDACTED] states that she was the president of [REDACTED] during the period of time in which the beneficiary worked full-time as a handmade sample tile and mold maker. She also noted that [REDACTED] ceased business operations in August 2002. This letter did not give specific dates of employment, nor did it list the duties of the beneficiary's position.

The petitioner also submitted a letter dated December 6, 2006 and signed by [REDACTED], City Treasurer on [REDACTED] letterhead which states that [REDACTED] ceased and retired its business on August 16, 2002.

The director issued an intent to deny (NOID) on December 1, 2008 in which he informed the petitioner that the evidence of record was not sufficient to establish that the beneficiary's experience met the requirements of the labor certification. The director requested that the petitioner provide independent, objective evidence that [REDACTED] actually existed at the time the beneficiary claimed to have been employed.

The petitioner responded to the NOID on December 30, 2008 by submitting another sworn statement from [REDACTED] signed before a notary public on December 20, 2008. In this statement, [REDACTED] states that there are no records of the beneficiary's employment with [REDACTED] because the Bureau of Internal Revenue in the Philippines purges such records every three years and all other records were destroyed due to the eruption of Mount Pinatubo in 1991.

The affidavit also states that the beneficiary held the position of Assistant Production Manager and listed the beneficiary's duties as follows:

- Make sample tiles and molds as requested for fine ceramic tile by using hand and power tools.
- Handsculpt or handcarve original sample tiles on plaster block.
- Handmix and pour ceramical plaster to make master molds and production molds.
- Create prototype sample tiles.
- Use Pugmill Machine and Rampress Machine to mold clay into prototype tiles.
- Handprint tiles using pressure air gun.
- Examine molds and tiles for accuracy.
- Supervise assistants to assure that they do their job properly.

The response also included a letter dated December 18, 2008 and signed by [REDACTED] City Treasurer on [REDACTED] letterhead which states that [REDACTED] ceased and retired its business on August 16, 2002.

The petitioner's response also included a copy of the Articles of Incorporation of [REDACTED] from the [REDACTED]. These Articles of Incorporation are dated May 15, 1990 and signed by each officer of the corporation. The beneficiary claims to have been employed by the company from January 1, 1981 to January 1, 1985. However, the evidence in the record does not establish that [REDACTED] existed prior to May 15, 1990.

The director denied the petition on October 14, 2009. In his denial, the director noted that the record contained two sworn statements from the same individual that claimed the beneficiary was employed, however one letter stated the beneficiary's position was a Handmade Sample Tile and Mold Maker while the other claimed she was an Assistant Production Manager. The director noted that the letter filed as initial evidence did not speak to the beneficiary's specific duties, while the letter submitted in response to the director's NOID listed the duties verbatim from the labor certification, neither letter addressed the special requirements listed in Part H, Item 14 of the labor certification.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, *and any other requirements* of the individual labor certification" (emphasis added).

The director denied the petition because the evidence of record is insufficient to establish that the beneficiary gained two years of experience in the job offered prior to the priority date and there was no evidence in the record to establish that the entity at which the beneficiary claimed to have gained her two years of qualifying experience existed at the time she alleged to be employed.

On appeal, the petitioner submitted a third sworn statement from [REDACTED] dated November 4, 2009. [REDACTED] states that she was the owner/operator of [REDACTED] which began operations in January 1981 until December 1989 when it became Bellissima, Inc. after she was able to attract investors to provide capital funds and expand the business. The statement reiterated that the beneficiary was employed prior to incorporation and that no records are available to establish the beneficiary's employment due to natural disaster. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The petitioner failed to provide sufficient evidence to overcome the director's denial. The petitioner provided three statements sworn before a notary public, however all three statements provided were from the same individual and contained inconsistencies that were not adequately overcome by independent, objective evidence. 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 petitioner submitted statements that assert that all evidence of the beneficiary's experience was destroyed in a natural disaster but provided no evidence, such as a statement from the local government on government letterhead establishing that the records were destroyed by the Mount Pinatubo disaster or the regular purging of government records.

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).

In addition to the lack of independent, objective evidence of the beneficiary's experience and the existence of the entity in which the beneficiary claims to have gained the experience, the sworn statement which lists the beneficiary's duties is verbatim from the labor certification casting doubt on the validity of the statement. Finally, the record does not contain evidence that the beneficiary has met the special requirements set forth at Part H, Item 14 of the labor certification.

The evidence in the record does not establish that the beneficiary possessed all of the required qualifications set forth on the labor certification by the priority date. Therefore, the petitioner has failed to establish that the beneficiary is qualified for the offered 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.