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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 13 2012

OFFICE: NEBRASKA 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 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, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as an insurance company. It seeks to employ the beneficiary permanently in the United States as an operations manager. 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), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is November 19, 2007. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date.

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 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.²

On appeal, counsel submits a brief; a copy of a pay statement from [REDACTED]; and a copy of a pay statement from [REDACTED]. On appeal, counsel asserts that the director erred in finding the employment letters provided as evidence questionable and, therefore, finding that the petitioner had not demonstrated that the beneficiary was qualified to perform the proffered position. On appeal, counsel asserts that the pay statements constitute objective evidence demonstrating that the beneficiary worked for the companies with which he gained his qualifying experience.

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), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

² 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).

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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 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 has the following minimum requirements:

- H.4. Education: High School.
- H.5. Training: None required.
- H.6. Experience in the job offered: 48 Months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: None.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as an operations manager with [REDACTED] in Capital Federal, Argentina from January 1, 1987 until February 15, 1991. No other experience is listed. 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)(ii)(A) states:

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.

The record contains an experience letter from [REDACTED] letterhead stating that the company employed the beneficiary as an operations manager from January 1, 1987 until February 15, 1991. According to [REDACTED] as articulated in this letter,

This is to certify that [the beneficiary] was employed by our company as an Operations Manager from January 1, 1987 to February 15, 1991. This position as an Operations Manager was full time (40 hours per week) and permanent position.

He worked as an Operations Manager and his duties included:

Supervise operations. Serve as liaison with customers to ensure that the required procedures are complied with. Review and delegate work to subordinates appropriately. Liase [sic] with agencies and Insurance brokerage companies on behalf of clients. Coordinate and ensure all permits, registrations are timely. Negotiate with clients for fees.

According to Section H.11 of ETA Form 9089, the duties associated with the proffered position are as follows:

Supervise operations. Serve as liaison with customers to ensure that the required procedures are complied with. Review and delegate work to subordinates appropriately. Liase [sic] with DMV and Insurance brokerage companies on behalf of clients. Coordinate and ensure all permits, registrations are timely. Negotiate with clients for fees.

In his decision, the director found that the language of the employment letter is identical to the position description as set forth in Section H.11 of ETA Form 9089, with the exception of the replacement of "DMV" with "agencies" in the employment letter. The director indicated that based upon the language, it appeared that the employment letter was "coached." Further, the director noted that the beneficiary was 16 years of age and still a high school student when he supposedly commenced employment with [REDACTED] making it unlikely that such an individual with presumably no experience would be responsible for supervising the operations of a company, delegating work to subordinates and performing the other duties identified in the letter, particularly not on a full-time basis. For these reasons, the director questioned the veracity of the claims made in the letter.

The AAO concurs with the director's findings but would add that the letter, supposedly written by [REDACTED] in Capital Federal, Argentina is a copy and is written in English as opposed to being

an English translation of a Spanish document. Further, the beneficiary had just turned 16 when he supposedly commenced work with [REDACTED] while remaining a full-time high school student. According to the beneficiary's secondary school transcript and diploma, his school, [REDACTED] is located in Rosario in [REDACTED] tal Federal which refers to the Federal Capital of Argentina or Buenos Aires, Argentina.³ Rosario is located 174 miles from Buenos Aires.⁴ This fact makes is even more unlikely that the beneficiary was working full-time for [REDACTED] while a full-time secondary school student.

On March 31, 2009, the director issued a Notice of Intent to Deny, identifying the discrepancies in the letter from [REDACTED] as articulated above, and indicated that it was his intention to deny the petition without independent, objective evidence clarifying the truth of the beneficiary's employment and substantiating the beneficiary's qualifying experience.

On April 30, 2009, the Nebraska Service Center received the petitioner's response. In the response, counsel for the petitioner admits that his office provided "a sample letter to the beneficiary's previous employer which was used as a basis to prepare the experience verification letter." Counsel maintained, however, that the fact that his office provided the employer with the sample letter "does not change the truth that [the beneficiary] did indeed work for [REDACTED] Counsel further asserted that the beneficiary did, in fact, work for [REDACTED] while attending secondary school in the evenings due to financial hardships which his family was experiencing. With his response, counsel provided a new employment letter from [REDACTED] of [REDACTED] In the second letter, [REDACTED] states:

We are now providing a more detailed explanation of [the beneficiary's] employment with us. [The beneficiary] commenced employment with us initially in January 1, 1987 as a sales person and worked as a part of a sales team signing up clients for us and serving as a liaison with our client companies. He continued to work in this capacity until January 1989. Because of his very impressive performance with us he was promoted to the position of an Operations Manager in February 1989 and continued in this capacity until he left us on February 15, 1991. It is during this period as the Operations Manager that he began to supervise the day to day operations of the company. These operations included customer relations, relations with insurance brokerage companies, and liaison with government agencies to complete paperwork for all types of permits and registrations. Since many of the clients of the company were known to [the beneficiary] he was in the best position to bargain the best fees for the company and the clients.

³ <http://capital-federal.enbuenosaires.com/> (accessed September 29, 2012)

⁴ <http://www.timeanddate.com/worldclock/distanceresult.html?p1=51&p2=1079> (accessed September 29, 2012)

The director found that counsel's admission that the first letter was issued after counsel provided the former employer with a sample called into question the veracity of the claims made in that first letter. The director also noted that the second letter admits that the beneficiary had not worked as an operations manager for four years, as initially claimed, but that he worked as a sales person for more than two years prior to assuming the post of operations manager. Given the inconsistencies between the two letters and the fact that the petitioner provided no independent, objective evidence clarifying the nature of the beneficiary's employment, the director found that the letters did not substantiate the beneficiary's claimed experience with [REDACTED].

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).

It should also be noted, at this point, that the second letter dated April 24, 2009 is also a copy and does not bear any indication that it is an English translation of a Spanish-language document. The petitioner did not provide an original letter and did not provide a letter which was written in Spanish. Further, the petitioner provided no attestation by a translator, certifying that the translation is complete and accurate and that the translator is competent to translate from the foreign language in to English as is required by 8 C.F.R. § 103.2(b)(3). Therefore, on its face, the document does not comply with the regulatory requirements.

Further, it is more likely than not that the employment experience claimed for the beneficiary on ETA Form 9089, and attested by the beneficiary under the penalty of perjury, is false and appears to have been offered in an attempt to misrepresent the beneficiary's qualification for the proffered position.

See section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

See also 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

(d) finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

A willful misrepresentation of a material fact occurs is one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961).

In claiming to have the 48 months of experience as an Operations Manager which are required by Section H.6 of ETA Form 9089, the beneficiary certified, under penalty of perjury that he was qualified for the proffered position when, in fact, the claimed experience is false. Thus, the beneficiary's claim served to cut off a material line of inquiry into his qualifying experience. Had the beneficiary accurately portrayed the experience which he now claims to have gained with [REDACTED] such experience would not have satisfied the requirements as stipulated on the ETA Form 9089 and the beneficiary would not have been found eligible to obtain the certified labor certification. Therefore, the evidence would demonstrate that the beneficiary misrepresented his qualifications and that misrepresentation was perpetrated for the purposes of obtaining the labor certification and, ultimately, the approved immigrant visa petition which is based upon the certified ETA Form 9089. Under the circumstances, the certified ETA Form 9089 is subject to invalidation.

With his response to the director's NOID, counsel also submitted a letter from [REDACTED] on [REDACTED] letterhead, stating that the company employed the beneficiary as a computer operations manager from March 1991 until September 1994. According to [REDACTED]

As an Operations Manager, [the beneficiary] was responsible for coordinating all the sales operations. He recruited, evaluated and trained employees in this rather specialized area. He maintained an excellent relationship with our customers and our suppliers.

Because of the unresolved inconsistencies evident in the letters from [REDACTED] the director found the letter from [REDACTED] unconvincing.

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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Further, the director noted problems with the letter from [REDACTED]. The date affixed to the [REDACTED] letter appeared to have been added at a date which was different than the date upon which the letter was created, this finding based upon the fact that the font used for the date is different than the font used in the creation of the body of the employment letter. Additionally, the director noted that even if USCIS were to accept the letter from [REDACTED] it would not demonstrate that the beneficiary is qualified for the proffered position because the duties ascribed to the beneficiary by [REDACTED] do not include "involvement with government agencies" or "any relevant experience with government regulations, particularly with the specialized nature of insurance regulations," which form a primary requirement of the proffered position.

The AAO concurs with the director's findings. However, we would also note that the experience claimed in the [REDACTED] letter was not included on ETA Form 9089.

In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

Further, the letter from [REDACTED] is a copy and not the original letter. Not only does the font used to create the date appear different from the font used in the body of the letter but the ink is bolder than that which appears in the body of the letter, seeming to indicate that the date was affixed to a letter which had already been written. Further, the body of the letter is bolder than the name, address and telephone number that appear in the upper left hand corner of the letter, seeming to indicate that the letter was created in at least three phases. Nevertheless, without the original document, the veracity of this letter cannot be proven. Without the claimed experience having been included on ETA Form 9089 and certified by the Department of Labor, the letter as a whole remains dubious. Again, as with the [REDACTED] letter submitted in response to the director's NOID, this letter is written in English with no indication that it is an English translation of a Spanish-language document and contains no certification from a translator as would be required by 8 C.F.R. § 103.2(b)(3).

On appeal, counsel asserts that the director erred in finding that the supplied letters do not substantiate the beneficiary's claimed experience. Counsel further asserts that the director's determination was arbitrary in that he neglected to consider the facts presented. Notwithstanding all of the inconsistencies enumerated, counsel asserts that the evidence, indeed, demonstrates that the beneficiary worked for the two companies as claimed and that pay statements submitted on appeal substantiate such claims.

Counsel submitted a copy of one pay statement which was purportedly issued to the beneficiary by [REDACTED] sometime in 1990 along with a translation of the statement. This letter is submitted in an effort to demonstrate that the beneficiary was employed by [REDACTED] at the time claimed by the beneficiary.

It must be noted that the translation bears a notary stamp which indicates that [REDACTED] appeared before the notary on August 13, 2009. However, there is no indication regarding the identity of [REDACTED] or her role in this process.

8 C.F.R. § 103.2(b)(3), as already noted, states:

Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

However, in this case, the translation does not bear such certification and, therefore, cannot be accepted as accurate. Also, there are irregularities on the document which further call into question its veracity. For example, the translation claims that the statement bears an issuance date of October 1990 but that the date of the salary is November 3, 1990. Then the translation indicates that the funds were deposited on October 7, 1990. Also the translator translated the numerical date, 7-10-90, as October 7, 1990 (the month in the second position) but the numerical date, 11-03-90, as November 3, 1990 (the month in the first position).

8 C.F.R. § 103.2(b)(4) addresses the submission of copies of documents, stating:

Application and petition forms, and documents issued to support an application or petition (such as labor certifications, Form DS 2019, medical examinations, affidavits, formal consultations, letters of current employment and other statements) must be submitted in the original unless previously filed with USCIS.

The instant pay statement was submitted as independent, objective evidence which was meant to reconcile inconsistencies in the employment letters, by pointing to where the truth, in fact, lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Given the problems associated with the copy of the pay statement submitted, when considered with the numerous inconsistencies identified in the employment letters, the document does not serve to reconcile the inconsistencies identified.

Further, even if the AAO were to accept the copy of the pay statement as bona fide, the single pay statement alone would not serve to substantiate four years of claimed employment with [REDACTED]

Counsel also submitted a copy of a pay statement purported to have been issued by [REDACTED] to the beneficiary in 1993 with an English translation of the document. This letter contains the same inconsistencies and deficiencies noted in the pay statement purported to be from [REDACTED]

The translation bears the same notary stamp which is present on the [REDACTED] translation but does not contain the translator's certification which is required by 8 C.F.R. § 103.2(b)(3). The statement is a copy and not the original.

Additionally, the translations of both documents contain the position title: Operations Manager. However, the translator translated two different sets of terms using the same English term. On the statement from [REDACTED] the translator translated [REDACTED] as Operations Manager. However, on the statement from [REDACTED] the translator translated the term [REDACTED] as Operations Manager.

Again, given the problems associated with the copy of the pay statement submitted, and the fact that this statement was meant to substantiate experience which was not included on ETA Form 9089, and the inconsistencies noted in the [REDACTED] employment letter, the evidence does not serve to reconcile the inconsistencies identified and, thereby, substantiate the claimed experience.

Further, even if the AAO were to accept the copy of the pay statement as bona fide, the single pay statement alone would not serve to substantiate three years of 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. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

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.