

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

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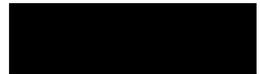


DATE:

NOV 29 2012

OFFICE: TEXAS SERVICE CENTER

FILE:



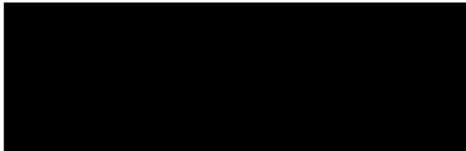
IN RE:

Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas 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 a supermarket. It seeks to permanently employ the beneficiary in the United States as a Baker, Polish Specialty. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).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 July 11, 2008. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner has not established that the beneficiary possessed 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

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

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.

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).

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: None required.
- H.5. Training: None required.
- H.6. Experience in the job offered: 48 months.
- H.8. Alternate combination of education and experience: None 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 a Baker, Polish Specialty, with [REDACTED] in Brooklyn, New York, from June 1, 2002, until November 30, 2006. 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, dated April 15, 2008, from a co-employee at [REDACTED], stating that the company employed the beneficiary as a Baker, Polish Specialty, from June 1, 2002, until November 30, 2006. This letter fails to meet the requirements for an experience letter. *Id.* (alien’s experience must be supported by letters from employers). This letter is written by a co-employee, and not written by the employer; the letter is on plain paper, and not on company

stationery. In addition, the beneficiary's affidavit states that he asked his father, a "senior baker," to write the letter, which the director noted in his denial. The writer has given no indication that he has authority to represent the employer. As this letter is not from the employer, it does not meet the requirements for documenting the beneficiary's experience. *Id.*

Further, the record contains a Form G-325A, filed with the beneficiary's form I-485, Application to Register Permanent Residence or Adjust Status, signed by the beneficiary on August 25, 2004, in which he claims he was self-employed as of August 25, 2004. This claim of self-employment conflicts with the beneficiary's purported employment by [REDACTED] at that time. This inconsistency casts doubt on the beneficiary's claimed employment with [REDACTED]. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

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.

The director issued a Request for Evidence (RFE) on May 10, 2011, indicating the deficiencies in the above discussed letter, and the conflict with the Form G-325A, and requested that the petitioner provide a letter from the employer, and credible supporting evidence including payroll records. In response, the petitioner provided a letter and translation, dated May 25, 2011, from the proprietor of a [REDACTED] in Poland, stating that the beneficiary was employed full-time as a Baker, Polish Specialty, from June 26, 1995, to August 27, 1999. This experience is not listed on the labor certification, which casts doubt on the experience claimed only after the director's RFE requesting documentation of the beneficiary's claimed employment with [REDACTED]. 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, this letter is not on company stationery, but rather it is on plain paper which bears an address stamp at the top and again at the bottom. Neither the petitioner nor the beneficiary has provided any explanation as to why this claimed experience was not included on the labor certification. The petitioner has not provided any independent, objective evidence to corroborate the beneficiary's late-claimed experience. Therefore, without independent, objective evidence of this late-claimed experience, such as confirmation through official work book records with a valid translation, the letter from the [REDACTED] is not credible evidence that the beneficiary possessed the minimum experience, 48 months in the position offered, required on the labor certification as of the priority date.

The record also contains an affidavit, dated June 21, 2011, from the beneficiary. The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. See *Matter of Ho*, 19 I&N at 591-592 (states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The AAO notes that the

affidavit does not explain why the regulatory required evidence from [REDACTED] is unavailable,³ or why the later claimed experience from the bakery in Poland was not included on the labor certification. The affidavit now claims that the beneficiary was an independent contractor at [REDACTED] however, the beneficiary did not provide any independent information, such as Forms 1099-MISC or a contract, to establish that he was in fact working for [REDACTED] as an independent contractor. This is insufficient to overcome the lack of regulatory required evidence. 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 has not demonstrated the unavailability of primary evidence of the beneficiary's employment, therefore, secondary or tertiary evidence cannot be considered. *Id.* (the petitioner must demonstrate the non-existence or unavailability of both the required document, and relevant secondary evidence, before submitting at least two affidavits, sworn to or affirmed by persons who are not parties to the petition and who have direct personal knowledge of that which must be proved). Therefore, as the petitioner has not established that initial evidence, or secondary evidence, is unavailable, the sworn statements cannot be accepted in lieu of the regulatory required evidence. The petitioner has provided the beneficiary's personal tax returns in which he states his occupation to be that of a "baker" to bolster the claim that he was in fact an independent contractor. However, these returns alone are insufficient to overcome the doubt already cast on the evidence in the record; the returns are photocopies without Forms 1099-MISC or W-2 statements. The statement of occupation on Form IRS 1040 is self-reported, and is not independently verified by the IRS. The tax returns, without independent, objective evidence to corroborate the beneficiary's claims, such as W-2 statements, do not overcome the inconsistencies in the record.

Additionally, even if the tax returns could be accepted as evidence of employment, none of the amounts earned would appear to represent full-time employment, as the amounts claimed (Adjusted Gross Income for 2002: \$5,692; 2003: \$5,964; 2004: \$7,869; 2005: \$5,769; and 2006: \$6,090) are more indicative of part-time employment.

The petitioner has not provided sufficient regulatory required evidence of the beneficiary's claimed experience. Further, the petitioner has not provided any independent, objective evidence to overcome the inconsistencies in the record. Therefore, the petitioner has not established that the beneficiary possessed the 48 months of experience in the position offered as required on the labor certification by the priority date.

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.

³ The beneficiary's affidavit simply states, "I was unable to obtain a letter from [REDACTED] There is no explanation of the beneficiary's efforts to obtain said letter, or the employer's response or reasons for denying such a request. As noted above, the beneficiary's assertion is self-serving and in this case does not provide any grounds that would permit the AAO to accept secondary or tertiary evidence of the beneficiary's experience. 8 C.F.R. § 103.2(b)(2)(i).

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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.