



U.S. Citizenship  
and Immigration  
Services

(b)(6)

Date: **APR 08 2013**

Office: NEBRASKA 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:

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,

*Elizabeth McCormack*

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a construction company. It seeks to permanently employ the beneficiary in the United States as a cement mason layout man. 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).<sup>1</sup>

The petition is accompanied by a Form ETA 750, Application for Alien Employment 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 April 30, 2001. 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.<sup>2</sup>

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

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<sup>1</sup> 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.

<sup>2</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 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).

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:

**EDUCATION**

Grade School: 6 years

**TRAINING**: None Required.

**EXPERIENCE**: Three (3) years in the job offered or in the related occupation of Mason Block Work.

**OTHER SPECIAL REQUIREMENTS**: Measuring skills.

In the instant case, the Form I-750, Application for Alien Employment Certification, states that the offered position requires the beneficiary to perform the duties of a mason layout man. Specifically, the duties to be performed are as follows:

Layout man that performs duties as a blue print reader, mason, laborer and block layer. May be designated according to masonry to perform other related duties. Attends and assists in the excavation of the trenches. Locates specified slab on conveyor and verifies dimensions, using tape measure. Spreads mortar over stone and foundation with trowel and sets stone in place by hand or with aid of crane. May spread mortar along mortar guides to ensure joints of uniform thickness. Responsible [for] finish[ing] the foundation grade.

Layout reference points and dimensions for work pieces and excavation.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a Cutter and Blue Print Reader with [redacted] in Madison Heights,

Michigan from September 1998, for 30 hours per week; and experience as a Mason, Blue Print Reader, with [REDACTED] the petitioner.<sup>3</sup> No other experience is listed. The beneficiary signed the labor certification on April 26, 2001 under a declaration that the contents are true and correct under penalty of perjury.

The record does not reflect that the beneficiary has three years' experience in mason block work. The beneficiary's claimed qualifying experience must be supported by letters from previous 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).

The record contains an employment verification letter, dated April 12, 2001, from [REDACTED] stating that from September 1998 to February 2001, the beneficiary worked in its cutting material department measuring blocking vinyl, following blue print specifications, verifying lengths and width on each job. This experience is approximately 30 months of part-time experience<sup>4</sup> in measuring skills. It does not satisfy the experience requirement of the proffered position, three (3) years in the job offered or in the related occupation of Mason Block Work. This experience establishes the measuring skills listed in the ETA 750: OTHER SPECIAL REQUIREMENTS. It does not, however, establish the beneficiary's experience in mason block work.

The record also includes an April 17, 2001 employment verification letter from [REDACTED] stating that the beneficiary worked at the ranch in 1997 and 1998, as a member of its surveying crew laying out concrete pads at its almond plant and orchards. The letter from [REDACTED] does not indicate when the employment commenced in 1997, when it ended in 1998, and the numbers of hours per week the beneficiary worked. Also, the letter states that the beneficiary worked on the surveying crew, but does not specify the duties of his position. This experience, therefore, does not amount to the three years' experience in mason block work required for the proffered position. In addition, the beneficiary does not list this employment with [REDACTED] on the Form ETA 750B. Per *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. 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.

Also included in the record is a 1996 Form W-2 from [REDACTED] for the applicant, and a 1997 Form W-2 from [REDACTED]. The W-2s show wages paid to [REDACTED]. The evidence is inconsistent with the information on the Form I-140, at Part 3, that indicates the

<sup>3</sup> The ETA 750B does not indicate the date employment ended with [REDACTED] or when employment commenced with [REDACTED].

<sup>4</sup> It is noted The ETA 750B states that the beneficiary's employment with [REDACTED] was for 30 hours per week, which does not equate to fulltime employment. The DOL indicates that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

beneficiary arrived in the United States on January 2, 1998. Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. *Matter of Ho*, 19 I & N Dec. 582, 591-592 (BIA). As the experience is not listed on the Form ETA 750B and there is no evidence overcoming the inconsistency with other evidence of record indicating that the beneficiary arrived in the United States on January 2, 1998, subsequent to such work at the [REDACTED] the AAO will not consider this evidence as reliable evidence of the beneficiary's experience before the priority date.

These letters are, therefore, not probative of the applicant's mason block work experience.

As noted above, the record includes a 1996 Form W-2 from [REDACTED] and a 1997 Form W-2 from [REDACTED]. The beneficiary did not list this experience on the ETA-750B, and the petitioner did not submit a letter from this employer. The employment verification letter from [REDACTED] does not indicate that the applicant was employed in 1996. The 1996 Form W-2 from [REDACTED] includes a Social Security Number for [REDACTED]. The beneficiary attests that he also used the name [REDACTED] and that he is the same person as [REDACTED]. It is noted, however, that on both the Form I-140, Part 3, and, the Form I-485, Part 1, the Social Security Number for the beneficiary is left blank. The beneficiary does not explain these discrepancies pertaining to his claimed employment experience. The record does not contain independent, objective evidence resolving the inconsistencies. *See, Matter of Ho*, 19 I & N Dec. 591-592.

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.

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.