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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



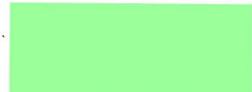
U.S. Citizenship  
and Immigration  
Services



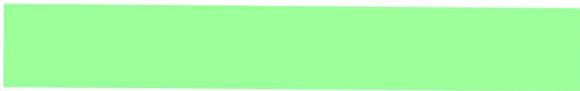
DATE: JUL 19 2013

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)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

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 was summarily dismissed on September 16, 2010 because the petitioner failed to provide the required documentary evidence of the beneficiary's prior work experience. The petitioner filed a motion to reopen and motion to reconsider the AAO's decision on October 15, 2010. These motions were dismissed on February 28, 2013. On April 1, 2013, the petitioner filed a second motion to reopen and motion to reconsider. The motions will be granted. The previous decision of the AAO, dated February 28, 2013, will be reopened, a new decision entered, and the petition will remain denied.

The petitioner is a hardware business. It seeks to permanently employ the beneficiary in the United States as a glazier. The petitioner requests classification of the beneficiary as a skilled worker or professional 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 750B, Application for Alien 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 December 6, 2004. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner failed to establish that the beneficiary possessed the minimum experience required to perform the offered position by the priority date.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The AAO's February 28, 2013 decision cited the inconsistency in the record of the beneficiary's initial claim that he worked for General Hardware from 1998 through April 2000 and stated that the beneficiary's subsequent affidavit regarding this experience was self-serving and did not constitute independent, objective evidence of the beneficiary's prior work experience. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (stating that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). The AAO also found that the petitioner had not demonstrated that the updated affidavits submitted on motion constituted "new" evidence to support a motion to reopen. *See* 8 C.F.R. § 103.5(a)(2).

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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.

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 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).

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 requires two (2) years of experience in the job offered, glazier. The labor certification also states that the beneficiary qualifies for the offered position based on experience as a glazier for General Hardware from an unlisted month in 1998 to April 2000.

The regulation at 8 C.F.R. § 204.5(1)(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 three affidavits from the beneficiary in which he states that the owner of his former employer, [REDACTED] is not willing to write an experience letter attesting to the beneficiary's employment. The record also contains affidavits attesting to the beneficiary's experience with [REDACTED] including: two affidavits from [REDACTED] one of the beneficiary's co-workers at [REDACTED] an affidavit from [REDACTED] one of the beneficiary's co-workers who states that he first met the beneficiary in "November or December of 1997" and that he helped train the beneficiary as a glazier; an affidavit from [REDACTED] one of

customers; and an affidavit from counsel for the petitioner, attesting to her conversation with the owner of [REDACTED] and her attempts to contact [REDACTED] accountant.<sup>2</sup>

The AAO notes several discrepancies and inconsistencies that the petitioner has not overcome by independent, objective evidence.

First, as noted above, the labor certification states that the beneficiary worked for [REDACTED] from 1998 to April 2000. The beneficiary's first affidavit, dated November 30, 2004, states that he "began working for [REDACTED] in 1998 and worked there until about April of 2000." The beneficiary's second affidavit, dated June 12, 2008, stated that he was mistaken as to the 1998 date and that it was actually November or December 1997 when he began working for [REDACTED]. This updated affidavit is now in conflict with the labor certification which states the beneficiary began working at [REDACTED] in 1998 but does not state the month. The petitioner has not resolved these discrepancies by independent, objective evidence to corroborate the time that the beneficiary began working for [REDACTED]. 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 Dec. at 591-592 (BIA 1988) (stating 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)). Therefore, the beneficiary's affidavit cannot stand in lieu of the regulatory required evidence of his claimed work experience.

Second, the affidavit from [REDACTED] states that he is a vendor who has done business with the petitioner and [REDACTED] and that he first met the beneficiary in "November or December 1997" when the beneficiary was employed as a glazier. [REDACTED] states that to the best of his recollection, the beneficiary worked there for two years. He also states "in the course of doing business with [REDACTED] from December 1997 through April or May of 2000 I had occasion to see [the beneficiary] working as a glazier" and that he observed him "on different occasions" performing the duties of a glazier as outlined in the labor certification. However, this affidavit does not provide corroborating information evidencing that the beneficiary was employed full-time as a glazier by [REDACTED]. It is unclear how often [REDACTED] observed the beneficiary working there, whether he would be able to ascertain the number of hours the beneficiary worked there each week, whether this was full-time or part-time work, or whether the beneficiary performed other duties as well. The AAO also notes that [REDACTED] second affidavit is not notarized.

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<sup>2</sup> The petitioner must provide independent, objective evidence to resolve this issue. *See Matter of Ho*, 19 I&N Dec. at 591-592. Statements by the petitioner's counsel cannot be considered to meet this requirement. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Third, the affidavit from [REDACTED] is not notarized and states that he first met the beneficiary in “November or December 1997,” but does not state how often he shopped at [REDACTED] whether he had any knowledge of the beneficiary’s job duties or whether the beneficiary worked there full-time or part-time. Therefore, this letter would not be sufficient to establish that the beneficiary was employed full-time for at least two years in the position offered.

The AAO also notes that the beneficiary stated the following in his second affidavit, dated June 12, 2008:

Initially I had difficulty recalling exactly when I began working for [REDACTED] [REDACTED] but after going over my work history with my attorney, and mentally retracing the events that led me to decide to come to the United States and the steps I took to gain employment after entering this country, I was able to recollect specific events that occurred before I began working at [REDACTED] how I came to begin working there and what made me decide to leave.

...

To the best of my recollection I began working there at the end of November or beginning of December of 1997.

It is unclear why [REDACTED] each state the exact same phrase, that they know that the beneficiary began working at [REDACTED] in “November or December of 1997.” The similar language used in each affidavit diminishes its probative value, especially as it has been shown that the beneficiary seems to have had difficulty remembering when he began working there, but [REDACTED] each of whom had differing degrees of contact with the beneficiary, could attest that the beneficiary began working at [REDACTED] in “November or December of 1997.” These affidavits do not appear to constitute independent, objective evidence of the beneficiary’s experience at [REDACTED] as they do not appear to be based on the purported writers’ personal knowledge of the matter. The affidavits conflict with the claimed employment experience on the labor certification and the beneficiary’s first affidavit; while they appear to attempt to resolve this discrepancy, because they do not appear to be based on personal knowledge, they are not credible. *See Matter of Ho*, 19 I&N Dec. at 591-592.

On appeal, counsel asserts that an experience letter from the beneficiary’s employer, [REDACTED] is unavailable. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Further, counsel contends that the affidavits provided meet the regulatory requirements for tertiary evidence. *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). The petitioner has not

demonstrated that secondary evidence issued to the beneficiary, such as pay statements, time sheets, bank statements, or other contemporaneous evidence verifying his claimed employment, are unavailable. The AAO finds the affidavits in the record to be insufficient to demonstrate the unavailability of secondary evidence of the beneficiary's employment. 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.

Further, even if the AAO were to have determined that secondary evidence did not exist or could not be obtained, these affidavits cannot overcome the unavailability of secondary evidence due to the unresolved discrepancies in them, noted above. Therefore, even if the AAO were to determine that the petitioner had demonstrated the unavailability of required and secondary evidence, and even if the AAO were to accept these affidavits in lieu of the unavailable required and secondary evidence, these affidavits fail to document that the beneficiary possessed the required two (2) years of experience in the position offered, glazier, as of the priority date.

The AAO also stated in its February 18, 2003 decision that the petitioner did not meet the requirement of 8 C.F.R. § 103.5(a)(1)(iii)(C), which requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this motion, and in the previous motion, the petitioner has not met this requirement by submitting the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden.

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.

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

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine

whether the petitioner had sufficient net income<sup>3</sup> or net current assets<sup>4</sup> to pay the difference between the wage paid, if any, and the proffered wage.<sup>5</sup> If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967).

In the instant case, it appears that the petitioner has employed the beneficiary since May 2000. The labor certification states that the beneficiary will work 40 hours per week at \$17.21 per hour but also states in Part 15 that the beneficiary must be willing to work 11-hour shifts. The beneficiary's work schedule is listed as 8:00 a.m. to 7:30 p.m., Wednesday through Sunday, which amounts to more than 40 hours per week. However, the labor certification also states overtime "as needed," and the Form I-140 and a letter from the employer, dated May 16, 2007, indicate a rate of pay of \$688.40 per week (\$35,796.80 per year), which equates to a 40-hour week at \$17.21. In any further filings, the petitioner must provide independent, objective evidence to establish the required number of hours the beneficiary will work each week and the annual proffered wage. The record contains Forms 1099, which state nonemployee compensation for 2005, 2006, and 2007. The AAO notes that these Forms 1099 are handwritten, each contains one typed line indicating the petitioner's address and each states the exact same amount of nonemployee compensation, \$23,625.00. The AAO does not view these Forms 1099 as reliable evidence towards establishing the petitioner's ability to pay the beneficiary's proffered wage for these years. For 2004, the petitioner's net income of \$1,534.00 and net current assets of \$26,847 are insufficient to pay the beneficiary's proffered wage. Although the petitioner's net current assets for 2005 and net income for 2006 were sufficient to pay the beneficiary's proffered wage for these years, the record does not contain the petitioner's tax return for 2007, as requested by the director's Request for Evidence (RFE).<sup>6</sup> Therefore, the petitioner has not established its ability to pay the beneficiary the full proffered wage for 2004 and 2007.

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<sup>3</sup> For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return

<sup>4</sup> Net current assets are the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets are shown on Form 1120, Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18.

<sup>5</sup> *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010).

<sup>6</sup> The AAO notes that the petitioner's response to the director's RFE was received on April 25, 2008, shortly after the April 15th filing deadline with the IRS. The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

Further, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets. Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

**ORDER:** The motion is granted. The petition remains denied.