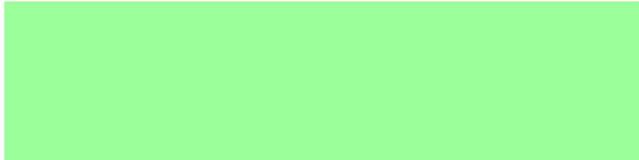




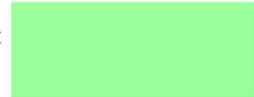
U.S. Citizenship
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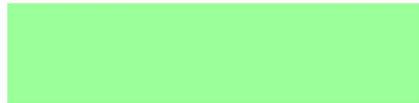


DATE: JUN 12 2013 Office: TEXAS SERVICE CENTER

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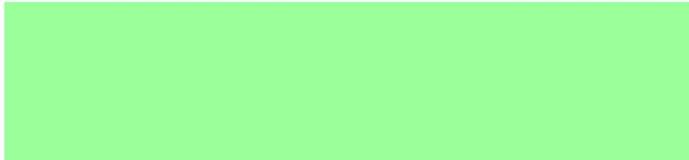


IN RE: Petitioner:
Beneficiary:



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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The appeal was dismissed by the Administrative Appeals Office (AAO). Counsel to the petitioner filed a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, and the appeal will be dismissed on its merits.

The petitioner is an IS/IT professional consulting services business. It seeks to employ the beneficiary permanently in the United States as a network engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). Upon reviewing the petition, the director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with three years of qualifying employment experience. The director denied the petition accordingly. The AAO dismissed the appeal and also concluded that the record did not establish the petitioner's continuing ability to pay the proffered wage.

As set forth in the director's February 9, 2009 denial, and the AAO's June 11, 2012 decision, the primary issue in this case is whether the petitioner has established that the beneficiary possessed all the education, training, and experience requirements as of the priority date.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, 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.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. See *Matter of Wing's Tea House*, 16 I&N Dec.158 (Acting Reg'l Comm'r 1977). The priority date of the petition is January 28, 2005, which is the date the labor certification was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d).¹ The Immigrant Petition for Alien Worker (Form I-140) was filed on May 16, 2007.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 *Madany v. Smith*, 696 F.2d 1008

¹ 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.

(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).

A review of the AAO's decision reveals that the AAO accurately set forth a legitimate basis for the denial. The AAO determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position because the employment letters submitted by the petitioner were insufficient to establish that the beneficiary possessed the required experience as set forth on the labor certification by the priority date. The letters also pertained to experience not previously claimed by the beneficiary on the Form ETA 750 and the Form G-325A, and were therefore not considered credible evidence of prior work experience. Accordingly, on motion the issue is whether the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position with three years of qualifying employment experience.

As noted above, the DOL certified the Form ETA 750 in this matter. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified, and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. See *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d at 1012-1013.

The key to determining the job qualifications is found on Form ETA 750 Part 14. This section of the application for alien labor certification describes the terms and conditions of the job offered. It is important that the Form ETA 750 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the alien labor certification, nor may it impose additional requirements. See *Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* 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 an alien labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. See *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 alien labor certification must involve reading and applying *the plain language* of the alien labor certification application form. See *id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the alien labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the alien labor certification.

Evidence of qualifying experience shall be in the form of letters from former employers which include the name, address, and title of the writer and a specific description of the duties performed. If such evidence is unavailable, other documentation relating to the experience will be considered. 8 C.F.R. § 204.5(g)(1); 8 C.F.R. § 204.5(l)(3)(ii)(A).

According to the plain terms of the labor certification in the instant matter, the applicant must have three years of experience in the job offered or in a related occupation (computer software developing, consulting, and/or working with networks). The labor certification also indicated that the worker must also have the following special requirements: "Technologies: Network protocols (e.g. TCP/IP, DNS, DHCP, Netbios and SNMP), OS (e.g. CISCO IOS, Windows, Linux), H/W (CISCO Hubs, routers, catalytic switches), MS Access, My SQL, Lotus Notes, USRP and so on."

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. The beneficiary stated that he worked for the petitioner as a network engineer from June 2004 to January 7, 2005, the date he signed the labor certification. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented the following employment experiences:

- [REDACTED] as a network engineer from June 2002 through April 2003.
- [REDACTED] as a network engineer from November 2003 through June 2004.

The beneficiary does not provide any additional information concerning his employment background on the labor certification.

The petitioner initially submitted the following evidence:

- An employment letter dated April 13, 2007 from [REDACTED] of [REDACTED] who stated that the company employed the beneficiary as a network engineer from November 2003 to June 2004. The declarant does not specify his job title, fails to describe the beneficiary's job duties and does not specify the number of hours the beneficiary worked per week.
- An employment letter from the technical manager of [REDACTED] who stated that the company employed the beneficiary as a network engineer since June 6, 2002. The declarant further stated that the beneficiary was responsible for providing technical support to customers, including corporations. The declarant fails to specify the dates of the beneficiary's employment and fails to specify the job duties performed by the beneficiary. Neither does the declarant explain the source of his knowledge of the beneficiary's employment.

In response to the director's request for evidence of the beneficiary's employment experience, the petitioner submitted the following:

- An employment letter dated June 6, 2002 and an employment letter dated December 2, 2008 from the technical manager of [REDACTED] who stated that the company employed the beneficiary as a network engineer from June 2002 to April 2003. He also stated that he was the beneficiary's technical manager during this period and that the beneficiary was involved in troubleshooting problems with Windows NT, Workstations and servers, and that he performed other job duties of the position.

The director determined that the evidence submitted by the petitioner demonstrated that the beneficiary had a total of 24 months and 27 days ([REDACTED] 10 months, [REDACTED] 7 months 27 days, and [REDACTED] 7 months) of experience which was insufficient to demonstrate that he had 3 years of experience as required by the labor certification.

On appeal, the petitioner submitted the following evidence:

- An employment letter from [REDACTED] which stated that the beneficiary was employed by the company as a junior network engineer from May 1998 to June 1999. The declarant fails to specify his/her job title and fails to specify the job duties performed by the beneficiary.
- An employment letter dated May 27, 2012 from the [REDACTED] in India which stated that the beneficiary was employed as network engineer from June 1999 to May 2002. The declarant fails to specify his/her job title and fails to specify the job duties performed by the beneficiary.

On motion, the petitioner submitted the following evidence:

- Two letters from the chief officer of the [REDACTED] in India who stated that the school was established in January 1998 and shut down in May 2004.
- An affidavit signed by the beneficiary in which he stated that he was employed by [REDACTED] as a junior network engineer and by the [REDACTED] in India as a network engineer. He further stated that he only provided the initial employment information because the Form ETA 750B asked for only 3 years of employment and the Form G-325A asked for only 5 years of employment.

On motion, counsel asserts that the documentation submitted by the petitioner is sufficient to establish that the beneficiary had gained the required three years of professional experience prior to the priority date of January 28, 2005. Counsel further asserts on motion that the petitioner inadvertently failed to submit the two additional employment letters submitted for the first time on

appeal. However, neither the petitioner nor the beneficiary indicated the existence of such employment on the Form ETA 750 or Form G-325A prior to the director's denial. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the BIA noted in dicta that the beneficiary's experience, without such fact certified by the DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

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. 582, 591-592 (BIA 1988)(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 inconsistencies and contradictions cast doubt on the petitioner's proof. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon 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 lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582.

Regardless, even if the AAO were to consider the employment letters on motion and on appeal as credible evidence of the beneficiary's work experience which was not claimed on the labor certification or on the Form G-325A, which it will not, the declarants fail to specify their titles, their relation to the beneficiary, the source of their knowledge, and a description of the beneficiary's job duties. Therefore, these letters fail to specifically describe the beneficiary's job duties and are not sufficient under the regulations. 8 C.F.R. § 204.5(l)(3)(ii)(A); 8 C.F.R. § 204.5(g)(1). Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

A second issue in this matter is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

On motion, the petitioner submitted evidence that it has been paying the beneficiary a salary in excess of the proffered wage since 2005. In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. Accordingly, the AAO will withdraw this portion of its previous decision.

Nevertheless, the beneficiary does not qualify for visa classification pursuant to section 203(b)(3)(A)(i) of the Act because it has not been credibly established that he has three years of qualifying work experience before the priority date.

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 AAO's prior decision, dated June 11, 2012, is affirmed. The petition remains denied, and the appeal is dismissed.