



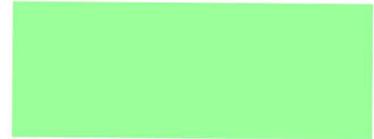
U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: JUN 26 2013

OFFICE: TEXAS SERVICE CENTER

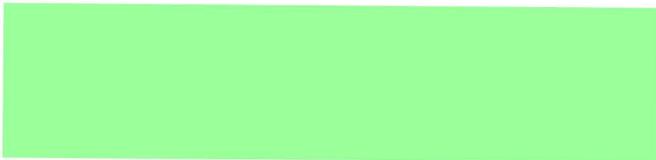


IN RE:           Petitioner:  
                    Beneficiary:



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

ON BEHALF OF PETITIONER:

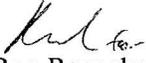


INSTRUCTIONS:

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

The petitioner is a private individual. It sought to employ the beneficiary permanently in the United States as a nanny. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary possesses the 24 months of experience in the job offered as required by the terms of the labor certification. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely 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.

On appeal, counsel asserts that the regulation at 8 C.F.R. § 204.5(g)(1) requires that United States Citizenship and Immigration Services (USCIS) take an expansive view of the documentation of the beneficiary's qualifying experience and training; even if such experience and training was not listed on the labor certification. Counsel includes a previously submitted experience letter in support of the appeal. Although counsel indicates that she is submitting a copy of a USCIS memorandum in support of the appeal in a brief that was submitted subsequent to the filing of the appeal, a review of the record reveals that counsel did not include any USCIS memorandum with the appeal or submit such thereafter.

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.

As set forth in the director's October 10, 2012 denial, the sole issue in this case is whether or not the record contains sufficient credible evidence demonstrating the beneficiary possesses the 24 months of experience as a nanny as required by the terms of the labor certification.

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.

In order for the petition to be approved, the petitioner must establish that the beneficiary is qualified for the offered position. Specifically, the petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 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 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 (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. Coorney*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

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). 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.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at \*7.

A petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. §§ 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977). *See also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In the instant case, the petition has a priority date of May 15, 2011, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The required education, training, experience and skills for the offered position are set forth at Part H of the labor certification. Part H of ETA Form 9089 states in pertinent part 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: 24 months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: None accepted.
- H.10. Experience in an alternate occupation: None accepted.

At Part H.11., of the ETA Form 9089, the petitioner described the job duties of nanny as follows:

Care for children in private households and provide support and expertise to parents in satisfying[sic] childrens physical, emotional, intellectual and social needs. Duties may include meal planning and preparation, laundry and clothing care, organization of play activities and outings, discipline, intellectual stimulation, language activities and transportation.

The ETA Form 9089 at Part K., reflects that the beneficiary qualifies for the offered position based in part on her experience as a nanny with the petitioner from February 1, 2011 through the priority date of May 15, 2011. The labor certification also states that the beneficiary was employed as a nanny by [REDACTED] New York from January 13, 1998 to May 8, 2010, and that she was employed as a nanny by [REDACTED] New York from November 8, 1994 to December 20, 1996. No other experience is listed. Nevertheless, representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner cannot be used to qualify the beneficiary for the certified position.<sup>1</sup> Specifically, the petitioner indicates that questions J.19 and J.20,

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<sup>1</sup> 20 C.F.R. § 656.17 states:

(h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation

.....

(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

(ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

which ask about experience in an alternate occupation, are not applicable. In response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?" the petitioner indicates that the question at J.21, is not applicable. The petitioner specifically indicates in response to question H.6 that 24 months of experience in the job offered is required and in response to question H.10 that experience in an alternate occupation is not acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable<sup>2</sup> and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates that her position with the petitioner was as a nanny, and the job duties are the same duties as the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as she was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the

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- (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
  - (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

- (i) The term "employer" means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
- (ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

<sup>2</sup> A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

5) For purposes of this paragraph (i):

- (ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

beneficiary to qualify for the proffered position. In addition, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

The regulation at 8 C.F.R. § 204.5(g)(1) states, in part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. *If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.*

(Emphasis added); *see also* 8 C.F.R. § 204.5(l)(3)(ii)(A). Therefore, USCIS may accept other reliable documentation relating to the beneficiary's employment experience to establish that the beneficiary possesses the experience required by the terms of the labor certification. Such evidence may include statements from former supervisors and coworkers who are no longer employed by the petitioner. USCIS may also consider copies of Forms W-2, Wage and Tax Statement, issued by the prior employer, paychecks, offer letters, employment contracts, or other evidence to corroborate the identity of the employer and the nature and duration of the claimed employment.

As noted above, the labor certification reflects that the beneficiary was employed as a nanny by Mr. [REDACTED] from January 13, 1998 to May 8, 2010. However, the record is absent a letter of employment from [REDACTED] verifying the beneficiary's claim of employment with this individual. 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 record contains a letter dated January 12, 1998 that is signed by [REDACTED]. In her letter, [REDACTED] stated the following regarding the beneficiary's employment:

This letter is to confirm that [the beneficiary] was employed in my home as a Live-in Cook, preparing and cooking Kosher foods for myself, my husband and seven children from November 1994 until December 1996.

[The beneficiary] was responsible for preparing and cooking all meals during the day and evening, including breakfast prior to the children going to school. She is extremely clean and always kept all dairy and non-dairy utensils and kitchen vessels separate in accordance with our Jewish dietary laws.

Clearly, the beneficiary's employment with [REDACTED] was as a Kosher cook rather than a nanny as claimed at Part K., of the ETA Form 9089. The record is absent any explanation as to why

the beneficiary's employment as a Kosher cook for [REDACTED] was listed as qualifying experience in the position of nanny on the labor certification. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Therefore, the beneficiary's employment with [REDACTED] as a Kosher cook cannot be used to establish that she has 24 months of qualifying experience as a nanny as required by the labor certification.

The record also contains a letter dated July 23, 2012 that is signed by [REDACTED]. In her letter, Ms. [REDACTED] stated the following regarding the beneficiary:

I am verifying that [the beneficiary] worked for our family as a nanny for our children in January 1992-May 1994. Her daily routine included child care, helping the children with activities, laundry clothing care, meals and helping them with their homework. She is very lovely. Our family enjoyed her gentle ways.

However, the beneficiary's work experience for Shahla Weg was not listed at Part K., of the ETA Form 9089. Neither the beneficiary nor the petitioner has offered any explanation as to why the beneficiary did not list this employment on the labor certification if this experience qualified her for the offered job of nanny. Counsel's assertion on appeal that the regulation at 8 C.F.R. § 204.5(g)(1) requires that USCIS take an expansive view of the documentation of the beneficiary's qualifying experience and training even if such experience and training was not listed on the labor certification is misplaced. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) (where the Board noted in dicta that the beneficiary's experience, without such fact certified by DOL on the beneficiary's labor certification lessens the credibility of the evidence and facts asserted). The petitioner has submitted no independent, objective evidence of the beneficiary's employment with [REDACTED]. While 8 C.F.R. § 204.5(g)(1) does allow the submission of other documentation, none has been submitted. The letter from [REDACTED] may not be used to establish the beneficiary's work experience without independent, objective evidence to support the claimed employment.

The evidence in the record is not sufficient to establish that the beneficiary possessed the required 24 months of experience in the offered job of nanny as listed at Part H.6., of ETA Form 9089.

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.