



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 27 2013

OFFICE: TEXAS SERVICE CENTER

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 on May 12, 2010. The petitioner filed a motion to reopen on June 15, 2010. The director granted the motion to reopen and reaffirmed the decision to deny the petition on September 28, 2010. The petitioner appealed the decision to the Administrative Appeals Office (AAO), and the AAO subsequently dismissed the appeal. The matter is now before the AAO on a motion. The motion will be granted, the previous decision of the AAO will be withdrawn in part and affirmed in part, and the petition will remain denied.

The petitioner is a thoroughbred horse racing stable. It seeks to permanently employ the beneficiary in the United States as a thoroughbred racehorse groom. 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).¹ The director determined that the petitioner had not established that the beneficiary had met the requirements of the labor certification, and also that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly. On February 28, 2013, the AAO affirmed the director's decision that the beneficiary failed to possess the minimum experience required to perform the offered position by the priority date, and the petitioner had failed to demonstrate its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The record shows that the motion is properly filed², 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 motion, counsel asserts that, in the AAO's decision, "the labor certification cited is for the alien who had been certified but was being subbed out." Counsel contends that the "wrong ETA 750 Part Bs were reviewed" and that "there is not any requirement under the regulations to include documentation for schooling less than secondary education." Counsel further asserts that a brief will be submitted within 30 days to establish that "the beneficiary had the requisite experience, the six years of elementary

¹ This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition, March 16, 2007, predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

² On the Form I-290B, Notice of Appeal or Motion, submitted on April 2, 2013, the petitioner checked Box B, which states "I am filing an appeal." However, the accompanying narrative is characterized as a motion. It is noted that the AAO does not exercise appellate jurisdiction over its own decisions. The AAO exercises appellate jurisdiction over only the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1 (effective March 1, 2003). An appeal of an AAO appeal is not properly within the AAO's jurisdiction. However, because the petitioner characterized its filing as a motion on the Form I-290B it will be accepted as one despite the incorrect box being checked on the form.

schooling (even though it is not needed) and was eligible for licensing.” Counsel dated the motion on April 1, 2013. While the AAO has received no further evidence or brief, it is noted that any evidence or brief must be submitted with the petitioner’s motion. 8 C.F.R. §§ 103.5(a)(1)(i), (iii); cf. 8 C.F.R. §§ 103.3(a)(2)(vii) and (viii) (permitting additional time to submit a brief on appeal).

Upon review of the record, the AAO’s decision does not reflect that the instant beneficiary’s work experience was analyzed. While this portion of the AAO’s decision will be withdrawn, and the instant beneficiary’s work experience will be analyzed, the record does not indicate that the beneficiary possessed the required experience as of the priority date. The AAO’s finding in this decision on the beneficiary’s qualifications for the position offered will supersede its finding in the previous decision.

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.

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 has the following minimum requirements:

EDUCATION

Grade School: 6 years

High School: "N/A."

College: "N/A."

TRAINING: None Required.

EXPERIENCE: Two (2) years in the job offered.

OTHER SPECIAL REQUIREMENTS: "Will need to eligible [sic] for state groom license."

Form ETA 750B, signed by the beneficiary on December 22, 2006, states that the beneficiary qualifies for the offered position based on the following experience as a thoroughbred race horse groom:

- **July 2005 through Present (December 2006)**

[REDACTED]

- **January 2001 through September 2004³**

[REDACTED]

- **June 2000 through September 2000**

[REDACTED]

- **March 2000 through June 2000**

[REDACTED]

- **August 1997 through February 2000**

[REDACTED]

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(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.

³ It is noted that in Form ETA 750B, 15.b., the beneficiary indicates he "only worked 6 to 7 months a year."

The record contains two Spanish-language, notarized affidavits from [REDACTED] both carrying "certification number [REDACTED] and dated April 7, 2010. Both affidavits are accompanied by English translations, one of which is certified as accurate and dated June 11, 2010, and one without a translator's certification. In the affidavit without a translator's certification, the affiant states that the beneficiary worked with him "in all types of work concerning horses, from the year 1997 through the year 2001." Because the petitioner failed to submit a certified translation of this document, the AAO cannot determine whether this evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the uncertified translation is not probative and will not be accorded any weight in this proceeding.

In the certified, translated affidavit, [REDACTED] indicates that he has been the ranch manager at [REDACTED] for more than 20 years. He also indicates that he is acquainted with the beneficiary, as well as with his brothers and his now-deceased father. The affidavit indicates that the beneficiary would "help groom the horses" and "[w]hen he left school, he began working more hours and he returned to work for me at the [REDACTED] every time he returned from the United States."

It is noted that although the two affidavits have the same date and time of writing, they contain differing content. While the uncertified translation states dates of employment, the certified translation does not. Further, both affidavits bear the same certification number despite containing differing content. The inconsistencies cast doubt on the authenticity of the affidavits. 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). Because the certified translation does not state dates of employment, the AAO is prevented from determining whether the beneficiary would have possessed the required work experience by the priority date. It is also noted that the properly translated affidavit was provided in conjunction with the petitioner's motion to reopen the director's decision in an attempt to correct the inconsistencies noted by the director; however, the affidavit predates the date of director's decision. This discrepancy brings into question the veracity of the affidavits. Doubt cast on any aspect of the applicant's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the application or visa petition. *Id.*

On Form ETA 750B, the beneficiary indicates that he attended school from September 1988 until July 1994, and worked at the [REDACTED] from August 1997 until February 2000. However, the affiant specifically states that the beneficiary worked with him from 1997 until 2001. The affiant also suggests that the beneficiary worked part-time after he finished school, prior to 1997. These inconsistencies cast doubt on the credibility of the beneficiary's claimed employment. 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. *Id.* It is also noted that the beneficiary qualifications must be established by the priority date in 1997. The record reflects that the beneficiary turned 15 years old in 1997, therefore, it appears unlikely that the

beneficiary would have had two years of full-time work experience in the position offered from the ages of 13 to 14 years old.

Further, as noted in the AAO's prior decision, it is unclear whether the affidavit's author is the beneficiary's employer, but rather may be a co-worker. Also, the affidavit does not give specific dates and hours worked by the beneficiary. The affidavit does not meet the regulatory requirements. 8 C.F.R. § 204.5(l)(3)(ii)(A). Thus, the affidavit from J [REDACTED] does not establish that the beneficiary had two years of full-time experience as a thoroughbred racehorse groom prior to the November 14, 1997 priority date. The record does not contain experience letters from any other employers indicated on the labor certification, and none were submitted on appeal or motion.

Further, although the labor certification requires the beneficiary be "eligible for [sic] state groom license," the record fails to contain such evidence despite counsel's assertion on motion that the beneficiary has the requisite license or eligibility and evidence will be submitted. 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 petitioner has 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.

On motion, counsel asserts that the petitioner has demonstrated its ability to pay the beneficiary the proffered wage. While counsel contends that the AAO referenced the wrong ETA Part B in analyzing the petitioner's ability to pay the proffered wage, the AAO analyzed the correct Forms W-2 and the petitioner's tax returns to calculate the petitioner's ability to pay. The AAO's prior decision found that the petitioner failed to demonstrate its ability to pay the beneficiary the proffered wage in 1997, 2003, 2004 and 2005.

Counsel asserts that from 2002 through 2005 the beneficiary worked for only part of the years and that is why he was not paid the prevailing wage. Counsel requests that USCIS annualize the wage paid for the portion of the year that the beneficiary worked to find an "annual" wage. Counsel provides no legal basis, or citations to relevant law or regulation, that would permit the AAO to extrapolate a seasonal income to an annual income in order to determine a petitioner's ability to pay. As discussed in the AAO's prior decision, the AAO will consider a petitioner's net income, net current assets, as well as wages paid to the beneficiary, in determining a petitioner's ability to pay the proffered wage.

Counsel also asserts that although the petitioner failed to submit a complete tax return for 1997, it did submit its quarterly tax returns for 1997. Counsel states that the petitioner's quarterly tax returns for 1997 reflect "that the employer paid \$176,474.01 in wages for the last quarter of 1997; the employer's Schedule C for 1997 was also included which showed that the employer had gross receipts o[f] \$2,205,163.00, with a net profit of \$425,656.00 (which is consistent with other years of

his taxes) also a copy of the employer's 'W-3 Transmittal of Wage and Tax Statements 1997' was submitted which shows that the employer paid \$615,252.40 in wages for the year." As noted in the AAO's prior decision, in 1997, the record contains only Schedule C of the sole proprietor's IRS Form 1040, and does not include page one showing the proprietor's adjusted gross income. Furthermore, the record fails to contain an accounting of the sole proprietor's monthly expenses.⁴ The record does not contain the proprietor's 2003 tax return. Thus, the AAO cannot properly analyze whether the sole proprietor's adjusted gross income covers the difference between the proffered wage and the wage paid and leaves enough to support his household for the year 1997, as well as 1998 through 2005. Even if the petitioner could establish its ability to pay the proffered wage in 1997, the petitioner also failed to submit its tax return for 2003 on appeal or motion. 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). 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 petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage from the priority date onwards.

In the AAO's prior decision, it noted that USCIS records indicate that the petitioner has filed immigrant visa petitions on behalf of at least 15 other beneficiaries.⁵ The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. See 8 C.F.R. § 204.5(g)(2). On motion, counsel states that the "employer is attempting to create a list that will satisfy the AAO and to show that most are still working with horses." However, no additional evidence has been received. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for

⁴ In a March 17, 2010 Request for Evidence (RFE), the director requested that the petitioner submit evidence regarding the proprietor's monthly household expenses, including car loans, insurance, utility bills, food, clothing, house payments, etc. In an April 15, 2010 response, counsel stated that the sole proprietor's personal monthly expenses are approximately \$5,000 (\$60,000 per year) but submitted no evidence to verify the expenses claimed. 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). 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's decision notes that the proprietor's Schedule A to his IRS Forms 1040 show annual itemized expenses including medical expenses, taxes, home mortgage interest and gifts greater than \$60,000 in 1999, 2000 and 2002. On motion, no additional evidence was submitted to overcome the AAO's finding.

⁵ Detailed information regarding the other beneficiaries was requested by the director's March 17, 2010 RFE. The petitioner did not provide evidence regarding these other beneficiaries on appeal or motion. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

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denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Thus, the petitioner has failed to demonstrate that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date onwards.

The petition will remain denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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, the petitioner has not sustained that burden. Accordingly, the motion will be granted; however, the petition will remain denied for the above stated reasons.

ORDER: The motion is granted. The AAO's decision, dated February 28, 2013, is withdrawn in part, a new decision is entered, and the petition remains denied.