



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, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The appeal will be dismissed.

The petitioner describes itself as a construction materials wholesaler. The petitioner seeks to permanently employ the beneficiary in the United States as a factory manager. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹

The petition is accompanied by a Form ETA 750, 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 determined the petitioner had not established that the beneficiary possessed the minimum experience required to perform the offered position. On March 3, 2009 the director denied the petition accordingly. The petitioner appealed, and the AAO dismissed the appeal on August 29, 2012.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. 8 C.F.R. § 103.5(a)(3). In addition, a motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The record shows that the motion is properly filed, timely and makes a specific allegation of error in law or fact. Thus the motion will be granted. Upon review, however, the appeal will be dismissed. 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. The AAO's *de novo* authority is well recognized by the federal courts. *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.²

¹ 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.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B,

As set forth in the director's March 3, 2009 and the AAO's August 29, 2012 denials, the issue in this case is whether or not the petitioner has established that the beneficiary possessed the minimum experience required to perform the offered position.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of 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 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 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 Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also 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

which are incorporated into the regulations by the regulation at 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).

requirements:

EDUCATION

Grade School: 6 years.

High School: 4 years.

College: 2 years.

College Degree Required: No.

Major Field of Study: Not applicable.

TRAINING: None Required.

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

OTHER SPECIAL REQUIREMENTS: None.

The labor certification states that the beneficiary has the following experience:

1. Self-employment as a manager in the export/import business from 2002 until November 26, 2004, the date the beneficiary signed the labor certification. The beneficiary does not list the name of his business. This experience conflicts with the beneficiary's Form G-325A signed by the beneficiary on April 14, 2008 and filed in conjunction with his application to adjust status (2008 Form G-325A) because the beneficiary does not list this self-employment, but rather lists that he was working as a director at [REDACTED] from February 1999 until April 14, 2008. This inconsistency is not explained.³

Additionally, this experience conflicts with the experience as listed by the beneficiary on a Form G-325A signed by him on June 5, 2002 (2002 Form G-325A) and other documents in the record.⁴ On these documents, the beneficiary listed his last employment as being with [REDACTED] ending in December 1998. The beneficiary listed no employment after December 1998. This inconsistency is not explained.⁵

2. As a distribution/financial manager with [REDACTED] an import/export wholesale distributor, in [REDACTED] from February 1999 until January 2002. This experience conflicts with the beneficiary's 2008 Form G-325A wherein he states that he was working for [REDACTED] as a director from February 1999 until April 14, 2008. This inconsistency is not explained.⁶

³It is incumbent on 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, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

⁴The Form G-325A requires an applicant to list employment for the previous five years. Thus when the beneficiary signed his 2002 Form G-325A on June 5, 2002, he was required to list all of his employment going back to June 5, 1997.

⁵*Matter of Ho*, 19 I&N Dec. at 591-592.

⁶*Id.*

Additionally, this experience conflicts with the beneficiary's 2002 Form G-325A wherein he does not list an employment with Exagrimp. This inconsistency is not explained.⁷

3. A manager with [REDACTED] a bank/financial corporation, in [REDACTED] South America from October 1984 until December 1998.

No other experience is listed on the labor certification.

The regulation at 8 C.F.R. § 204.5(l)(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.

On motion, the petitioner indicated that it was not relying on the beneficiary's self-employment to qualify the beneficiary for the offered position, and thus, that the inconsistencies noted by the AAO about the beneficiary's self-employment are not relevant. The AAO disagrees. The petitioner's credibility relies on the consistency and detail of the evidence in the record. The priority date in this case is December 6, 2004. The beneficiary's statement that he was self-employed for two years from 2002-2004 is in direct contradiction to his statement on the April 14, 2008 G-325A that he was employed by Exagrimp from 1999 – 2008. This inconsistency calls into question the veracity of the petitioner's other evidence of record. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591(BIA 1988). The inconsistency was not addressed on appeal, nor did the petitioner submit individual objective evidence to establish the dates of his employment at Exagrimp.

The record contains an undated experience letter from [REDACTED] (the beneficiary's wife) as president of [REDACTED] on company letterhead stating that it employed the beneficiary as a financial and distribution manager from February 1999 until January 2002. The letter states it is an import/export and distribution concern that primarily deals with the importation and distribution of wholesale products from South America. The letter does not state if the job was full- or part-time. The letter lists the beneficiary's duties as follows:

develop and implement operating methods designed to eliminate operating problems and improve product quality through supervisory coordination; develop and implement a budget, cost controls, quality control standards. Obtain, analyze, and implement data referring to type, quantities, specifications, and delivery dates of products imported and distributed to clientele. Review and analyze production,

⁷*Id.*

maintenance, and company operational reports; revise production, and exportation schedules as a result of operational problems.

As discussed in the AAO decision, this position of financial and distribution manager conflicts with the position of director as listed on the beneficiary's 2008 Form G-325, which the petitioner has not explained.⁸ Additionally, there is an inconsistency between the labor certification and the beneficiary's 2002 Form G-325A, which petitioner has not explained. Therefore, because the petitioner has not resolved the inconsistencies with independent, objective evidence of the beneficiary's employment with [REDACTED], such as payroll documents, paystubs or paychecks, the decided that the petitioner has not established that the beneficiary was employed as a factory manager by [REDACTED]. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

The AAO noted in its decision, the record also contains an October 25, 2004 letter from [REDACTED] whose title is Coordinator in the Human Resources department. The letter indicates that it is a bank and states that the beneficiary worked at [REDACTED] from October 19, 1984 until December 30, 1998, first as a professional, then as a branch manager at four different branches. The letter lists a number of duties consistent with banking. The letter does not indicate if the beneficiary's employment was full- or part-time. There is also a letter dated November 10, 1998 on [REDACTED] letterhead signed by [REDACTED] as personnel manager indicating the beneficiary worked there since 1984 for the first four years as an agronomic engineer and from 1988 until the date of the letter as a financial general manager of [REDACTED]. This letter does not indicate if the beneficiary's employment was full- or part-time. It appears that [REDACTED] are the same company. Based on these letters, the AAO decided that the petitioner has not established that the beneficiary's experience at this employer was as a factory manager.

Counsel reasserts, on motion, that the beneficiary's experience at [REDACTED] is substantially similar to the duties outlined on the labor certification. Counsel cites the letter of experience from [REDACTED] stating that from February 1999 until January 2002, the beneficiary worked and functioned, on a full-time basis, as [REDACTED] financial and distribution manager, and was also "listed as a nominal director."

On motion, in addition to the letter from [REDACTED] the petitioner submits as evidence of the beneficiary's employment with [REDACTED]

⁸*Id.*

- 1) An H-1B approval notice, dated February 25, 1999, valid from February 24, 1999 to January 15, 2002, issued to [REDACTED] petitioner, and to the beneficiary of the instant petition as the beneficiary of the H-1B petition.
- 2) Copies of the beneficiary's Income Tax Returns for 2001, 2002, and 2003, where his occupation is shown as a "manager," and 2001 Form W-2 issued to the beneficiary.

It is noted that although [REDACTED] states that from February 1999 until January 2002, the beneficiary was employed full-time as a financial and distribution manager, and the record reflects that the beneficiary was granted H-1B visa status by USCIS to work for [REDACTED] from February 24, 1999 to January 15, 2002, the beneficiary reports Form W-2 wages from [REDACTED] Corporation of only \$5,547, in 2001, and claims no W-2 wages in 2002. On the beneficiary's IRS tax form 1040, Schedule C for both 2001 and 2002 the beneficiary indicates his business as "distributor." The petitioner does not provide any additional corroborating documentation of the claimed experience with [REDACTED]. The evidence provided does not establish the beneficiary's full-time employment as a financial and distribution manager with [REDACTED] from 2000 – 2002.

Moreover, as noted in the AAO's previous decision, the petitioner has not established that the beneficiary's claimed experience as a director or distribution/financial manager are similar enough in scope to those of a factory manager to conclude that, even were the two years of experience established by a preponderance of the evidence, that the beneficiary had two years of experience as a factory manager as of the priority date.

Therefore, the petitioner has not established that the beneficiary has the required two years of experience as a factory manager, or that he is qualified for the immigrant visa.

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 motion to reopen and reconsider is granted. The appeal is dismissed. The denial of the petition is undisturbed.