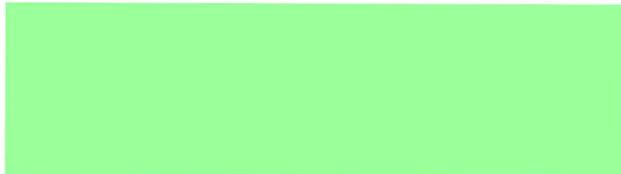




U.S. Citizenship  
and Immigration  
Services

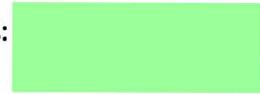
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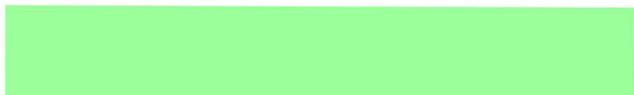
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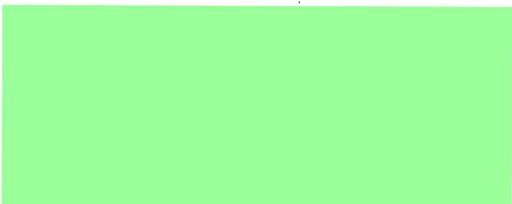
IN RE:

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)



**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 Director, Texas Service Center (director), denied the immigrant visa petition, and the matter was appealed to the Administrative Appeals Office (AAO). The AAO remanded the matter to the director for consideration. The director again denied the petition, and certified the matter to the AAO for review.<sup>1</sup> Certifications by field office or service center directors may be made to the AAO “when the case involves an unusually complex or novel issue of law or fact.” 8 C.F.R. § 103.4(a)(1). The regulations further state, in pertinent part, as follows: “*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision.” 8 C.F.R.

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<sup>1</sup> Certifications by field office or service center directors may be made to the AAO “when a case involves an unusually complex or novel issue of law or fact.” 8 C.F.R. § 103.4(a)(1). The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: “*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision.” The following subsection of that same regulation states as follows: “*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO].” 8 C.F.R. § 103.4(a)(5).

The AAO’s jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. See DHS Delegation No. 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO’s jurisdiction is limited to those 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(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

The regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) states in pertinent part:

(iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;

...

(B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act;

Pursuant to the delegation cited above, the AAO exercises the appellate jurisdiction formerly exercised by the Associate Commissioner for Examinations.

In the instant case, the petition was denied by the director as the director found that the beneficiary has not met all of the minimum requirements of the labor certification. Therefore the decision does not fall within the exception clause in subparagraph (B) in the regulation quoted above, which pertains only to a denial based upon a lack of a certification by the Secretary of Labor. The denial decision therefore was within the appellate jurisdiction of the AAO. Therefore, the certification of the denial decision is authorized by the regulation at 8 C.F.R. § 103.4(a)(5).

§ 103.4(a)(4). “*Certification to [AAO]*. A case described in paragraph (a)(4) of this section may be certified to the [AAO].” 8 C.F.R. § 103.4(a)(5). The AAO conducts its review on a *de novo* basis, before issuing a decision. *See Soltane v. DOJ*, 361 F.3d 1143 (3d Cir. 2004).

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a painter. As required by statute, the petition is accompanied by 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 possessed the required minimum experience for the proffered job as of the priority date. The director denied the petition accordingly.

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.

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 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, including new evidence properly submitted upon appeal.<sup>2</sup>

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary meets the experience requirements. The petitioner has not submitted sufficient evidence to establish that the beneficiary has the required skills or other requirements as stated on the labor certification.

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 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).

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<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, 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).

(b)(6)

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). In this case, the ETA Form 9089, Part H-6 requires twenty-four months of experience in the offered job.

In Part K, the beneficiary listed the following employers and dates of employment:

February 1, 1998 to December 31, 1998  
May 1, 1999 to November 1, 2000  
November 1, 2000 to January 31, 2002  
February 1, 2002 to April 30, 2002  
May 1, 2002 to Present

In support of the experience claimed on the ETA Form 9089, the beneficiary provided a certified English language translation of an experience letter written by [REDACTED] of [REDACTED] which asserts the beneficiary was employed there from February 1, 1998 to February 15, 1999.<sup>3</sup> A second letter from [REDACTED] asserted that the beneficiary was employed with that employer from March 2000 to January 2001.<sup>4</sup> Even if these letters

<sup>3</sup> We have noted the experience claimed by the beneficiary on the ETA Form 9089, and we note that there are substantial discrepancies between that form, the experience letters submitted in support of that form, and the Form G-325A, Biographic Information Sheet, also included in the record.

The beneficiary states on the Form G-325A that he was employed by [REDACTED] from February 1998 to April 2000. Yet on the ETA Form 9089, he claims to have worked there from February 1998 to December 1998. The letter purportedly from that employer claims he was employed from February 1998 to February 1999. Thus, the beneficiary only claimed eight months of experience from this employer, but provided a letter claiming twelve months.

Additionally, *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

It 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.

<sup>4</sup> The beneficiary states on the Form G-325A that he was employed by [REDACTED] from April 2000 to the "present time," which at the time the form was signed on July 31, 2002. However, the letter in the record from [REDACTED] alleges the beneficiary was employed there from March 2000 to January 2001. The beneficiary asserts on the ETA Form 9089 that he was employed there from February 2002 to April 2002. Thus, the beneficiary claimed three months of experience on the ETA Form 9089 for this employer, but provided a letter alleging nearly ten months.

were accepted, these two letters combined assert that the beneficiary has roughly 22 months experience.<sup>5</sup>

The petitioner provided a letter stating it has employed the beneficiary since 2002. However, 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 or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position.<sup>6</sup> Specifically, the petitioner indicates that questions J.19 and J.20, which ask about

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<sup>5</sup> Additionally, on the ETA Form 9089 beneficiary asserts that he was employed by [REDACTED] from November 2000 to January 2002. This employer does not appear on the Form G-325A, but during this same time on that form, the beneficiary alleges to have been employed by [REDACTED]. Finally, the Form 1099s issued by [REDACTED] to the beneficiary indicate the beneficiary was self-employed.

<sup>6</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

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 answered "no." 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>7</sup> and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the

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require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

- (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>7</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 indicates in response to question K.1. that his position with the petitioner was as a painter, 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 he 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 beneficiary to qualify for the proffered position. Additionally, 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 director informed the petitioner of the above issues in a Request for Evidence (RFE) issued on April 20, 2012. In response, the petitioner provided, *inter alia*, letters from the beneficiary, [REDACTED]

The beneficiary blamed his faulty memory for the inconsistencies in his employment and experience history. The beneficiary conceded that at the time he alleged to have been employed by [REDACTED] in the United States, the beneficiary was still living in Bolivia. The beneficiary stated he forgot when he came to the United States. It seems unlikely that one would forget the timing of a major life event such as an international change of residence. This is especially true in light of the fact that the beneficiary was issued a visa to enter the United States, date stamped February 15, 2000, while he was living in Bolivia. We note that the beneficiary claimed to have entered the United States on March 9, 2000.

The record contains experience verification letters from [REDACTED]. However, the beneficiary's description of his work history contradicts these experience letters.

The letter from [REDACTED] states that he employed the beneficiary from an undetermined date in May 2000 to an unknown date in December 2000, and for five months in 2001. He states there are no personnel records to show exactly which dates the beneficiary was employed, but there are Forms 1099 which show that the employer paid the beneficiary \$21,188 in 2000, and \$12,807 in 2001. [REDACTED] states that he paid the beneficiary \$13.00 per hour, and that the beneficiary worked on average forty hours per week. He does not state how he remembered the exact rate of compensation. [REDACTED] does not remember the exact dates of employment, and consequently cannot confirm the exact amount of work experience the beneficiary gained.

The letter from [REDACTED] states that his company employed and paid the beneficiary \$7,007 in 2000, \$10,930.09 in 2001, and \$4,955.83 in 2002. The letter states that the beneficiary was paid at a rate of \$11.50 per hour. [REDACTED] does not remember the exact dates of employment, and consequently cannot confirm the exact amount of work experience the beneficiary gained.

Additionally, from the evidence in the record, the beneficiary's work history is inconsistent. If taken at face value, the record shows that:

- The beneficiary lived outside the United States for 9.7 weeks in 2000;

- [REDACTED] employed the beneficiary for 15.2 weeks in 2000;
- [REDACTED] employed the beneficiary for 40.8 weeks in 2000.

Thus, the beneficiary accounts for 65.7 weeks in 2000. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa 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, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The record contains a statement from the beneficiary, through counsel, which shows that the beneficiary ran his own business. He employed painters, paid for supplies and expenses and was paid to perform work for others. In light of this evidence, and the inconsistencies in the beneficiary's claimed experience, it is impossible to determine exactly how much qualifying experience the beneficiary had before the priority date.

The evidence submitted to address the inconsistencies noted in the beneficiary's work experience does not establish that the beneficiary meets the requirements of twenty-four months of experience as stated on the labor certification. Rather, the evidence indicates that the beneficiary worked various painting jobs for unspecified periods of time in 2000, 2001, and 2002. 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 director's decision denying the petition is affirmed.