

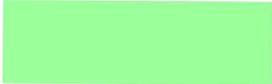
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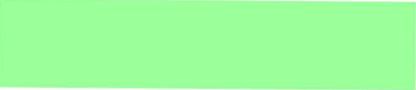
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: **MAY 07 2013** OFFICE: TEXAS SERVICE CENTER

FILE: 

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", with a long horizontal flourish extending to the right.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, revoked the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a jewelry business and seeks to employ the beneficiary permanently in the United States as a jeweler. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor (DOL), accompanied the petition. The director approved the petition on April 28, 2006. Upon further reviewing the record and the petitioner's responses to the notices of intent to revoke (NOIR)¹, the director determined that the documents evidencing the beneficiary's experience contained inconsistent information and therefore did not satisfy the experience requirement indicated on the labor certificate. Therefore, the director revoked the approval of the petition on December 29, 2011. The petitioner timely appealed the director's decision.

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.²

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.

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 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on August 4, 2005.³ The Immigrant Petition for Alien Worker (Form I-140) was filed on November 17, 2005.

¹ The record contains two NOIRs, one dated January 28, 2010 and the other undated. The petitioner's counsel indicates the undated NOIR was mailed out on November 3, 2011.

² 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).

³ 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.

In evaluating the beneficiary's qualifications, U.S. Citizenship and Immigration Services (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. 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). 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).

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

On the ETA Form 9089, the "job offer" position description for a jeweler provides:

Under direct supervision, help make, adjust and repair jewelry made from gold (24K), silver, platinum and precious gems. Assist in examining jewelry for defects or damage. Aid in customizing jewelry according to specific consumer requests and tastes. Help engrave letters and symbols on jewelry. Assist in mounting gems on rings, brooches, bracelets and necklaces. Polish metals and gems using specific cleaning/shining methods to give a brilliant shine attractive to potential buyers.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Minimum level required: "None."

H.5. Training: None required.

H.6. Is experience in the job offered required for the job?

The petitioner checked "yes."

H.6-A. If yes, number of months experience required:

The petitioner indicated "24" months.

H.8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "no" to this question.

H.9. Is a foreign educational equivalent acceptable?

The petitioner checked "yes."

H.10. Is experience in an alternative occupation acceptable?

The petitioner checked "no" to this question.

The labor certification states that the beneficiary qualifies for the offered position based on his experience as a jeweler with [REDACTED] from May 31, 1997 until January 1, 1999; and with [REDACTED] from January 31, 1996 until May 1, 1997. No other experience is listed. The beneficiary signed the labor certification on August 18, 2005, under a declaration that the contents are true and correct under penalty of perjury.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains two experience letters from [REDACTED] the owner and the former president of [REDACTED] dated February 17, 2003 and February 23, 2010, stating that he employed the beneficiary as a jeweler from May 1997 until January 1999. Although the 2003 letter does not provide a description of the beneficiary's experience, the 2010 letter indicates that the beneficiary examined and repaired various jewelries while employed by [REDACTED]

The record also contains a letter from [REDACTED] the owner of [REDACTED] dated February 17, 2003, indicating that the beneficiary was employed from January 1996 to May 1997. However, the letter does not describe the duties in detail. Furthermore, the record reflects that during an interview by a USCIS investigator on December 10, 2003, [REDACTED] indicated that the beneficiary was employed by [REDACTED] from 1993 until 1999, which is inconsistent with his February 2003 letter and the information provided by the beneficiary on the ETA Form 9089.

The petitioner also submits two "Certificate of Experience" letters from the [REDACTED]. The first one, signed by [REDACTED] Director, dated February 21, 2003, indicates that the beneficiary was employed by [REDACTED] from February 1988 until July 1993 as a jeweler.⁴ The letter states that the certificate was issued by the association because [REDACTED] was no longer in business. This letter from the association further indicates that the association maintains personnel records of the member companies and therefore can verify the beneficiary's employment history. The record contains a second letter from the [REDACTED] signed by [REDACTED] Chairman, on February 18, 2010, listing the beneficiary's experience from February 1988 until January 1999, also including his high school and military service years. The AAO notes that the petitioner did not list [REDACTED] on the labor certificate as one of the beneficiary's employers. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's ETA Form 750B, lessens the credibility of the evidence and facts asserted.

Additionally, the petitioner submits a letter, dated November 16, 2011, indicating that beneficiary was observed performing certain skills as part of its hiring practice. The petitioner states that the beneficiary has demonstrated skills of an experienced jeweler and meets their two-year-experience requirement. Similarly, a letter from [REDACTED] the owner of the beneficiary's previous petitioner, dated November 18, 2011, indicates that after assessing the beneficiary's skills, he is convinced that the beneficiary possesses a minimum of two years of experience as a jeweler. The AAO notes that the letters from the current and the previous petitioners reflecting their observations of the beneficiary's skills as part of their hiring process do not satisfy the evidence requirement for the beneficiary's experience listed on the labor certificate. 8 C.F.R. § 204.5(1)(3)(ii)(A).

On appeal, counsel asserts that the petitioner submits circumstantial evidence to show that the beneficiary possesses two years of experience because new certificates of experience from the previous employers are unattainable. Moreover, counsel asserts that [REDACTED] the owner of [REDACTED] did not deny the beneficiary's past employment, rather, he confused him with another employee who had the last name [REDACTED]. Counsel requests a new overseas investigation to verify the new facts. Counsel also provides [REDACTED] wife's phone number for USCIS to confirm the beneficiary's employment with [REDACTED]. Counsel further asserts that the experience letter, which does not contain a job description, should be considered because all jewelers have the same or very similar job duties.

The AAO disagrees. The regulation is unambiguous that the beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(1)(3)(ii)(A). The

⁴ The record also contains a letter from [REDACTED] dated November 18, 2003, indicating that the association never issued the certificate dated February 21, 2003, that the petitioner submitted to USCIS.

AAO also notes that it is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988) (stating that 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 visa petition). The current record fails to explain or reconcile the inconsistencies regarding the beneficiary's employment dates with [REDACTED]. Moreover, 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. Counsel's requests for USCIS to conduct a new overseas investigation and providing USCIS a phone number for the former employer's wife for USCIS to verify the beneficiary's employment history do not satisfy the petitioner's burden of proof. The record supports only 19 months of experience for the beneficiary while he was employed by [REDACTED] from May 1997 until January 1999; therefore, the beneficiary does not meet the 24-month-experience requirement as indicated on the labor certification.

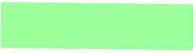
The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A) of the Act.

Beyond the decision of the director, the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. With respect to the petitioner's ability to pay, the regulation at 8 C.F.R. § 204.5(g)(2), in pertinent part, provides:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the instant case, the ETA Form 9089 labor certification was accepted for processing on August 4, 2005. The rate of pay or the proffered wage specified on the ETA Form 9089 is \$7.87 per hour, or \$16,369.60 per year. To show its ability to pay, the petitioner submits its corporate tax return for 2004, which indicates that the petitioner's fiscal year runs from July 1, 2004 to June 30, 2005. This evidence does not cover the priority date of August 4, 2005 onward. The record contains no evidence demonstrating that the petitioner has the ability to pay the proffered wage from the priority date onward.

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The petition will be 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, that burden has not been met.

ORDER: The appeal is dismissed.