

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

(b)(6)

Date: **MAY 08 2013**

Office: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

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

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is August 25, 2006, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The director's decision denying the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date.

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. 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

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);

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 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).

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:

- H.4. Education: High School.
- 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: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: None.

On the ETA Form 9089, the beneficiary claims to qualify for the position based on experience as a manager with [REDACTED] from February 1, 1998 to March 3, 2001. 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(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.

The record contains an experience letter dated May 27, 2008 from [REDACTED] owner on [REDACTED] letterhead stating that he employed the beneficiary as a manager from February 1, 1998 to March 31, 2001. The petitioner also submitted copies of the Articles of Incorporation of [REDACTED]

listing [REDACTED] as a director along with the letter. The documents show that [REDACTED] operated as [REDACTED].

The director denied the petition, stating that it was unclear whether or not [REDACTED] was in a position to write an experience letter for [REDACTED]. Additionally, the director's decision stated that when attempting to contact [REDACTED] via the phone number on the experience letter, the person answering the phone had no knowledge of [REDACTED] or the beneficiary. In light of this information, the director denied the petition finding that the petitioner has not established the beneficiary had the required 24 months of experience.

The petitioner then filed a motion to reopen and reconsider with the director and submitted the following evidence:

1. Affidavit of [REDACTED] dated March 2, 2011 stating that the beneficiary worked at [REDACTED] as a manager from February 1, 1998 to March 31, 2001. [REDACTED] also states that on May 11, 2001, he sold the business to [REDACTED]. [REDACTED] further states that he provided the 2008 letter at the request of the attorney handling the case and was not representing that he still owner the [REDACTED] at that time;
2. Specialty Warranty Deed with Vendor's Lien dated May 11, 2001 signed by [REDACTED] as president of [REDACTED];
3. Seller's Statement dated May 11, 2001 showing the sale of [REDACTED] to [REDACTED] signed by [REDACTED] as president;
4. Articles of Incorporation for [REDACTED] that list [REDACTED] as one of three directors;
5. Texas State Incorporation records listing [REDACTED] as the registered agent for [REDACTED];
6. Texas Franchise Tax Public Information Report dated March 16, 2001 for [REDACTED] listing [REDACTED] as president;
7. A lawsuit filed jointly against [REDACTED] and [REDACTED] and
8. Internal Revenue Service (IRS) Forms 1120S for [REDACTED] for 1998 to 2001, signed by [REDACTED]. The 1998, 1999 and 2000 returns were all stamped as received by the IRS District Director in Houston, TX.

The director dismissed the motion stating that the petitioner did not meet the requirements of a motion to reopen or reconsider. In dismissing the motion, the director stated that the 2008 employment letter in the record contradicted [REDACTED] statement that he sold the business in 2001.

Upon review of the record on appeal, the AAO issued a request for evidence (RFE) notifying the petitioner that the 2008 employment letter written under the name of a business that closed in 2001 raised doubt about the veracity of the letter and that 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, 591-592 (BIA 1988). As such, 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. *Id.* The AAO informed the petitioner that [REDACTED] affidavit attesting to the beneficiary's experience does not meet this

threshold. The documents submitted serve as objective documentary evidence that [REDACTED] existed as a business, was owned by [REDACTED] and was sold by [REDACTED] on May 11, 2001; however none of these documents are objective documentary evidence that the beneficiary was in fact working for [REDACTED] during the time in question or that the beneficiary has the claimed experience. Therefore, the AAO requested that the petitioner submit independent objective documentary evidence that the beneficiary has the claimed experience with [REDACTED]. *Id.* Such evidence may include, but was not limited to, IRS Forms W-2 or paychecks issued to the beneficiary by [REDACTED]. If such primary evidence was unavailable, the petitioner may submit secondary evidence in accordance with the regulations at 8 C.F.R. § 103.2(b)(2)(i).

In a response dated April 2, 2013, counsel for the petitioner renewed his assertions that [REDACTED] was only issuing a new experience letter at the request of prior counsel and that the 2008 letter was not meant to represent that [REDACTED] still owned [REDACTED]. Counsel states that the beneficiary was employed by [REDACTED] illegally and therefore does not have documentary evidence of his employment. However, 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).

The petitioner failed to submit independent, objective evidence or secondary evidence to establish that the beneficiary had the required two years of experience. 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 professional or skilled worker under section 203(b)(3)(A) of the Act.

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 appeal is dismissed.