



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAY 21 2013**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 Director, Nebraska Service Center (director), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as an adult care facility. It seeks to permanently employ the beneficiary in the United States as a caregiver. The petitioner requests classification of the beneficiary pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3)(A)(iii), which provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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 30, 2004. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner did not demonstrate that the beneficiary possessed the minimum experience required to perform the offered position by the priority date.

The record shows that the appeal is properly filed 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.¹

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, 1008 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

¹ 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).

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

High School: 4 years

College: 0 years

College Degree Required: None Required

TRAINING: None Required

EXPERIENCE: 3 months in the proffered job

OTHER SPECIAL REQUIREMENTS: Character Reference Required

The only experience listed on the application for labor certification states that the beneficiary was employed by [REDACTED] in the Philippines as a customer service representative and performed clerical duties. 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.

In response to the director’s December 22, 2008, Request for Evidence (RFE), the petitioner asserted that the beneficiary had experience as a caregiver with [REDACTED] California. An undated experience letter from [REDACTED] asserts that the beneficiary was employed by [REDACTED] as a caregiver in an assisted living center from August 2003 until June 2004. As noted by the director, when evaluating the petition, USCIS records indicate that [REDACTED] did file a non-immigrant employment based petition on behalf of the beneficiary. This petition sought to employ

the beneficiary part-time (20 hours per week) as a business operations analyst, not a caregiver. However, the Form I-129 was not filed until November 25, 2003 (nearly four months after the beneficiary purportedly began working for [REDACTED] and was ultimately denied. This denial was appealed to the AAO, and the appeal was dismissed.

On appeal, the petitioner submitted copies of what purport to be pay stubs issued by [REDACTED] to the beneficiary. Based on research in all available databases, the Social Security Number (SSN) listed on the pay stubs is not valid. Further, nothing on the pay stubs indicates the job title, job duties, or experience of the beneficiary.

The record of proceeding includes two experience verification letters from [REDACTED]. One was undated and was submitted in response to the RFE. One was dated May 24, 2010 and was submitted on appeal. Not only do these letters bear significant differences with each other, but the letters also bear significant differences with the letter submitted by [REDACTED] in support of the non-immigrant petition noted by the director. The AAO notes that both experience letters claim to be signed by [REDACTED] however, the two signatures are very different and do not appear to be from the same person. Although the logo on the experience letter matches, it does not match the logo of the non-immigrant support letter dated November 3, 2003. However, the font of the address, phone, and fax for [REDACTED] on the undated experience letter matches the November 3, 2003 non-immigrant support letter, but not on the May 24, 2010 experience letter.

In her brief on appeal, counsel asserts that the undated experience letter was written in 2009 and that it is possible that [REDACTED] would have changed its logo and letterhead since 2003. It is unlikely however, that a company would change the font on its letter head from 2003 to 2009, but later revert to its old font in 2010. It is further unlikely that the signature of a company's Chief Financial Officer/Human Resources Director would change drastically from 2009 to 2010. These inconsistencies, combined with the fact that the experience letters claim experience for the beneficiary as a caregiver when she was actually petitioned for as a business operations analyst, raise doubts about the veracity of the beneficiary's actual experience.

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). At present, the record does not contain evidence explaining the above inconsistencies, which seriously undermines the credibility of all submitted documentation. As counsel points out in her brief and Notice of Intent to Deny (NOID) response, the petitioner is not required to explain the actions of a third party [REDACTED]. However, the petitioner is required to submit independent and objective evidence to support the beneficiary's claimed qualifying experience. Here, the additional experience letter and the pay stubs do not corroborate the beneficiary's claimed experience, but rather raise further doubts.

Therefore, the petitioner has not established that the beneficiary met all of the requirements of the offered position set forth on the labor certification by the priority date.

Furthermore, the AAO notes that, 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 Form ETA 750B, lessens the credibility of the evidence and facts asserted. This fact substantially weakens the value of any letter submitted by [REDACTED] even without the above noted inconsistencies.

Beyond the decision of the director,² the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. See 8 C.F.R. § 204.5(g)(2).

According to USCIS records, the petitioner has filed fifteen (15) I-140 and I-129 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document the priority date, proffered wage, or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

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.

² An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).