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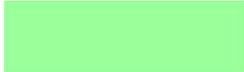
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Service  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



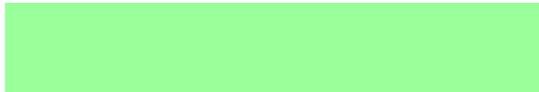
DATE: NOV 12 2013

OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

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.

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center (the director), and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The petitioner filed a motion to reopen and motion to reconsider with the AAO. The motions are granted, the AAO's and director's decisions will be withdrawn and the petition remanded for a new decision.

The petitioner is a dental practice. It seeks to employ the beneficiary permanently in the United States as a laboratory technician 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). Section 203(b)(3)(A)(i) of 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.

As required by statute, 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 April 27, 2009, 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 concluded that the beneficiary does not possess the minimum two years of experience in the proffered profession required to perform the offered position by the priority date. The AAO affirmed the director decision, citing inconsistencies and lack of independent, objective evidence, regarding the beneficiary's qualifying employment. See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The record shows that the motions are 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). On motion, counsel submits a brief, a new translation of a certificate of employment, a certificate of income and copies of financial documents requested by the AAO in a request for evidence (RFE).

8 C.F.R. § 103.5(a) provides, in pertinent part:

(2) *Requirements for motion to reopen.*

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . .

(3) *Requirements for motion to reconsider.*

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 Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

On motion, counsel contends that the AAO failed to look at the beneficiary's complete history of education, licensing, employment and experience and unfairly dismissed the beneficiary's experience as owner, operator and dental technician of his own dental offices. Counsel contends that the evidence establishes that the beneficiary has the 24 months of required experience for the proffered position.

A petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977). See also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). 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 *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 (1<sup>st</sup> Cir. 1981).

The required education, training, experience and skills for the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the offered position required 24 months of experience in the proffered position.

The labor certification states that the beneficiary qualifies for the offered position based on the beneficiary's experience as an owner/dental technician with [REDACTED] South Korea, from August 22, 1991 to February 21, 2002; an owner/dental technician with [REDACTED] South Korea, from March 15, 2002, to June 9, 2003; a full-time lecturer with [REDACTED] South Korea, from March 1, 2004 to November 1, 2004; and in the proffered position with the petitioner from October 1, 2007, until April 27, 2009, the date on which the ETA Form 9089 was filed. 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 record contains a license of Dental Lab Technician issued to the beneficiary by the [REDACTED] on May 26, 1990. It also contains a July 15, 1999, business registration certificate (tax exemption) for [REDACTED] reflecting that the business was opened in September 11, 1974 by [REDACTED] and is located at [REDACTED]

The record contains a certificate of employment dated August 17, 2011, from [REDACTED] president, on [REDACTED] letterhead, stating that the company employed the

beneficiary as a special technician in the removable prosthesis laboratory department from November 10, 1988 to July 31, 1991. The letter states that the beneficiary's duties were to make partial dentures, full dentures, retainers and temporary crowns and bridges.

The record contains a certificate of employment dated July 5, 2010, from [REDACTED] president, [REDACTED] stating that the company employed the beneficiary as dental technician from November 10, 1988 to July 31, 1991. The letter does not list any duties of the beneficiary, nor does it provide a description of the beneficiary's experience. Additionally, a translation of the certificate of employment dated July 26, 2010, states that the beneficiary was employed by [REDACTED] prosthetic lab as a dental technician from November 10, 1988 to July 31, 1991, but lists [REDACTED] as the signatory of the certificate of employment. This inconsistency cast doubt on the beneficiary's claimed employment experience, especially in light of the fact that this experience did not appear on the labor certification. See *Matter of Ho*, 19 I&N Dec. at 582, 591. 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.

On motion, the petitioner submits a new translation of the above-referenced certificate of employment dated December 13, 2012, stating that [REDACTED] employed the beneficiary in the department of prosthetic removable parts lab, as a dental technician from November 10, 1998 to July 31, 1991. The petitioner also submits a certificate of income from the director of the [REDACTED] District Tax Office dated January 17, 2013, reflecting that between January 1988 and December 1991, the beneficiary earned income from [REDACTED]. Specifically, the beneficiary earned 360,000 won in 1988; 2,160,000 won in 1989; 2,400,000 won in 1990; and 1,400,000 won in 1991 as wage and salary income from [REDACTED]. While the experience used to qualify the beneficiary for the proffered position does not appear on the labor certification, the AAO is not inclined to follow *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), as the experience is not inconsistent with the information contained on the labor certification, the Form I-140 immigrant petition or the beneficiary's resume. The petitioner has provided independent, objective evidence of the beneficiary's employment with the qualifying employer.

Thus, the petitioner has overcome the ground for denial in the director's decision regarding the beneficiary possessing the required 24 months of experience in the proffered position. Accordingly, the director's decision will be withdrawn.

However, the director made no findings in his decision as to whether the petitioner has established its continuing ability to pay the proffered wage.

Therefore, the petition will be remanded to the director for the consideration of this issue, and any other issue the director deems appropriate. The director may request additional evidence

from the petitioner, if needed, and the petitioner may submit additional evidence within a reasonable time period to be set by the director. The director will then issue a new decision.

As always in visa petition proceedings, the burden of proof rests entirely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

**ORDER:** The motions are granted. Upon reopening and reconsideration, the director's decision dated August 6, 2011, and the AAO's decision dated November 16, 2012, are withdrawn. The petition is remanded to the director for the issuance of a new decision.