

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: SEP 06 2013 OFFICE: NEBRASKA SERVICE CENTER

IN RE:

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 (AAO) 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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: On February 6, 2006, United States Citizenship and Immigration Services (USCIS), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the Director, Nebraska Service Center on May 23, 2006. The director, however, revoked the approval of the immigrant petition on January 29, 2010. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The petitioner then filed a motion to reopen and reconsider, which was granted, the previous decision of the AAO was affirmed, and the approval of the petition remained revoked. The petitioner has filed a second motion to reopen and reconsider. The motion to reconsider will be granted, the previous decision of the AAO will be affirmed, and the approval of the petition will remain revoked.

The petitioner describes itself as a real estate company. It seeks to employ the beneficiary permanently in the United States as a development manager pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification. As stated earlier, this petition was approved on May 23, 2006, but that approval was revoked in January 2010. The director determined that the evidence submitted concerning the beneficiary's education was issued by an institution considered a "Diploma Mill" and not an institution of higher education and were therefore both insufficient to establish that the beneficiary had the education claimed, but also cast doubt about the validity of the other evidence submitted especially concerning the evidence submitted to verify the beneficiary's experience. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.2.

On July 17, 2012, the AAO dismissed the subsequent appeal, affirming the director's denial. The petitioner then filed a motion to reopen and reconsider the AAO decision. Those motions were granted and the previous AAO decision affirmed. The petitioner then filed a second motion to reopen and reconsider. The record shows that the motions are properly filed and timely. The motions to reconsider will be granted based on arguments made by counsel. 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.

¹ 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.

Concerning the requirements of the position, it is the Department of Labor's (DOL) responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification. Also, 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).

Here, counsel states that the petitioner requests classification of the beneficiary only in the skilled worker category pursuant to section 203(B)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A). The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(B) states:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the [labor certification]. The minimum requirements for this classification are at least two years of training or experience.

The determination of whether a petition may be approved for a skilled worker is based on the requirements of the job offered as set forth on the labor certification. *See* 8 C.F.R. § 204.5(1)(4). The labor certification must require at least two years of training and/or experience. Relevant post-secondary education may be considered as training. *See* 8 C.F.R. § 204.5(1)(2).

Accordingly, a petition for a skilled worker must establish that the job offer portion of the labor certification requires at least two years of training and/or experience, and the beneficiary meets all of the requirements of the offered position set forth on the labor certification.

In evaluating 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*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *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.

The required education, training, experience and special requirements for the offered position are set forth at Part A, Items 14 and 15, of Form ETA 750. In the instant case, the labor certification states that the position has the following minimum requirements:

Block 14:

- | | |
|--------------------------|--|
| College Degree Required: | Master’s degree in management or business administration. “In alternative, employer will accept 10 years of managerial experience involving applicant in increasingly high levels of authority & supervision.” |
| Experience: | 6 years in the job offered or in the alternate occupation of Manager (General). |
| Grade School: | 8 years |
| High School: | 4 years |
| College: | 6 years |

The AAO appeal and decision on the first motions to reopen and reconsider considered copies of recruitment materials submitted by the petitioner concerning its minimum requirements for the position as communicated to potential job applicants. The AAO analyzed the advertisements submitted and noted that the newspaper advertisements stated that the requirements of the position are: “Master’s in Mgmt or Biz Adm & substantial managerial experience.” As stated previously, none of the newspaper advertisements contained the alternate requirements stated on the labor certification of “10 years of managerial experience involving applicant in increasingly high levels of authority & supervision.” In addition, the advertisements submitted were silent as to whether the petitioner intended the six years of college to be included in the alternate experience stated, which is the argument made by counsel on appeal and with its motions.² The AAO concluded that the terms

² With the instant motion, counsel asserts that the AAO ignored the in-house advertisement for the position in its previous analysis. The petitioner’s in-house advertisement states that the requirements for the position are:

Master’s degree in Management or Business Administration + 6 yrs exp in job offered or as Manager-General (In alternative, employer will accept 10 yrs of Managerial experience involving applicant in increasing high levels of authority and supervision).

of the labor certification require a master's degree in management or business administration plus six years of college. The beneficiary does not possess six years of college in any discipline. The petitioner failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification by the priority date. Therefore, the AAO found that the beneficiary does not qualify for classification as a skilled worker.

Counsel states in the brief submitted with the instant motions, as he stated in the previously submitted brief in support of the first motion to reopen and reconsider, that the six years of college would culminate in the Master's degree and is thus included in the education option for qualification as opposed to qualifying through the 10 years of progressive managerial experience listed. Specifically, counsel states that the labor certification should be read as: six years of college with a master's degree in management or business plus six years of experience or 10 years of managerial experience involving applicant in increasingly high levels of authority & supervision. Counsel reiterates his assertion that the AAO's interpretation of the labor certification requirements could potentially require an applicant to demonstrate six years of collegiate education in addition to a Master's degree, which would be counterintuitive. Counsel also argues that the AAO must accept the petitioner's interpretation of the position requirements.

The AAO may accept the petitioner's interpretation of the minimum requirements for the position, however, those minimum requirements must have been communicated to potential applicants. Counsel cites to correspondence between USCIS and the petitioner as evidence of its intent for the minimum requirements for the position, however, as stated throughout the process, whatever intent the petitioner had cannot have solely been communicated to USCIS, but must also have been communicated to potential job applicants. The petitioner has not submitted any evidence to support counsel's interpretation of the requirements of the position as stated on the labor certification. Although six years of collegiate education may culminate in a master's degree for some students, USCIS may not ignore a term of the labor certification. *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); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The terms of the labor certification require six years of collegiate education regardless of any degree achieved. As a result, under the terms of the labor certification an applicant with a U.S. Master's degree would qualify for the position as that degree presumes six years of collegiate education, but also an applicant with six years of collegiate education who holds no degree would qualify if he/she met the alternate experience requirement. The recruitment did not indicate that the petitioner was only interested in

The in-house advertisement is not clear as to what the alternative requirements apply. Even if we were to read the requirements in the way that counsel urges us to, a clear intent to all applicants has not been expressed as the newspaper advertisements, which reach a broader audience, do not contain any such alternative.

the resulting degree as opposed to the knowledge and training gained through collegiate education.³ As a result, we may not ignore this requirement as stated by the petitioner on the labor certification. Counsel asserts with the motion that the AAO's interpretation of the labor certification ignores the expressed alternative requirement and that the AAO may not pick and choose which requirements to accept. The labor certification as written, however, provides an alternative to the degree required, not to the number of years of education required. As a result, the AAO accepts that the degree requirement has an alternative which may be met through experience as opposed to a Master's degree. The number of years of education required has no such expressed alternative.

Counsel on motion additionally asserts that as DOL certified the labor certification, it must have accepted its interpretation that the alternative expressed in space 15 applied to all of the spaces in block 14 as opposed to the space for degree requirement containing the asterick. As stated above, DOL's role in the labor certification process is to determine whether the requirements of the position are in keeping with industry standard and to determine whether U.S. workers are available to fill the position. DOL does not determine whether the beneficiary meets the requirements of the position; that role is delegated to USCIS. USCIS does not dispute that the requirements of the position are different than those expressed on the labor certification, the only issue is whether the beneficiary meets the requirements as set forth on the labor certification. Similarly, the AAO is not stating that the petitioner did not conduct its recruitment in keeping with DOL requirements, the finding is limited to whether the petitioner's recruitment materials expressed to potential U.S. workers that the minimum requirements for the position might be met with something other than a collegiate degree. The recruitment materials submitted express no such intent and the petitioner has not demonstrated

³ Counsel asserts that the AAO interpretation of the labor certification would yield an interpretation where the education degree and number of years of education would always be mutually exclusive, which would be illogical and impractical. Counsel states that such an interpretation would require six years of collegiate education in addition to the years of education required to obtain a Master's degree. As explained above, the way that counsel crafted the labor certification provided an alternate means to qualify concerning the degree required and did not include the years of education in that alternative. Counsel had other ways of crafting the requirements to meet the requirements he now asserts were the petitioner's true intent. For example, as noted by counsel with the instant motion, the spaces on the labor certification for number of years required could have been blank, relying purely on the degree requirement space and the alternative. Counsel states that leaving those spaces blank would be counterintuitive as six years of education are required to earn a Master's degree. While six years of education are required for a Master's degree, it is a common understanding that six years are required, so no additional information on that point is necessary. If counsel were uncomfortable leaving the space for number of years of education blank, he could have stated in space 15 that it intended both the years of education and the degree required to have an alternative or simply could have included an asterick after the number of years of education requirement to include that space in the stated alternative as he included an asterick after the degree requirement.

that the beneficiary has six years of college education, so the approval of the petition will remain revoked on this ground.

In addition, the previous AAO decisions found that the petitioner did not demonstrate that the beneficiary had the experience required for the position. Specifically, the previous decision stated that the employment experience verification letters submitted do not provide a sufficient description of the beneficiary's job duties to establish that the beneficiary has 10 years of managerial experience in positions with increasingly high levels of supervision and responsibility.

The letters submitted to verify past experience must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). The previous AAO decision considered letters from [REDACTED] which contained scant information about the beneficiary's responsibilities and job duties during his time with each of the companies. With its first motion to reopen and reconsider, the petitioner submitted additional letters from these companies. The AAO decision stated that these letters established managerial experience with [REDACTED] from July 1990 to March 1998, but that the other two letters submitted did not meet the regulatory requirements of 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A).

With the instant motion, the petitioner resubmits the July 29, 2012 letter from [REDACTED], which bears an illegible signature of someone claiming to be a senior manager (P&A), states that the beneficiary worked from June 1976 to July 1990 for the company and the July 27, 2012 letter from [REDACTED], bearing an illegible signature, states that the beneficiary was employed by that company as Dy. Project Manager from April 1998 to August 2000.

As stated in the prior AAO decision, neither the letter from driplex or the one from [REDACTED] contains the name or title of the author so that we are unable to determine whether the letter was authored by an employer as required by 8 C.F.R. § 204.5(l)(3)(ii)(A). In addition, the letter from [REDACTED] does not contain job duties for each position that the beneficiary held for the company so that it is insufficient to determine how many of the years the beneficiary worked for that company constituted managerial experience. As a result, neither of these letters may be considered in determining whether the beneficiary has the experience required by the terms of the labor certification. In addition, the labor certification requires 10 years of "increasingly high levels of authority and supervision" and the letters do not demonstrate such a progression, even if the letters could be considered.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

The petition will remain revoked for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving

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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 director's decision is affirmed. The appeal is dismissed and the approval of the petition remains revoked.