



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **SEP 27 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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.

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: The preference visa petition was denied by the Director, Texas Service Center, and the petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal, and the petitioner has filed a motion to reopen and reconsider the AAO's decision. The motion will be granted, the previous decision by the AAO, dated June 14, 2013, will be affirmed, and the petition will remain denied.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as drywall mechanic. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to submit sufficient evidence to establish that the petitioner had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, which in this case is April 30, 2001. The director also determined that the petitioner did not demonstrate that the beneficiary possessed the requisite experience required under the labor certification. The petitioner appealed the director's decision, and submitted additional documents on appeal. The AAO dismissed the appeal, affirming the director's decision that the petitioner had not established that the beneficiary possessed the requisite experience as indicated in the labor certification. However, the AAO determined that based on the evidence presented on appeal, the petitioner demonstrated the continuing ability to pay the proffered wage through an analysis of its net current income and net current assets. The motion, dated, July 15, 2013, contests the AAO's decision that the petitioner did not demonstrate that the beneficiary possessed the requisite experience.

The record shows that the motion is properly filed and timely. 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 motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. The petitioner indicates that it does have the ability to pay the proffered wage to the beneficiary, and has submitted supporting evidence.

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy.

As set forth in the AAO's decision, dated June 14, 2013, the issue in this case is whether or not the petitioner has demonstrated that the beneficiary possessed the two years of experience as a drywall mechanic as of the priority date as required by the labor certification.

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 motion.¹

¹ The submission of additional evidence on motion is allowed by the instructions to the Form I-

The 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'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, 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 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience as a drywall mechanic. On the labor certification, signed by the beneficiary on April 27, 2001, he claims to qualify for the offered position based on experience as a drywall installer from January 1996 until April 1998, with [REDACTED] in Springfield, Virginia. The beneficiary also indicated in the labor certification that he worked with the petitioner beginning April 1998.

On motion, the petitioner submitted in the record Form W-2s for the beneficiary issued for: 2008 and 2009 [REDACTED] for 2010 and 2011 from [REDACTED] and for 2011 from [REDACTED]. The petitioner also provided a hand-addressed letter dated July 11, 2013, previously dated December 28, 2009, and previously in the record.

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 AAO previously determined that the evidence submitted by the petitioner upon appeal did not sufficiently demonstrate that the beneficiary did in fact possess the required two-years of experience stated on the labor certification. In its appeal the petitioner submitted an employment letter from [REDACTED] dated June 14, 2001, in which the author indicated that the beneficiary was employed with I [REDACTED] in Berkeley County, West Virginia, as a drywall hanger. The AAO determined in its appeal decision that the letter did not conform to the regulations and was insufficient to demonstrate the beneficiary's experience, because the letter fails to provide the dates of employment, or whether the beneficiary's employment was on a full-time basis. The author also did not state his title, or the basis for his knowledge of the beneficiary's employment. *Id.* The AAO also indicated in its prior decision that the beneficiary did not indicate that he worked for this employer in the labor certification at the time of its filing, which cast doubt on this later claimed experience. 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. Upon motion, the petitioner did not submit any further evidence addressing this issue.

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 motion. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner in its appeal also submitted an employment verification letter and form respectively, from the petitioner's Vice President and General Manager, [REDACTED] dated, March 2, 2010 and April 30, 2013, indicating that the beneficiary was employed by the petitioner beginning April 1998 as a drywall installer.² [REDACTED] also indicated that the beneficiary was paid through his brother, [REDACTED] because the beneficiary did not have a social security number. The petitioner submitted an affidavit from [REDACTED] dated, March 2, 2010 indicating that he is the beneficiary's brother and that the beneficiary was paid through him because he did not have proper employment authorization documents. [REDACTED] also indicates that because of this lack of documents, there are no income tax records demonstrating the beneficiary's employment with the petitioner. The AAO determined that in its appeal the petitioner had not submitted any independent objective evidence of the beneficiary's employment with the petitioner, and that although it was stated that the beneficiary did not have a social security card, the record did contain Form W-2s issued to the beneficiary from other employers bearing his social security number. Upon motion, the petitioner has submitted the same Form W-2s from 2009, 2010 and 2011 previously submitted.

Counsel indicates upon motion, that the "AAO erred in its analysis by minimizing the evidence and the argument that the substantial tax records did not confirm the employment history of the beneficiary." Counsel also asserted that there were three particular points of error in the appeal decision:

The beneficiary was eligible for his application for adjustment of status in 2008, which then facilitated his securing employment authorization and a social security card. These items then allowed the beneficiary to file income taxes at that time, and this is why his tax information is not clearly illustrated prior to 2008.

The beneficiary did work full-time for the petitioner, with documentation from the payroll service, [REDACTED] This is the payroll service for the petitioner. [REDACTED]

The indication that the beneficiary could not work for the petitioner at the same time it worked for other companies during the requisite period is incorrect.³

² On the employment verification form from [REDACTED] dated, April 30, 2013, [REDACTED] indicated that the beneficiary was employed with the petitioner from April 1998 to present. The letter from [REDACTED] dated, December 28, 2009, also indicated that the beneficiary was employed with the petitioner from April 1998 until present, but this was "crossed out," and the date, April 2001, was written on top of this type written information, along with adding in "full-time" employment. These handwritten changes are initialed and dated July 11, 2013.

³ The AAO indicated in an appeal footnote that counsel asserted in response to the AAO's RFE that the W-2s submitted which are from other companies during the period of claimed employment with the petitioner reflect times when the petitioner allowed the beneficiary to work with other companies during its slow work periods.

Counsel offers statements that the beneficiary did in fact work for the petitioner since 1998 and has demonstrated this in their evidence presented. 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).

Regarding the claimed experience with the petitioner, 20 C.F.R. § 656.21(b)(5) [2004] states:

The employer shall document that its requirements for the job opportunity, as described, represent the employer's *actual minimum requirements* for the job opportunity, and the **employer has not hired workers with less training or experience** for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

[Emphasis added.]

When determining whether a beneficiary has the required minimum experience for a position, experience gained by the beneficiary with the petitioner in the offered position cannot be considered. This position is supported by the Board of Alien Labor Certification Appeals (BALCA). See *Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA):

[W]here the required experience was gained by the alien while working for the employer in jobs other than the job offered, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the Employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.⁴

In *Delitizer*, BALCA considered whether an employer violated the regulatory requirements of 20 C.F.R. § 656.21(b)(6)⁵ in requiring one year of experience where the beneficiary gained all of his experience while working for the petitioning employer. After analysis of other BALCA and pre-BALCA decisions,⁶ the Board in *Delitizer* determined that 20 C.F.R. § 656.21(b)(6) does require that

⁴ In a subsequent decision, the BALCA determined that the list of factors for determining whether jobs are sufficiently dissimilar as stated in *Delitizer* is not an exhaustive list. See *E & C Precision Fabricating, Inc.*, 1989-INA-249 (Feb. 15, 1991) (en banc).

⁵ 20 C.F.R. § 656.21(b)(5) [2004].

⁶ See *Frank H. Spanfelner, Jr.*, 79-INA-188, May 16, 1979; *Mecta Corp.*, 82-INA-48, January 13, 1982; *Inakaya Restaurant d/b/a Robata*, 81-INA-86, December 21, 1981; *Visual Aids Electronics Corp.*, 81-INA-98, February 19, 1981; *Yale University School of Medicine*, 80-INA 155, August 13,

employers establish “the ‘dissimilarity’ of the position offered for certification from the position in which the alien gained the required experience.” *Delitizer Corp. of Newton*, at 4. In its decision, BALCA stated that Certifying Officers should consider various factors to establish that the requirement of dissimilarity under 20 C.F.R. § 656.21(b)(6) has been met, and that, while Certifying Officers must state the factors considered as a basis for their decisions, the employer bears the burden of proof in establishing that the positions are dissimilar. *Delitizer Corp. of Newton*, at 5.

In the instant case, representations made on the labor certification clearly indicate that the actual minimum requirements for the offered position are two years of experience in the job offered and that experience in an alternate occupation is not acceptable. As the actual minimum requirements are two years of experience, the petitioner could not hire workers with less than two years of experience for the same position. See 20 C.F.R. § 656.21(b)(5) [2004].⁷ In its employment verification letter of December 28, 2009, the petitioner states that it employed the services of the beneficiary for the following duties:

Drywall installation, erects metal framing, and fuming channels for fastening drywalls, and installs drywall to cover walls, ceiling soffits, shafts and movable partitions in residential, commercial, and industrial buildings. He reads blueprints, and other specifications to determine method of installation, work procedure, and materials, tool, and work requirements. He lays out reference lines and points for use in computing location and position of metal framing and fuming channels, and marks, and cuts metal runners, rods, and fuming channels to specified size using square, tape measure, and marking devices. He fits and fastens board into specified position on wall, using screws and adhesives. He uses the following tools in his job such as, hammer, screw gun, router, tee square, tape measure, and utility knife.

These duties closely match the duties of the offered position of drywall mechanic, as stated by the petitioner in Item 13 of Form ETA 750:

Employee will be responsible for Drywall installation. Employee will plan gypsum drywall installation. He will erect metal framing and fuming channels for fastening drywalls and install drywall to cover walls, ceiling soffits, shafts, and movable partitions in residential, commercial, and industrial buildings. He will read

1980; *The Langelier Co., Inc.*, 80-INA-198, October 29, 1980; *Creative Plantings*, 87-INA-633, November 20, 1987; *Brent-Wood Products, Inc.*, 88-INA-259, February 28, 1989.

⁷ In hiring a worker with less than the required experience for the offered position, in violation of 20 C.F.R. § 656.21(b)(5) [2004], the employer indicates that the actual minimum requirements are, in fact, not as stated on Form ETA 750. Rather, in that the beneficiary was hired in the offered position with less than two years of experience, it is evident that the job duties of the offered position can be performed with less than the two years of experience listed on Form ETA 750. Therefore, two years of experience as a drywall mechanic cannot be the actual minimum requirement for the offered position of carpenter.

blueprints and other specifications to determine method of installation, work procedure, and materials, tool and work aid requirements. He will lay out reference lines and points for use in computing location and position of metal framing and fuming channels and mark position for erecting metalwork, using chalk line. He will measure, mark and cut metal runners, rods and fuming channels to specified size, using tape measure, straightedge, and hand and portable power cutting tools. He will secure metal framing to walls and fuming channels to ceilings using hand portable power tools. He will measure and mark cutting lines on drywall, using square, tape measure, and marking devices. He will fit and fasten board into specified position on wall using screws and adhesive.

Experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without evidence that the DOL conducted a *Delitizer* analysis of the dissimilarity of the position offered and the position in which the beneficiary gained experience with the petitioner. In the instant case, the beneficiary did not represent on Form ETA 750, Part B that it had been employed with the petitioner in any position. Therefore, the DOL was precluded from conducting a *Delitizer* analysis of the dissimilarity of the offered position and the position in which the beneficiary gained experience.⁸

Furthermore, on his December 28, 2009 employment verification letter, [REDACTED] expressly states that the beneficiary previously worked for the petitioner performing similar drywall mechanic duties as the ones listed on the labor certification. As discussed above, in order to utilize the experience gained with the employer, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. *Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA). The petitioner failed to establish the dissimilarity between the position the beneficiary previously held with the employer and the permanent position offered. Therefore, the AAO cannot consider the beneficiary's experience gained with the petitioner as qualifying experience to meet the requirements of the labor certification by the priority date.

In general, experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without invalidating the actual minimum requirements of the position, as stated by the petitioner on the Form ETA 750. In the instant case, as the beneficiary's experience gained with the petitioner was in the position offered, the petitioner cannot rely solely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with

⁸ The fact that the beneficiary's experience with the petitioner was not mentioned on Form ETA 750, Part B also weighs against the consideration of this experience as being able to establish that the beneficiary had the qualifications stated on the labor certification application, as certified by the DOL. 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.

the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

There is no regulatory-prescribed evidence in the record of proceeding demonstrating that the beneficiary is qualified to perform the duties of the proffered position as indicated. The petitioner in the instant motion, and throughout the record of proceedings, failed to provide any evidence of the experience claimed by the beneficiary on the labor certification. The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation—*

(A) *General.* 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.

(B) *Skilled workers.* 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 individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

(D) *Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Therefore, the petitioner has not in its motion demonstrated that the beneficiary possessed the two-years of experience required in the labor certification as of the priority date.

Beyond the decision of the director, and the appeal decision of the AAO, the AAO finds in its instant decision that it has not been clearly demonstrated that a *bona fide* job offer existed at the time the labor certification was filed. The petitioner asserted that it has employed the beneficiary in the position offered since April 1998. However, according to the record of proceedings, the beneficiary's 2006, 2007, and 2009, personal income taxes all indicate that he is self-employed as the tax returns list only "business income" on Line 12, and do not list any Form W-2 wages on Line 7 of the tax returns. The tax returns also include a Schedule C, Profit or Loss from Business. This documentation suggests that the beneficiary may be self-employed, rather than employed full-time by the petitioner. Therefore, it is unclear that the petitioner is offering full-time employment as stated in the labor certification, or if the position is part-time or contractual in nature. The job offer

must be for a permanent and full-time position. See 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994). In any future filings, the petitioner must establish that a *bona fide* full-time, permanent job opportunity exists.

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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The motion to reopen and reconsider the previous decision of the AAO is granted. The petition remains denied.