



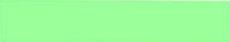
U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **JAN 03 2014**

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 (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:** The Director, Nebraska Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a manufacturing business. It seeks to permanently employ the beneficiary in the United States as a repairman. The petitioner requests classification of the beneficiary 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).<sup>1</sup>

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, which is the date the DOL accepted the labor certification for processing, is May 22, 2012. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner has not demonstrated that the beneficiary met the minimum experience requirement as stated on the labor certification 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.<sup>2</sup>

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);

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<sup>1</sup> 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.

<sup>2</sup> 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 clearly 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: None required.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: None.

The labor certification states that the beneficiary qualifies for the offered position based on experience as an ‘ [REDACTED] ’ with [REDACTED] [REDACTED] from March 1, 2004 until July 1, 2006. The labor certification also states that the beneficiary worked for the petitioner as an ‘ [REDACTED] ’ beginning on July 1, 2006. 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 on the petitioner’s letterhead from the petitioner’s co-owner, stating that the company has employed the beneficiary since July 1, 2006 and that his job duties are to “repair, maintain or install electric motors, wiring or switches.”

On appeal, counsel for the petitioner states that USCIS should be focusing on whether the beneficiary was qualified for the position offered before the priority date in accordance with *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977), rather than whether the beneficiary was qualified before being hired by the petitioner. Counsel is correct that *Matter of Wing's Tea House* holds that the beneficiary must be qualified prior to the priority date. However, in this case, the record includes no experience letter, or other evidence prescribed by 8 C.F.R. § 204.5(l)(3)(ii)(A), from [REDACTED] or any other entity other than the petitioner. Therefore, it appears that the beneficiary seeks to qualify for the instant position based on experience gained while working for the petitioner. The beneficiary's experience with the petitioner must have been in a position that was not substantially comparable to the position offered. Part J.21 of the labor certification asks whether the beneficiary gained any of the qualifying experience with the petitioner in a position substantially comparable to the job opportunity requested. In response to this question, the petitioner checked "No." Therefore, even though the beneficiary must meet all of the requirements of the offered position set forth on the labor certification before the priority date, because the beneficiary lists employment with the petitioner that is substantially comparable to the position offered, the beneficiary's experience with the petitioner cannot qualify him for the instant position and thus he must rely upon experience he gained before being hired by the petitioner. 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).

The director informed the petitioner in a request for evidence (RFE), dated June 21, 2013, that the beneficiary's employment with the petitioner cannot qualify him for the instant position. The director requested that the petitioner provide evidence that the beneficiary gained other qualifying experience prior to the priority date. In response to the director's RFE, counsel for the petitioner states that the ETA Form 9089 makes it clear that the beneficiary gained 24 months of experience with [REDACTED]. However, the record does not contain an experience letter from [REDACTED] regarding the beneficiary's employment as required by 8 C.F.R. § 204.5(l)(3)(ii)(A). Therefore, the petitioner has not established that the beneficiary was qualified for the instant position before to the priority date.

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 skilled worker under section 203(b)(3)(A)(i) of the Act.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.