



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE:

JUL 31 2014

OFFICE: TEXAS SERVICE CENTER

FILE:

IN RE:

Petitioner:

Beneficiary:

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

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, Texas Service Center (Director), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on certification. *See* 8 C.F.R. §§ 103.4(a)(2), (5). The Director's decision will be affirmed.

The petitioner operates a resort. It seeks to permanently employ the beneficiary in the United States as a manager of guest services. It requests preference classification of the beneficiary as a professional or skilled worker under section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A).¹

An Application for Alien Employment Certification, Form ETA 750 (labor certification), certified by the U.S. Department of Labor (DOL), accompanies the petition. The petition's priority date is December 19, 2003, which is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

The Director denied the petition on October 19, 2009, concluding that the petitioner did not establish its continuing ability to pay the proffered wage of the offered position. After we dismissed the appeal on the same ground on January 11, 2013, the petitioner moved this office to reopen and reconsider its decision. On August 23, 2013, we granted the petitioner's motion, reconsidering our decision and concluding that the petitioner demonstrated its ability to pay the proffered wage.

However, we also found that the record did not establish the beneficiary's possession of the minimum experience required to perform the offered position by the petition's priority date. We therefore remanded the record to the Director to allow the petitioner to respond to the evidentiary deficiency. After considering the petitioner's response to his Request for Evidence (RFE), the Director denied the petition on May 23, 2014, and issued a Notice of Certification (NOC), concluding that the petitioner did not demonstrate the beneficiary's possession of the minimum, required experience.

The petitioner timely submitted a brief in response to the NOC. *See* 8 C.F.R. 103.4(a)(2) (allowing an affected party to submit a brief within 30 days of the date of the NOC's service). The record documents the procedural history of the case, which is incorporated into the decision. The procedural history will be elaborated only as necessary.

This office conducts appellate review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted.²

¹ Section 203(b)(3)(A)(i) of the Act grants preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least 2 years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

² The instructions to Notice of Appeal or Motion (Form I-290B), which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow the submission of additional evidence. The record in

A beneficiary must meet all of the requirements of the offered position specified on the accompanying labor certification by the petition's priority date. 8 C.F.R. §§ 103.2(b)(1), (12); see also *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In determining 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 *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

If the position's requirements are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" to determine the qualifications required of a beneficiary. *Madany, supra*, at 1015. The only rational manner by which USCIS can be expected to interpret the job requirements of a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Co. v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job requirements must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS will not look beyond the plain language of the labor certification to determine the employer's claimed intent.

A petitioner for a skilled worker or professional must support any training or experience requirements with letters from trainers or employers giving their names, addresses, and titles, and a description of the training received or the beneficiary's experience. 8 C.F.R. § 204.5(l)(3)(ii)(A). In the instant case, in addition to a 4-year bachelor's degree or the equivalent in hotel and restaurant management, the labor certification states that the offered position requires at least one year of experience as a concierge.

On the Form ETA 750B, the contents of which the beneficiary declared to be true and correct under penalty of perjury, the beneficiary stated that, before he assumed the offered position with the petitioner in January 1999, he worked as a chief concierge for the [REDACTED] Mexico from 1995 to 1998. The Form ETA 750B states that the beneficiary held no other jobs related to the offered position.

The record contains a copy of a June 12, 1998 letter from a human resources manager at Fiesta Americana Merida, indicating that the beneficiary worked at the hotel from November 14, 1994 to November 14, 1997. The letter states that the beneficiary "supported the opening of the Hotel, as well as the standardization of the duties of Concierge, he worked a few months as receptionist, later he was promoted to Chief Concierge."

the instant case provides no reason to preclude consideration of any of the documents newly submitted with the petitioner's response to the certification. See *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

The dates of employment stated in the experience letter (November 14, 1994 to November 17, 1997) conflict with the dates of employment stated on the labor certification (1995 to 1998). Unlike the labor certification, the letter indicates that the beneficiary worked in multiple positions at the hotel. In addition, the letter does not state for how long the beneficiary worked in each position. The letter also does not describe the beneficiary's experience pursuant to 8 C.F.R. 204.5(l)(3)(ii)(A) and does not indicate whether his employment was full-time in nature. The June 12, 1998 experience letter therefore does not establish that the beneficiary possessed at least one year of experience as a concierge as specified by the accompanying labor certification.

In response to the Director's January 22, 2014 RFE, the petitioner submitted two additional experience letters on behalf of the beneficiary. A January 29, 2014 letter from a human resources coordinator at [REDACTED] states that the beneficiary worked at the hotel as a concierge from November 11, 1994 to November 1, 1997. The letter also states that he served as a receptionist there from November 2, 1997 to December 20, 1997.

The 2014 letter conflicts with the prior letter of June 12, 1998, casting doubt on the reliability of both letters. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (holding that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of the petition). The 2008 letter states that the beneficiary's employment at the [REDACTED] hotel ended on November 14, 1997, while the 2014 letter indicates that he did not stop working there until December 20, 1997. The 2008 letter also suggests that the beneficiary worked as a receptionist before serving as a concierge, while the 2014 letter states that he worked as a receptionist after serving as a concierge. Also, unlike the prior letter, the 2014 letter does not indicate that the beneficiary worked as a chief concierge. Because of these unresolved discrepancies, the 2014 letter also appears unreliable and does not establish the beneficiary's possession of the required employment experience. *See id.* at 591-92 (holding that a petitioner must resolve inconsistencies in the record by independent, objective evidence). Therefore, the 1998 and 2014 letters from the [REDACTED] hotel are not credible evidence of the beneficiary's purported qualifying experience.

The petitioner also submitted a February 14, 2014 letter from an assistant manager of human resources at the [REDACTED] Mexico. The letter states that the beneficiary worked for Hotels and Guest Villas as chief concierge from June 12, 1998 to March 10, 1999.

The February 14, 2014 letter is from a different hotel in Mexico City, not the [REDACTED] hotel identified on the labor certification. The names of the hotels are similar, suggesting that they may be affiliated. However, the letters do not state or explain an affiliation.

The letter from the Mexico City hotel suggests that the beneficiary gained qualifying experience beyond that stated on the Form ETA 750B. *See Matter of Leung*, 16 I&N Dec. 12, 14-15 (Dist. Dir. 1976), *disapproved of on other grounds*, *Matter of Lam*, 16 I&N Dec. 432, 434 (BIA 1978) (finding the testimony of an applicant for adjustment of status not credible regarding prior employment

experience that was not stated in the visa petition or on the accompanying labor certification).³ The beneficiary's purported employment at the Mexico City hotel would have occurred after the prior employment he identified on the labor certification. The petitioner has not explained why the beneficiary would have omitted the more recent qualifying experience on the labor certification. In addition, the letter indicates that the beneficiary worked in Mexico until at least March 1999, while the beneficiary stated on the Form ETA 750B that he began work for the petitioner in the United States in January 1999. These discrepancies cast doubt on the accuracy and validity of the experience letter from the hotel in Mexico City. *Matter of Ho, supra*, at 591-92 (holding that a petitioner must resolve inconsistencies in the record by independent, objective evidence).

The petitioner asserts that USCIS erred in denying the petition based on "minor inaccuracies" on the labor certification. Counsel asserts that the Form ETA-750B misstated the beneficiary's employment dates with the petitioner and inadvertently omitted his work history with the Mexico City hotel. Counsel contends that the beneficiary's H-1B admission to the United States on March 20, 1999 establishes that he did not begin working for the petitioner until March 1999, despite the beneficiary's start date stated on the labor certification.

The petitioner also submits a June 16, 2014 letter from a purported former sub-director of [REDACTED]. The letter states that the same parent company owned the [REDACTED] and Mexico City hotels, and that the [REDACTED] hotel hired the beneficiary in November 1994, shortly before its January 1995 opening. The beneficiary was purportedly hired as a concierge, and he temporarily "helped out" as a receptionist before assuming the position of concierge once the hotel opened. The letter states that the hotel promoted the beneficiary at the end of 1995 to chief concierge, a position he held until the beginning of November 1997. The purported former sub-director stated that the beneficiary then chose to change departments at the hotel because of a disagreement with a new manager and worked as a receptionist until December 20, 1997. The former sub-director stated that he later invited the beneficiary to serve as chief concierge at the Mexico City hotel, where the beneficiary purportedly worked from June 12, 1998 to March 10, 1999.

The purported former sub-director's letter appears to clarify the beneficiary's employment history and the relationship between the [REDACTED] and Mexico City hotels. However, the record lacks evidence to corroborate the former sub-director's claimed employment with [REDACTED] and his claimed knowledge of the beneficiary's experience with the employer. The letter is written on the author's personal stationery, rather than on [REDACTED] stationery. Thus, the record does not establish that the document qualifies as a letter from an employer pursuant to 8 C.F.R. § 204.5(I)(3)(ii)(A).

³ The petitioner argues that *Matter of Leung, supra*, does not apply to the instant case. *Matter of Leung, supra*, holds that, in the absence of unusual or outstanding equities, an adjustment application will be denied as a matter of discretion if it is supported by a labor certification predicated on the applicant's unauthorized employment in the United States. *Matter of Leung, supra*, at 15. However, we cite the case only for its finding that an alien's testimony of prior employment experience is not credible if he did not previously claim the experience on the labor certification. *Id.* at 14-15.

Even if the regulations allowed consideration of the letter, it is not supported by independent, objective evidence sufficient to overcome the conflicting evidence in the record. The beneficiary's own resume contradicts the dates of employment and job titles stated in the letter. On his resume, the beneficiary stated that he worked for the [REDACTED] hotel as chief concierge until September 12, 1997, not until November 1997 as the letter states. The beneficiary stated on his resume that he then served as a front desk clerk at the hotel, not as a receptionist as the letter states. The beneficiary's resume also states that he worked at the Mexico City hotel until February 1999, not until the March 10, 1999 date indicated in the letter. The letter also does not state when the beneficiary's initial employment as a receptionist ended and when his employment as a concierge began.

In addition, the record does not contain evidence corroborating or explaining counsel's assertion that misstatements and omissions on the labor certification regarding the beneficiary's employment history were inadvertent. *See Matter of Obaighena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (stating that the assertions of counsel do not constitute evidence) (citation omitted). We note that, even if the petitioner had overcome the issues identified above, the petition is unapprovable. None of the letters regarding the beneficiary's prior employment describe his experience pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A). In addition, the letters do not indicate whether the beneficiary worked on a full-time basis, even though, in our August 23, 2013 decision, we notified the petitioner of this evidentiary defect. Therefore, the record lacked initial evidence of the beneficiary's purported qualifying experience.

For the foregoing reasons, the record does not establish that the beneficiary possessed at least one year of experience as a concierge as of the petition's priority date, as required by the accompanying labor certification. We therefore affirm the director's decision that the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

In visa petition proceedings, the petitioner bears the burden of establishing eligibility for the 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 Director's May 23, 2014 decision denying the visa petition is affirmed.