



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUL 31 2014

OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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: The Director, Nebraska Service Center, (director) revoked the approval of the employment-based 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 wholesale/retail business. It seeks to permanently employ the beneficiary in the United States as a marketing manager. The petitioner requests classification of the beneficiary as a skilled worker or professional pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹

We note that the case involves the substitution of a beneficiary on the labor certification. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

The petition is accompanied by a Form ETA 750, Application for Alien 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 April 30, 2001. *See* 8 C.F.R. § 204.5(d).

The director's decision revoking the approval of the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position 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.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

¹ 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

² 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).

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); *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 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 will not look beyond the plain language of the labor certification to determine the employer’s claimed intent.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: 6 years.

High School: 4 years.

College: None Required.

College Degree Required: None Required.

Major Field of Study: None Required.

TRAINING: None Required.

EXPERIENCE: Two (2) years in the job offered.

OTHER SPECIAL REQUIREMENTS: Will have knowledge of international exotic perfumes such as Ittar from India and other Asian countries.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a marketing manager with [REDACTED] California, from 1997 until 2000. The beneficiary also claimed experience as a self-employed marketing consultant since 2000. On July 11, 2007, 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 dated February 10, 2009, from [REDACTED] letterhead stating that the company employed the beneficiary full-time as a purchasing manager from August 1997 until December 2000. Mr. [REDACTED] described the beneficiary's duties as, "to research market conditions and determine potential sales of products and services. He also advised [sic] the company of different marketing strategies to increase sales and improve efficiency and effectiveness of individual and organizational units." Mr. [REDACTED] did not state that the beneficiary had any experience with "international exotic perfumes such as Ittar from India and other Asian countries," as required by the labor certification.

On May 9, 2013, USCIS officers conducted a site visit at [REDACTED] and spoke with Mr. [REDACTED]. Mr. [REDACTED] informed the officers that the beneficiary had worked there for no more than one year and that while the beneficiary did not have an official title during his period of employment, Mr. [REDACTED] "would classify [the beneficiary] as a cashier because that was [the beneficiary's] primary job responsibility. Accordingly, the director issued a Notice of Intent to Revoke (NOIR) and subsequently revoked the approval of the employment-based immigrant petition.

On appeal, the petitioner resubmits a copy of the February 10, 2009, employment letter from [REDACTED] that was submitted with the petition. Counsel states that this letter establishes the beneficiary's eligibility. Counsel explains that Mr. [REDACTED] stated to USCIS officers that the beneficiary had worked for him for no more than one year because Mr. [REDACTED] bought [REDACTED] in 1999 (when the beneficiary had already been working there since 1997) and that the beneficiary continued to work for him for another year. However, this contention is not supported by any evidence of the date of Mr. [REDACTED] purchase of [REDACTED]. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).³ Counsel's assertion is not supported by any corroborating evidence and cannot be accepted.

³ Furthermore, even if counsel's explanation was corroborated by evidence, it would diminish the credibility of Mr. [REDACTED] February 10, 2009, letter, since it would mean that Mr. [REDACTED] was testifying to the beneficiary's employment during a period when he was not, in fact, the employer.

Counsel acknowledges on appeal that in his statement to USCIS, [REDACTED] stated “that the beneficiary primarily worked as a cashier but he took care of many other responsibilities around the store.” Counsel contends that the beneficiary’s “many other responsibilities” included marketing and, therefore, the work experience is sufficient to satisfy the requirements of the labor certification. However, counsel’s assertion is not supported by any corroborating evidence that would suggest that the beneficiary’s “other duties” included marketing. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, even if counsel’s assertion was corroborated by evidence that the beneficiary occasionally engaged in marketing during part of his duties as a cashier, it would remain that the beneficiary was employed as a cashier, not as a marketing manager. The labor certification specifically requires two years of experience as a marketing manager, not two years of experience as a cashier who occasionally engaged in marketing. In addition, the labor certification specifically requires that a job candidate possess “knowledge of international exotic perfumes such as [REDACTED] from India and other Asian countries.” The beneficiary has not claimed any experience with, or knowledge of, international exotic perfumes. For these reasons, the petitioner failed to establish that the beneficiary satisfies the minimum work experience requirements of the offered position set forth on the labor certification by the priority date.

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

Beyond the decision of the director,⁴ the petitioner has also failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay “shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.” *Id.*

The petitioner submitted its Internal Revenue Service (IRS) Form 1065, U.S. Return of Partnership Income, from 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2011, and 2012. However, these

⁴ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

documents show that in 2006 and 2007 the petitioner did not have sufficient net income or net current assets⁵ to pay the proffered annual wage of \$50,000. The record does not include any regulatory-prescribed evidence of the petitioner's ability to pay the proffered wage in 2008.

For these reasons, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. The petition remains revoked.

⁵ Net current assets are the difference between the petitioner's current assets and current liabilities. The petitioner's year-end current assets are shown on Form 1065, Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d).