



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **MAR 27 2014** OFFICE: TEXAS SERVICE CENTER

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, Texas 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 thoroughbred breeding and training business. It seeks to permanently employ the beneficiary in the United States as a thoroughbred exercise rider. 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 July 19, 2012. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner failed to establish that the beneficiary possessed the minimum 24 months of 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.

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);

---

<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 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.

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

- H.4. Education: None.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Yes, acceptable.
- H.10. Experience in an alternate occupation: Yes, 24 months.
- H.10-B Alternate acceptable occupation: Jockey.
- H.11 Job duties: “To ride thoroughbred horses to exercise and condition them for competitive races conferring with trainer regarding ability and peculiarities of horse ridden.”
- H.14. Specific skills or other requirements: “Employer will accept any suitable combination of education, training, and/or experience.”

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a jockey/exercise rider with [REDACTED] from March 27, 2007 until July 18, 2012. The labor certification further indicates that the beneficiary was employed in the position of jockey/exercise rider with [REDACTED] from June 7, 2004 until March 1, 2007. 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 director issued a Request for Evidence (RFE) dated July 30, 2013 requesting that the petitioner submit primary evidence of the beneficiary’s employment experience. The director indicated in the RFE that the evidence submitted with the petition was insufficient to demonstrate the beneficiary’s experience because although the petitioner submitted a letter from ([REDACTED]) dated April

4, 2004, this letter was not considered primary evidence of the beneficiary's experience as this employer was not listed on the labor certification, the letter did not offer a detailed description of the beneficiary's experience, and the English translation failed to meet the requirements under 8 C.F.R. § 103.2(b)(3).

The regulation at 8 C.F.R. § 103.2(b)(3) states:

Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation that the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The record also contains a statement from the Panamanian Office of the Stud Book and Statistic Chief, dated March 31, 2004, which the director further found did not satisfy the requirements for primary evidence demonstrating the beneficiary's experience because it did not offer specific details regarding the beneficiary's experience. The director in his RFE requested that the petitioner submit primary evidence of the beneficiary's experience.

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.

On September 16, 2013 the petitioner did not submit an experience letter from an employer listed on the labor certification with the requested details, or an updated English translation from [REDACTED] in its response to the director's RFE. The petitioner instead submitted: identification badges from the New Jersey and Kentucky Horse Racing Commissions; an experience letter from [REDACTED] dated August 29, 2013, stating that he employed the beneficiary as a professional jockey/exercise rider from 2004 until 2005, with responsibilities for breaking, exercising, and riding thoroughbreds; a letter from [REDACTED], dated August 29, 2013, indicating that he employed the beneficiary from 2005 until 2007, as a professional jockey/exercise rider, with the same responsibilities for breaking, exercising, and riding thoroughbreds; and a letter from Mr. [REDACTED], dated August 29, 2013, indicating that he employed the beneficiary from 2006 until 2008 in the same capacity, as a professional jockey/exercise rider, responsible for breaking, exercising, and riding thoroughbreds. Each letter was accompanied by the writer's respective state Racing Commission identification badge.

The director's decision discusses that, as with the previous submissions from purported employers, none of these employers were listed on the labor certification filed by the petitioner. The AAO notes that the three letters provided in response to the RFE do not provide the title of the signatory, or the names and addresses of the companies through which they operate as required by regulation. *See* 8

C.F.R. § 204.5(l)(3)(ii)(A). Further, the letters do not describe the duties of the beneficiary's employment in detail, specify the exact dates of the position, or state if the job was full-time, and therefore also do not comport with the primary evidence request made by the director in his RFE. See 8 C.F.R. §§ 103.2(b)(3) and 204.5(l)(3)(ii)(A).

As the director discussed, 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 labor certification, lessens the credibility of the evidence and facts asserted.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The director indicated in his decision that, in part because the petitioner did not submit primary evidence of the employment listed on the labor certification as requested in his RFE, the record did not support a finding that the beneficiary possessed at least twenty-four months of experience in the job offered at the time of the labor certification's filing. The director then determined that due to this lack of evidence, the petitioner had not demonstrated the beneficiary met the minimum requirements of 24 months of employment experience at the time that the request for certification was filed, and as such, the beneficiary was ineligible for the classification as a skilled worker.

On appeal, the counsel for the petitioner for the first time states, "in the horse racing industry jockeys, exercise riders, and contractors have agents to obtain mounts from the several trainers that perform at each racetrack, hence the reason for submitting letters from several different trainers that were not listed on the ETA Form 9089." However, the letters previously submitted in response to the director's RFE by the petitioner do not meet the regulatory requirements for employment experience letters, as discussed above. Therefore, they cannot be considered to establish the beneficiary's claimed employment experience. In addition, the petitioner did not submit any evidence in its response to the director's RFE demonstrating the statement regarding industry practice made through counsel in this case. 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).

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)(l) and (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 (1<sup>st</sup> Cir. 1981).

For the first time on appeal, the petitioner submits a letter from [REDACTED], dated October 21, 2013, indicating that he is a thoroughbred horse trainer and the beneficiary worked as a professional jockey/exercise rider under a P1 visa between June 2004 and March 2007. Mr. [REDACTED] also indicates that the beneficiary was responsible for “training, breaking and riding thoroughbred horses,” but does not explain in any detail what these job duties entailed. Therefore, the job description is vague, and insufficient in its evidentiary value as to the beneficiary’s experience with this employer. The letter is also not on any company letterhead, and does not provide the purported employer’s address, or indicate if this was full-time employment. See 8 C.F.R. § 204.5(l)(3)(ii)(A).

In addition, although [REDACTED] indicates that the beneficiary worked as a professional jockey/exercise trainer between June 2004 and March 2007, the letter submitted does not specifically indicate that its author directly employed the beneficiary in this capacity which is inconsistent with the information provided by the beneficiary on the labor certification. Moreover, because the dates of employment in this letter overlap with the dates of employment provided in the other experience letters previously submitted from Mr. [REDACTED] stating that he employed the beneficiary as a professional jockey/exercise rider from 2004 until 2005, from Mr. [REDACTED] indicating that he employed the beneficiary from 2005 until 2007, and from Mr. Anthony Sciametta, indicating he employed the beneficiary from 2006 until 2008, it is unclear whether the beneficiary possesses the minimum required amount of 24 months employment experience in order to qualify for the position offered. The employment letters submitted for the record claim conflicting years of employment, as well as contradictions with the sworn statement of employment history on the labor certification, thereby casting doubt on the beneficiary’s claimed employment experience.

*Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

The petitioner has not offered a sufficient explanation for this inconsistent information, or provided independent, objective evidence to establish the beneficiary’s purported employment experience with Mr. [REDACTED]. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner through counsel indicates only that the jockeys/riders have agents to obtain their mounts for them, and this is why they have submitted various employment experience letters for the beneficiary. However, neither in response to the director’s RFE, or upon appeal, has the petitioner provided specific evidence regarding this assertion in order to account for these inconsistencies. In

addition, this information was also not provided at the time the labor certification was filed. Furthermore, counsel's statement suggests that the beneficiary was not employed full-time by Mr. [REDACTED] as claimed on the labor certification as submitted to DOL.

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).

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 labor certification, lessens the credibility of the evidence and facts asserted.

Moreover, although the petitioner submitted a new certification of translation for the letter from the [REDACTED] dated November 13, 2013, this document likewise does not comport with 8 C.F.R. § 103.2(b)(3), as the translator again does not indicate that they are competent to translate in both the English and Spanish languages, only that they are familiar with these languages. It is also unclear from this translation that the document was accurately translated in its entirety. The certification offered on appeal indicates that the attached translation might also be a partial or summary translation.

USCIS indicated that the petitioner should submit primary evidence of the beneficiary's experience, such as letter(s) from the beneficiary's current or former employer(s) in its response to the RFE, and that this primary evidence must indicate the experience of the beneficiary listed on the labor certification as of the priority date. Secondary evidence of the beneficiary's experience may be permitted in certain circumstances, but only when it has been demonstrated that primary evidence is unavailable. See 8 C.F.R. § 103.2(b)(1), and (2). This secondary evidence must sufficiently corroborate the beneficiary's employment experience. *Id.*

In this case, the petitioner did not submit sufficiently corroborating evidence of the beneficiary's experience. The letters and translation submitted to the director were not found to be acceptable forms of evidence demonstrating the beneficiary's experience because they did not meet the regulatory requirements. The petitioner in its appeal, submitted a new translation, and a letter from the purported employer listed on the labor certification. However, as previously indicated the new translation and the letter from [REDACTED] also did not satisfy regulatory requirements. The employment experience evidence submitted on appeal cannot serve to demonstrate the premise for which it has been submitted.

Therefore, the petitioner has failed to establish that the beneficiary possessed the minimum qualifications for the position offered as required on the labor certification.

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 a professional or skilled worker under section.203(b)(3)(A) of the Act.

(b)(6)

*NON-PRECEDENT DECISION*

Page 8

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.