U.S. Department of Homeland Security
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Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: NOV 28 2008

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IN RE: Petitioner:
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The director, Nebraska Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a gas station/convenience store. It seeks to employ the beneficiary permanently in the United States as a frist line supervisor/manager of retail sales workers.[1] As required by statute, the petition is accompanied by a Form ETA 9089, Application for Permanent Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position based on lack of evidence as to the beneficiary's two years of relevant work experience, as stipulated by the Form ETA 9089. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case has been discussed in these proceedings previously and is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 17, 2007 denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The director noted that based on counsel's response to the director's Notice of Intent to Deny (NOID) the petition, counsel appeared to have prepared the beneficiary's letter of work experience from [redacted] which reduced the credibility of the letter. The director also noted that based on the affidavit provided by the beneficiary with the NOID, [redacted] the person who verified the beneficiary's employment up until November 30, 2005, was not associated with the claimed place of work as of December 2003, and therefore could not attest to the beneficiary's employment until 2005. The director accordingly denied the petition.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, 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.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on March 22, 2006.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2] On appeal, counsel did not

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[1] This classification is listed on the certified ETA Form 9089. The petitioner described the position on the I-140 petition as an evening manager.

[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 the regulation at 8 C.F.R. § 103.2(a)(1).

submit a brief, or any new evidence. Counsel states that the appeal is based on the materials dated November 20, 2006, submitted to the record in response to the director's NOID. On the Form I-290-B, counsel states that the director utilized overly harsh standards in determining the credibility of the documents submitted to the record without any consideration to the totality of the circumstances.

With the initial petition, the petitioner submitted a letter dated July 18, 2006, written by [redacted], Texaco Food Mart, [redacted], St. Cloud, Florida 34741. In the letter Mr [redacted] states that the beneficiary worked for Texaco Food Mart from approximately January 12, 2002 until about November 30, 2005 as assistant store manager. Mr. [redacted] also stated that he was the beneficiary's supervisor and that he obtained the above reference information regarding the beneficiary from employee records and personal knowledge.

In the director's NOID, the director stated that the address, [redacted], St. Cloud, Florida did not exist and that although a service station listed at [redacted] with a difference zip code did exist, this entity did not appear to be a Texaco station or food mart. Therefore, the director stated that the letter of work verification was not credible.

In the petitioner's response to the NOID, counsel acknowledged that the address on the letter of work verification was incorrect, and that the address should have read [redacted] St. Cloud, Florida 34771. Counsel stated that the address was copied from one of the old invoices provided by the beneficiary, that did not have an "N" in the address and then the zip code was incorrectly written down by counsel. Counsel states that the gas station at [redacted], St. Cloud was a Texaco Station Food Mart when the beneficiary left his employment there in 2005. Counsel submits the following evidence with regard to the existence of the Texaco Food Mart:

A copy of a Credit Memo for Narcoosee Texaco Attn: [redacted], St. Cloud, FL 34771. This document is dated February 17, 2003;

A copy of a bill to Automated Petroleum, Brandon, Fl. From VAC-AIR Services for an entity identified as Narcoosee Texaco;

A copy of Sales and Use Tax Returns for TSN of Central Florida, Inc. D/B/A Texaco Food Mart, [redacted], from the Florida Department of Revenue dated February 2003, September 2003, and October 2003;

A copy of a Management agreement dated February 2, 2003 between [redacted] and TSN of Central Florida, Inc, and [redacted] and [redacted] (referred to as the manager). The property to be managed by [redacted] is identified as Texaco Food Mart, located at [redacted], St. Cloud Florida 34771;

A copy of the articles of incorporation of TSN of Central Florida, Inc. that indicate [redacted] and [redacted] are directors. This documented is dated August 7, 2001;

A copy of the 2003, 2004, and 2005 For Profit Corporation Annual Reports for TSN of Central Florida, Inc. that indicate [redacted] is the sole officer and director, in 2003, 2004 and 2005;

A declaration from the beneficiary dated November 20, 2006. In this document, the beneficiary states he was employed by Texaco Station Food Mart, [redacted], St. Cloud,

Florida, from about January 12, 2002 until about December 2004, as the assistant store manager on a full-time basis and that from January 2005 to about November 2005, he was worked on an as needed basis about 15 to 20 hours a week. The beneficiary stated that at this time, the store management changed hands. The beneficiary further stated that he was paid in cash as he had no work authorization. The beneficiary also stated that [redacted] hired him in about January 2002, and that by December 2003, [redacted] was no longer associated with the Texaco business. The beneficiary then stated that [redacted] agreed to write the letter of work verification as the beneficiary's former supervisor and that the present owner/ manager, Mr. [redacted] refused to provide a statement verifying the beneficiary's work experience. The beneficiary also added that he had undergone a polygraph test to demonstrate his truthfulness with regard to his employment at the Texaco Station Food Mart;

A copy of a death certificate for [redacted] that indicates he died in Boston, Massachusetts on July 25, 2006;

A copy of the beneficiary's polygraph test conducted by [redacted] who also submitted his resume. Among the questions asked of the beneficiary in the polygraph transcript was whether he had worked at the Texaco on [redacted] from 2002 to 2004. Mr. [redacted] stated that upon a review of the polygraphs there were no significant reactions in the beneficiary's response which indicates the beneficiary was truthful in all his answers; and

Copies of the beneficiary's academic credentials from Pakistan, as well as his resume that lists previous employment in Qatar, from 1998 to 2000, and 1995 to 1998.

To determine whether a beneficiary is eligible for an employment based immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany 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).

The beneficiary set forth his credentials on Form ETA-9089 and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. The applicant must have two years of experience in the job offered, assistant night manager. On Part K-A, Job 1, the beneficiary represented that he had worked full-time at Texaco Food Mart, [redacted], St. Cloud, Florida as an assistant store manager from January 12, 2002 to November 30, 2005. The beneficiary did not list any other positions or prior experience in part K.

The regulation at 8 C.F.R. § 204.5(l)(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.

Upon review of the evidence submitted with the initial petition and in response to the director's NOID, the AAO acknowledges that the various bills and articles of incorporation in the record list the Texaco Food Mart as being at both [redacted] and [redacted], in St. Cloud, Florida. Based on the bills for oil and other documents submitted to the record, the record reflects that a service station existed on the site for part of the beneficiary's claimed period of employment. However, whether a Texaco service station still exists at the Narcoosee Road address, and whether the address has an "N" in it, is not the most relevant factor in these proceedings.

The most material question in these proceedings is whether the beneficiary's letter of work experience is credible. Pursuant to the regulation at 8 C.F.R. § 204.5(l)(3), the employer or trainer of the beneficiary is responsible for the preparation of a letter of work experience, not the petitioner's counsel. Further, the beneficiary's declaration in response to the NOID stated that the letter signer, [redacted] by December 2003, was no longer associated with his claimed place of employment. As [redacted] verifies the beneficiary's employment in 2004 and 2005, his 2003 departure undermines the work experience letter's credibility. If [redacted] left employment with Texaco in 2003 and had no ownership role in the Texaco Food Mart,[3] then in 2006, he would not have had access to such records at the time that he signed the letter. This undermines [redacted] claim that he prepared the letter based on records and personal knowledge. Additionally, [redacted] letter lists the Florida address of the beneficiary's reported work location. However, [redacted] appeared to be residing in Boston, Massachusetts (based on the death certificate provided) at the time that the letter was written. Based on these factors, in addition to the points the director raised, we find that the letter is not credible.

Although the director notes that the petitioner did not submit any additional letters of work experience for two other positions listed on the beneficiary's resume, the AAO notes that neither of these positions is listed on the ETA Form 9089. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where 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. Thus, these positions cannot be considered by either the director or the AAO as evidence of the beneficiary's prior work experience as an assistant night manager.

Additionally, regarding the beneficiary's polygraph examination and affidavit, as the director noted, the beneficiary's assertions "cannot substitute for credible documentary evidence that he had the work experience required by the job." *See* 8 C.F.R. 204.5(l)(3); Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N

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[3] The Annual Reports for the Texaco Food Mart for years 2003, 2004, and 2005 submitted to the record only indicate [redacted] as the sole officer and director for the business.

Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner did not provide any evidence on appeal to overcome these deficiencies.

The AAO thus affirms the director's decision that the petitioner failed to demonstrate that the beneficiary had the required two years of experience to meet the terms of the labor certification. 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.