



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

In Re: 8287461

Date: JULY 7, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a convenience store night manager. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(B)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that (a) the Beneficiary possessed the experience required by the labor certification as of the priority date; and (b) the Beneficiary intended to work for the Petitioner on a permanent basis.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further proceedings consistent with our opinion and for the entry of a new decision.

#### I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).<sup>1</sup> See section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. See section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). See section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. See section 245 of the Act, 8 U.S.C. § 1255.

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<sup>1</sup> The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is November 14, 2017. See 8 C.F.R. § 204.5(d).

## II. THE BENEFICIARY'S EXPERIENCE

The Director determined that the Petitioner did not establish that the Beneficiary possessed the experience required by the labor certification as of the priority date. A 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); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

In this case, the labor certification requires a high school diploma or GED and 24 months of experience in the job offered of convenience store night manager. Experience in an alternate occupation is not acceptable. The labor certification states that the Beneficiary qualifies for the offered position based on experience as a full-time store manager (40 hours per week) with [REDACTED] in Pakistan, from August 6, 2007, to February 3, 2010, and from January 5, 2015, to July 31, 2015.

In his denial notice, the Director determined that the “while the evidence accounts for at least 24 months of work experience with [REDACTED] the Petitioner has not established that the beneficiary gained experience performing the same duties as the proffered position.” He cited *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, slip op. at 4 (BALCA Oct. 24, 2011) (citations omitted), for the proposition that experience in a job offered means experience performing the key duties of an offered position.<sup>2</sup> He focused on the duties of the position and stated that the Beneficiary did not have any experience overseeing and directing the operations of a gas station because [REDACTED] was not a gas station. On appeal, the Petitioner asserts that the Beneficiary is qualified for the offered position. It states that the title of the offered job is “convenience store night manager,” and the fact that the convenience store where the Beneficiary worked did not offer gas “has no legitimate bearing on the beneficiary’s ability to perform the job duties.”

Although a key job duty is the oversight of operations of a convenience store and gas station, the record is not clear whether this key duty requires specific knowledge that could only be gained at a convenience store with gas pumps. For example, if oversight of the gas station includes overseeing inspection, testing, and compliance issues related to the gas pumps; troubleshooting problems with the gas pumps; and/or repairing the pumps, then the Beneficiary would need experience overseeing and directing the operations of a gas station to perform the duties of the offered job. Therefore, we will remand the matter to the Director to further clarify the key duties of the offered job.

Further, based on the deficiencies detailed below, we will also remand the matter to the Director to review whether the Beneficiary was employed at [REDACTED] during the time periods specified on the labor certification.<sup>3</sup> Evidence relating to qualifying experience must be in the form of a letter

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<sup>2</sup> Decisions of the Board of Alien Labor Certification Appeals (BALCA) do not bind USCIS. See 8 C.F.R. § 103.9(b) (stating that, in Department of Homeland Security (DHS) proceedings involving the same issues, precedent decisions of the Attorney General and the Board of Immigration Appeals bind DHS officers). But USCIS defers to DOL’s reasonable interpretations of its labor certification regulations. See *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 152 (1991) (requiring one administrative agency to defer to another’s reasonable interpretation of regulations that Congress authorized it to promulgate and enforce).

<sup>3</sup> 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 Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(l)(3). With the petition, the Petitioner submitted a letter dated August 5, 2015, from [REDACTED] President of [REDACTED] in Pakistan. He states that he has “access to all employee files” and, therefore, that he is “able to provide this letter to confirm” the Beneficiary’s employment. He states that the Beneficiary worked as a store manager 45 hours per week from August 6, 2007, to February 3, 2010, and from January 5, 2015, to July 31, 2015, and he listed his duties.

In a request for evidence (RFE), the Director indicated that information provided on the Beneficiary’s nonimmigrant visa application submitted in July 2015 conflicts with the information provided on the labor certification in this case. The Beneficiary indicated on the nonimmigrant visa application that his present occupation was “not employed” and that he was a freelance artist, working as a 3D animator and motion graphic animator. The Beneficiary also indicated that he had previously worked as a motion graphic animator in Malaysia from February 2013 to December 2014.<sup>4</sup> He did not disclose his purported employment with [REDACTED] on his nonimmigrant visa application, and he did not list the Malaysian employment on the labor certification. In the RFE, the Director indicated that the Petitioner must provide independent, objective evidence to resolve the inconsistencies regarding the Beneficiary’s prior experience. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).<sup>5</sup> Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

In response to the RFE, the Petitioner provided an affidavit dated May 21, 2019, from the Beneficiary. He stated that the 2015 nonimmigrant visa application asked him to provide his “primary occupation.” He asserted that because his bachelor’s degree was in creative multimedia, and he had been working on a freelance basis in 2013 and 2014 in that field and was entering the United States to obtain a master’s degree in the same field, he did not list his employment with [REDACTED] as that job was “officially ending at the end of the month.” However, the nonimmigrant visa application also required him to list his previous employment. In that section of the application, he listed his employment as a motion graphic animator in Malaysia from February 2013 to December 2014, but he did not list his purported experience as a store manager with [REDACTED] from August 2007 to February 2010. The reason for this omission is not clear. *See id.* Further, the Malaysian employment was not listed on the labor certification at Part K<sup>6</sup> as required. *See id.* Additionally, the Beneficiary submitted his nonimmigrant visa application in July 2015 and, as detailed below, he obtained the letter from his father verifying his employment as a store manager in August 2015. If he was entering the United States to solely pursue his education in creative multimedia as detailed in his affidavit, it is not clear why he obtained the work experience letter one month after submitting a nonimmigrant visa application that omitted this employment. *See id.*

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<sup>4</sup> He signed the application and certified that its contents were correct and that any false or misleading statement may result in the permanent refusal of a visa or denial of entry in the United States.

<sup>5</sup> Evidence that a petitioner creates after USCIS points out the deficiencies in a petition is not independent and objective evidence. Independent and objective evidence is evidence that is contemporaneous with the Beneficiary’s experience, such as paystubs, payroll records, tax returns, bank records, and/or personnel records.

<sup>6</sup> Part K required him to list all jobs held during the last three years, which would have included the Malaysian employment.

In response to the RFE, the Petitioner also provided an affidavit dated May 10, 2019, from [ ] verifying the Beneficiary's employment at [ ] in Pakistan. He stated that he is the Beneficiary's father and that he pays all of his employees in cash on the last day of every month.<sup>7</sup> He also stated that his company retains "payroll records for 12 months for internal accounts purposes," and, therefore, he does not have payroll records dating back to 2015.<sup>8</sup> The affidavit was dated and signed on May 10, 2019, but it was not notarized until May 11, 2019. It is not clear how the notary verified the authenticity of the document and its signer a day after the document was executed. *See id.* Further, [ ] identified himself as the President and sole owner of [ ] and affidavits in the record state that he worked at the store every day for decades until he semi-retired in 2016. However, if the Beneficiary began managing the store full-time in 2007 as detailed on the labor certification, [ ]'s role at the store during that time is unclear. *See id.*

Additionally, in response to the RFE, the Petitioner also provided an affidavit dated May 11, 2019, from [ ] who states that he owns a shop near the [ ] and that he has known the Beneficiary's family for "decades." He states that he saw the Beneficiary "working at their store daily as manager from 2007 until [the Beneficiary] left for Malaysia sometime in 2010" and again "from January 2015 until July 2015 when he left for the United States." The top of the affidavit is stamped "23 APR 2019" by [ ] Advocate High Court," presumably to legitimize the affidavit. However, since the affidavit was not executed until May 11, 2019, it is not clear how [ ] stamped it weeks earlier on behalf of a "High Court." *See id.*

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Based on the deficiencies described above, the affidavits submitted in response to the RFE are not independent, objective evidence of the Beneficiary's employment. *See Matter of Ho*, 19 I&N Dec. at 591-92.<sup>10</sup> Thus, we cannot affirmatively find that the Beneficiary possessed the minimum experience

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<sup>7</sup> The record does not contain copies of monthly deposit slips reflecting deposits of the Beneficiary's wages into his bank account, nor does it contain any other evidence of his receipt of cash wages from [ ].

<sup>8</sup> The record does not contain the Beneficiary's tax returns reflecting his income from [ ] which may have verified his employment there.

<sup>9</sup> His accompanying personal identification card is written in Urdu and translated into English.

<sup>10</sup> The use of identical language across various letters or affidavits from supposedly different sources can indicate that the assertions in these documents are not credible. *See Surinder Singh v. BIA*, 438 F.3d 145, 148 (2d Cir. 2006) (upholding an adverse credibility determination in asylum proceedings based in part on the similarity of the affidavits); *see also Mei Chai Ye v. U.S. Dep't. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (quoting *Matter of E-M-*, 20 I&N Dec. 77, 80 (Comm'r 1989).

required by the labor certification as of the priority date. On remand, the Director should request additional evidence of the Beneficiary's qualifications and allow the Petitioner reasonable time to respond.

### III. BENEFICIARY'S INTENT TO WORK FOR THE PETITIONER

The Director also determined that the Petitioner did not establish that the Beneficiary intended to work for the Petitioner on a permanent basis. A petitioner must be "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. It must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966). In the RFE, the Director noted that the Beneficiary was last admitted to the United States as a nonimmigrant student in 2015 to attend a master's level animation program in California, and that he intended to study animation and not work as a full-time convenience store night manager. Thus, the Director asked the Petitioner to provide a sworn statement from the Beneficiary indicating whether he intends to work for the Petitioner in the offered job on a full-time, permanent basis, or whether he intends to pursue further studies or employment related to animation. In response, the Petitioner submitted an affidavit from the Beneficiary stating that he intends to work for the Petitioner in the offered position "on a full-time basis" and that he does not "at this time, intend to pursue further studies or employment related to animation." The Director noted that the Beneficiary did not "expressly state that he intends to work for the petitioner on a permanent basis." The Director concluded that:

[i]n light of the beneficiary's education related to graphic animation, his experience as a freelance artist, and the resume and professional summary identifying him as an artist and multimedia designer, the evidence does not establish that the beneficiary intends to work for the petitioner as a convenience store night manager on a lasting, continuous, and permanent basis.

On appeal, the Petitioner asserts that it and Beneficiary have indicated a good-faith intention to make and receive an offer of full-time, permanent employment within the expectation of a job in the convenience store industry. It cites *Matter of Cardoso*, 13 I&N Dec. 228, 230 (BIA 1969), and *Matter of Rajah*, 25 I&N Dec. 127, 132 (BIA 2009), for the proposition that a beneficiary is not required to establish intent to remain at a certified job indefinitely. It states that "[a]n alien need not intend to remain at the certified job forever, but at the time of obtaining lawful permanent resident status, both the employer and the alien must intend that the alien be employed in the certified job." *Matter of Rajah*, 25 I&N Dec. at 132; *see Yui Sing Tse v. INS*, 596 F.2d 831, 835 (9th Cir. 1979).

The Petitioner has established that it is more likely than not that the Beneficiary intends to work for the Petitioner on a permanent basis. The Beneficiary has the required high school diploma, and the fact that he has college education in a field that differs from the offered job does not, in itself, preclude his intent to work for the Petitioner on a permanent basis. Further, although the Petitioner has not provided independent, objective evidence resolving the inconsistencies in the Beneficiary's prior qualifying employment, the fact that he may have also worked as an artist and multimedia engineer does not, in itself, preclude his intent to work for the Petitioner on a permanent basis. Thus, we will withdraw the portion of the Director's decision related to the Beneficiary's intent to work for the Petitioner on a permanent basis.

However, in April 2019, the Petitioner filed another Form I-140 on behalf of a different Beneficiary for the position of bookkeeper. The duties of a bookkeeper as detailed on that labor certification include reconciling daily transactions, recording numerical data, compiling reports and maintaining accounting records, and balancing accounts on a daily basis. DOL iCert, [https://icert.doleta.gov/index.cfm?event=ehLCJRExternal.dspCert&doc\\_id=3&visa\\_class\\_id=6&id=1454977](https://icert.doleta.gov/index.cfm?event=ehLCJRExternal.dspCert&doc_id=3&visa_class_id=6&id=1454977) (last visited Apr. 30, 2020). Those duties overlap with many of the duties of the offered job, including reconciling daily cash with sales receipts; preparing daily sales reports; and preparing payroll and sales tax ledgers. Based on the Petitioner's intent to hire a separate bookkeeper, it is not clear that it intends to employ the Beneficiary under the terms and conditions of the labor certification. Thus, we cannot affirmatively find that the job offer is *bona fide*. On remand, the Director should request additional evidence of the *bona fides* of the job offer and allow the Petitioner reasonable time to respond.

**ORDER:** The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.