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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B6

DATE: SEP 0 2 2011 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director, Texas Service Center (director). On June 29, 2010, the director served the petitioner with a Notice of Intent to Revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a landscaping business. It seeks to permanently employ the beneficiary in the United States as a landscaping worker. The petitioner requests classification of the beneficiary as an unskilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1]

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 is July 10, 2006, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

As set forth in the director's NOR, at issue in this case is whether the beneficiary possessed the minimum experience requirements of the offered position as set forth in the labor certification. The AAO will also consider whether the petition can be approved in the requested unskilled worker classification.[2]

The record shows that the appeal is properly filed, timely, 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.[3]

The petitioner must establish that the beneficiary possessed all the education, training, and

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[1] Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), grants preference classification to other qualified immigrants who are capable of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

[2] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director 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).

[3] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, 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).

experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 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. United States Citizenship and Immigration Services (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, 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).

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). 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.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff,* 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at *7.

The required education, training, experience and skills for the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the position requires a minimum of 24 months of experience in the job offered. The labor certification, signed by the beneficiary under penalty of perjury, states that he worked as a landscaping worker for [redacted] in Scotch Plains, New Jersey, from March 21, 1995, through March 21, 1999.

The record contains the following evidence of the beneficiary's claimed employment experience:

- A letter dated March 14, 2003, from [redacted], stating that the beneficiary worked for his company "AS A EXCAVATOR'S HELPER ON A FULL TIME BASIS FOR A PERIOD OF FIVE YEARS 3/21/95 TILL 3/21/99." [redacted] specified that the beneficiary performed the following duties: "USED HEAVY EQUIPMENT AND HAND TOOLS WHEN DIGGING CELLAR FOR NEW HOUSES, POOL'S WATER AND SEWER LINES."

- A second letter dated July 21, 2010, from [redacted], submitted as part of the petitioner's response to the NOIR, stating that the beneficiary worked for him as an excavation helper from March 1995 until December 1996, and then as a landscape worker from December 1996 until March 1999.

- A letter dated July 26, 2010 (with English translation) stating that the beneficiary worked as a landscaper from April 1992 through February 1995 for [redacted]

The regulation at 8 C.F.R. § 204.5(l)(3) provides, in part:

> (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.
> >
> > . . .
> >
> > (D) *Other Workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience and other requirements of the labor certificate.

The regulation at 8 C.F.R. § 204.5(g) also states that evidence relating to qualifying experience shall be in the form of letters from current or former employers and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered. *Id.*

The petitioner states on appeal that "he is now being denied because of improper instructions from his attorney." While the petitioner makes several references on appeal to being misguided by an attorney, the record does not contain any evidence that the petitioner was ever represented in this petition. Form I-140, Parts 8 and 9, reveals that the petition was filed by the petitioner, and was signed by [redacted] ETA Form 9089, Part M, specifically states that the application was completed by the employer, and was signed by [redacted].

The petitioner asserts on appeal that the beneficiary's job duties for [redacted] were detailed on the labor certification and that "common sense" dictates that the "explanation provided with the new letter would satisfy that problem." However, the second letter from [redacted] does not contain an explanation of the contradictions between that letter and his first employment letter. In his first letter, [redacted] provided a detailed description of the beneficiary's duties as an excavator's helper from 1995 to 1999. However, in his second letter, [redacted] states that the beneficiary actually worked for him as a landscaping worker from December 1995 through March 1999. [redacted] second letter does not explain the differences between the two letters, nor is it supported by any contemporaneous evidence that might resolve the inconsistencies between them.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). The petitioner has failed to submit any objective evidence to explain why [redacted] first letter provided a detailed description of the beneficiary's duties as an excavator's helper from 1995 to 1999, while his second letter vaguely states that the beneficiary worked in landscaping for over half of that period. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. *Id.*

The petitioner, on appeal, accuses the director and USCIS of "com[ing] up with new or extended [reasons for its] decision not mentioned on intent to revoke." However, the grounds cited by the director in the NOIR and NOR were the same: the petitioner had failed to submit evidence sufficient to establish that the beneficiary satisfied the experience requirements set forth on the labor certification. Therefore, the director's finding on the NOR has not been overcome on appeal.

The employment letter from [redacted] is also not sufficient to establish the beneficiary's qualification for the offered position. Part K of the labor certification instructs the petitioner to list any "experience that qualifies the alien for the job opportunity for which the employer is seeking certification." This claimed experience was not listed at Part K of the labor certification. The beneficiary's claim of prior qualifying employment experience is less credible if that experience is not stated on the labor certification. *See Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976).

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired 24 months of experience in the offered job prior to the priority date. Thus, the petitioner has not established that the beneficiary possesses the experience required to perform the proffered position. 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 Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Beyond the issue cited by the director in the NOR, the AAO will also examine whether not the petition may be approved for the requested classification of unskilled worker.

On Part 2.g. of Form I-140, the petitioner indicated that it was filing the petition for an unskilled worker.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(4) states, in pertinent part:

> Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

The regulation at 8 C.F.R. § 204.5(l)(2) states, in pertinent part:

> Other worker means a qualified alien who is capable, at the time of petitioning for this classification, of performing unskilled labor (requiring less than two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

In this case, the labor certification states that the offered position requires 24 months of experience in the job offered of landscaping worker. However, the petitioner requested the unskilled worker classification on the Form I-140. A petition requesting unskilled worker classification cannot be based on a labor certification requiring two years of training or experience. 8 C.F.R. § 204.5(l)(2). There is no provision in statute or regulation that permits the AAO to consider a petition under a different visa classification once the director has rendered a decision. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

Therefore, the petition cannot be approved in the requested classification of unskilled worker because the minimum experience requirement for the offered position as set forth on the labor certification is 24 months of experience in the job offered.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043; *see also Soltane v. DOJ*, 381 F.3d at 145

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

The director's decision to revoke the approval of the petition will be affirmed. 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.