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

B6

[redacted]

DATE: DEC 0 8 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a polo and polo horse company. It seeks to permanently employ the beneficiary in the United States as a polo barn boss. 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).[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, which is the date the DOL accepted the labor certification for processing, is May 28, 2009. *See* 8 C.F.R. § 204.5(d).

The director's decision denying 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.

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.[2]

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)(l), (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 Matter of Silver Dragon Chinese Restaurant*, 19 I&N

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[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.

[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).

Dec. 401, 406 (Comm. 1986). *See also Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *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 position offered[3] has the following minimum requirements:

H.4. Education: None required.
H.5. Training: None required.
H.6. Experience in the job offered: 24 months.
H.8. Alternate combination of education and experience: None accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: None.

The labor certification also states that the beneficiary qualifies for the position offered based on experience as a polo horse trainer with Rancho Alegre in Wellington, Florida, from April 29, 2002, until October 15, 2004. The labor certification also states that the beneficiary was employed by the petitioner as a polo horse trainer beginning January 31, 2005.[4] No other experience is listed. The

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[3] The petitioner indicated on the labor certification that the position offered is a "polo barn boss," however, in a letter, dated July 30, 2010, the petitioner indicated that the position offered is a "polo horse trainer."

[4] Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, indicate that the beneficiary's experience with the petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position. 20 C.F.R. § 656.17 states:

> (h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation
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> . . . . .

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 June 2, 2009, which is written in Spanish and accompanied by an English translation, from the company "Gomez de Parada y Asociados A.P.," on letterhead stating that the company employed the beneficiary as a polo barn boss from January 4, 2000, until March 1, 2002. This letter was first provided by the petitioner in response to the director's Request for Evidence, which was issued as the petitioner provided no documentation of the beneficiary's experience with the initial I-140 petition filing. As the director discussed in his decision, this experience was not listed in Part K on the labor certification, despite the instructions to that section which states "[l]ist all jobs the alien has held during the past 3 years. Also list any other

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> (i)(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums. DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer cannot require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:
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> > (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
> > (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.
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> . . . .
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> (5) For purposes of this paragraph (i):
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> > (i) The term ''employer'' means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
> > (ii) A ''substantially comparable'' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

experience that qualifies the alien for the job opportunity for which the employer is seeking certification."[5] Experience not documented on the labor certification, which allows for the listing of experience from multiple employers, and specifically requests that the beneficiary document "any other experience that qualifies the alien for the job opportunity," is less credible then the experience listed on the labor certification; experience listed on the labor certification is sworn to be true under the penalty of perjury by the beneficiary. *See Matter of Leung*, 16 I&N Dec. 12, Interim Decision 2530 (BIA 1976) (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.) Counsel argues that the omission of the experience, which the beneficiary is requested to provide on the labor certification by that form's instructions, does not lessen the credibility of the evidence.[6] However, the import of *Leung* is perhaps immaterial for this matter, as the letter provided is not credible on its face. The writer of the letter does not identify his title, therefore, the letter does not meet the regulatory requirements. The letter does not indicate whether the beneficiary was employed full-time or part-time, therefore the AAO cannot determine whether the beneficiary possessed the years of experience required on the labor certification. More importantly, the letterhead, which was not translated in the translation provided by the petitioner, indicates that the writer's business is as an "agentes de seguros," which suggests that the writer is an insurance agent.[7] Further, the translated line beneath the writer's name states, "Licensed in Industrial Relations." Thus, it appears that the writer of this letter is an insurance agent, and not the owner or operator of a polo horse stable; this casts doubt on the writer's claim that he employed the beneficiary as the "boss" of his polo stable. *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.

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[5] By default, ETA Form 9089 provides the beneficiary with three (3) sections in which to describe her qualifying experience; additional sections can be added as needed. However, the beneficiary listed only two employment experiences, both in a different occupation, polo horse trainer, than the position offered, polo barn boss. Thus, additional sections remained on the instant ETA Form 9089 in which the petitioner could have listed additional qualifying experience. The petitioner indicated on the labor certification in J.18 that the beneficiary possessed experience in the position offered. As noted above, the petitioner indicated on the labor certification in H.10 that applicants could not qualify for the position offered based on experience in an alternate occupation, which is corroborated by the petitioner's answer to J.20, which indicates that the beneficiary did not qualify for the position based on experience in an alternate occupation.

[6] Counsel's argument is that the holding of *Matter of Leung* is not regarding the credibility of experience omitted from the labor certification; as noted above, the citation is from the Board's dicta.

[7] *See* http://www.spanishdict.com/translate/seguro (accessed November 28, 2012) (definition 6, masculine noun, "insurance"); *see* http://www.spanishdict.com/translate/agentes (accessed November 28, 2012) (definition 1, noun, "agent").

Further, the translation states that this "letter is notarized." The translation of the notary block states, "without verifying the authenticity, validity or legality of the document presented in original, the preceding photocopy is comprised of one written page, single sided, and is a faithful and exact reproduction of its original." The notary stamp is dated August 27, 2009, over two months after the letter was purportedly written, however, the stamp is on a separate page; further, the stamp in no way identifies what document the notary is certifying to be an exact copy. Thus, as this stamp is not notarizing the writer's signature, and as the stamp is itself on a separate document in no way attached to the letter, and the notary's statement does not identify the document that it purports to certify, the notarial stamp provides no additional credibility to the document. Further, this letter was purportedly written by the insurance agent on June 2, 2009, however, it was not provided with the initial I-140 petition. Upon submission of the letter in response to the director's RFE, the petitioner did not offer any explanation as to why the letter was not previously provided, as the date on the letter indicates it was available at the time of filing. The petitioner did not offer any explanation as to why evidence of the beneficiary's claimed experience with Rancho Algere could not be obtained. To date, the petitioner has not provided any explanation as to why the beneficiary's purported experience with the insurance company's polo stable was omitted from the labor certification. In addition, there is no explanation in the record that accounts for the beneficiary's employment with the petitioner as a polo horse trainer, which appears to be a subordinate position to the position the beneficiary purportedly held previously, polo barn boss. These inconsistencies must be overcome by independent, objective evidence that the beneficiary possessed the required experience. *Id.*at 591-92, 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 record does not contain independent, objective evidence of the beneficiary's claimed experience. In any further filings, the petitioner would need to submit records from the relevant ministry in Mexico to verify this claimed employment, the full-time nature of this employment, and the relevant job title for this position, as well as resolve the inconsistencies set forth above related to the author of the letter, and issues with the letter itself. Therefore, the petitioner has not demonstrated that the beneficiary possessed 24 months of experience in the position offered, polo barn boss, as of the priority date.

Beyond the decision of the director, the petitioner has not demonstrated that the job offer is a realistic, *bona fide* offer of employment. *See* 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.3. The position offered is that of a "polo barn boss" with the first duty being the supervising and coordinating of "the activities of workers engaged in overall care of Polo horses." However, on Form I-140, Part 5, Item 2, the petitioner did not indicate that it employed any employees. Further, the petitioner indicated in C.5 on the labor certification that it had zero (0) employees. On the petitioner's 2008 tax return, IRS Form 1120S, Line 8, Salaries and Wages, indicates that the petitioner paid no salaries or wages in 2008; the same is true

for the petitioner's 2009 and 2010 tax returns.[8] Therefore, it does not appear that the petitioner employs any workers for the beneficiary to "supervise and coordinate." As discussed above, the only experience attested to be true by the beneficiary was experience as a polo horse trainer, not as a barn boss. This included employment with the petitioner. Further, the petitioner's letter indicated that the beneficiary's job title will be "polo horse trainer," which contradicts the job title utilized in the labor certification. *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986), quoted an advisory opinion from the Chief of DOL's Division of Foreign Labor Certification as follows:

> The regulations require a "job opportunity" to be "clearly open." Requiring the job opportunity to be bona fide adds no substance to the regulations, but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of regulation 656.20(c)(8). Likewise requiring the job opportunity to be bona fide clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of regulations 656.20.

As the petitioner does not appear to employ any workers, and as the position offered is contingent upon the beneficiary supervising workers, there does not appear to be a *bona fide* job offer. Therefore, the petition must also be denied because the petitioner failed to establish that it intends to employ the beneficiary in the position 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 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).

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 skilled worker under section 203(b)(3)(A)(i) of the Act. In addition, the AAO finds that the petitioner has not demonstrated that a *bona fide* job opportunity exists.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

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[8] The petitioner does list amounts under "cost of labor," line 3, Schedule A, on the 2009 and 2010 tax returns. However, as the return does not indicate any payroll or employment tax costs, it is unclear what the cost of labor includes.