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]

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DATE: DEC 2 6 2012 OFFICE: NEBRASKA 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, Nebraska 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 restaurant. It seeks to permanently employ the beneficiary in the United States as a cook. 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 October 3, 2005. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum two years 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.[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)(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 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 offered position has the following minimum requirement: two years of experience in the job offered. The petitioner does not allow for experience in any alternate position.

The labor certification also states that the beneficiary qualifies for the offered position based on prior experience as: (1) a dishwasher with the petitioner in Montvale, New Jersey from an unknown start date (form left blank) until December 1, 1997, (2) a food prep worker with the petitioner in Montvale, New Jersey from December 1, 1997 until January 1, 2000, and (3) a cook with the petitioner in Montvale, New Jersey from January 1, 2000 to an unknown end date (form left blank). 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.

Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly 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.[3] Specifically, the petitioner indicates that questions J.19 and J.20, which ask about

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[3] 20 C.F.R. § 656.17 (2009) 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 . . . . .
> > (4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(ii) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

(i) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(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 can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

(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.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

(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

experience in an alternate occupation, are not applicable. In response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." The petitioner specifically indicates in response to question H.6 that 24 months of experience in the job offered is required and in response to question H.10 that experience in an alternate occupation is not acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable[4] and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.2 that his most recent position with the petitioner was as a cook, and the job duties are the same duties as the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as he was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position.

Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position. Similarly, any experience the beneficiary gained with the petitioner as a dishwasher or food prep worker may not be used to qualify the beneficiary for the proffered position as the petitioner did not allow an individual to qualify through any alternate occupation.

With the filing of the Form I-140 petition on August 24, 2010, the petitioner submitted an experience letter detailing the beneficiary's employment as a cook in a restaurant, [redacted], in Puebla, Mexico. This position was not listed on the ETA Form 9089. ETA Form 9089, Item K on page 6 states, "[l]ist all jobs the alien has held during the past 3 years. Also list any other experience that qualifies the alien for the job opportunity for which the employer is seeking certification." The beneficiary's employment as a cook at [redacted] should have been listed because the experience could qualify him for the position of cook at the petitioner's restaurant. A Request for Evidence issued on August 25, 2011, requests an explanation for why the experience at [redacted] was not listed on the labor certification. In a response dated October 14, 2011, counsel states,

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descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

[4] A definition of "substantially comparable" is found at 20 C.F.R. § 656.17(i):

> (5) For purposes of this paragraph (i):
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> . . .
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> (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.

"[a]lso note that the undersigned prepared the application for alien labor certification, Form ETA-9089 and did not include the experience gained by the Beneficiary in Mexico. It was my oversight in not including an additional page and I apologize for any inconvenience it has caused."

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 Form ETA 750B, lessens the credibility of the evidence and facts asserted. Omitting qualifying experience may conceal relevant information necessary for DOL's labor certification determination. *See* 20 C.F.R. §656.17(i), §656.24. Additionally, ETA Form 9089 indicates the petitioner's name to be [redacted] only, and provides no "DBA." However, all three jobs listed in Part K indicate the employer's name to be [redacted] From the record, it is unclear whether the petitioner revealed to DOL that the employer indicated in Part K of ETA Form 9089 was actually the petitioner and whether all the beneficiary's experience was only with the petitioner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The record contains three experience letters. The first letter, dated May 13, 2011, from the owner of the petitioner states that the company hired the beneficiary in 1994 and employed him in the position of cook from January 1, 2001 until the present. As discussed above, the beneficiary's claimed experience with the petitioner cannot be used as qualifying experience in this matter.

As previously stated, the other two letters refer to employment experience not listed on the ETA Form 9089. The second letter, dated September 30, 2011, signed by three former co-workers of the beneficiary, states that the beneficiary was employed from 1990 until 1994 at [redacted] and prepared foods. However, the letter does not state the title of the beneficiary's position, specify the dates of employment, or state if the job was full-time. The letter is not from an employer, therefore, it does not qualify as regulatory evidence pursuant to 8 C.F.R. § 204.5(g)(1).

The third letter, dated July 2, 2010, from [redacted] states that the company employed the beneficiary as a cook from 1990 to 1994. The letter does not state the month and day that the employment began or ended or indicate whether beneficiary's employment was full-time or part-time, preventing the AAO from determining the total length of experience. The letter does not contain any job duties. The translation of the letter does not comply with the terms of 8 C.F.R. § 103.2(b)(3):

> *Translations.* Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which 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.

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[5] The coworkers' employment verification letter spells the restaurant, [redacted], while the owner's employment verification letter and the attorney submission spell it, [redacted]

The translation of the letter from [redacted] does not contain a translator certification. And, it appears that the English translation is not consistent with the Spanish language document. For instance, in comparing the two documents, the original Spanish language document contains a phrase at the end of the first paragraph that is completely absent from the translation. In addition, the translation mentions the beneficiary's family. However, the original Spanish language document does not appear to mention the beneficiary's family. Thus, because employment verification letter is not accompanied by a full English language translation which is complete, accurate, and in accordance with the regulations, it is not possible to evaluate the employment verification information provided.

These discrepancies in the evidence including deficiencies in the letters submitted cast doubt on the beneficiary's asserted work history in Mexico. It 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Because the beneficiary cannot rely on his work experience with the petitioner as discussed above, the only other evidence in the record that would demonstrate eligibility is the beneficiary's work experience in Mexico which is deficient as set forth above.

On appeal, the petitioner states that the director applied an impermissible standard to the quality of evidence because the evidence was not listed on the ETA Form 9089 and that the director wrongly rejected counsel's explanation that the beneficiary's work experience at [redacted] was not listed on the ETA Form 9089 due to attorney error. Counsel also asserts that the director misread and misapplied *Matter of Leung* because there has been no finding of fraud relating to the employment letters.

In *Matter of Leung*, the district director concluded that the beneficiary's claim of prior employment experience was not credible. In reaching this decision, the district director considered the entire record of proceeding, and one relevant factor mentioned was the fact that the beneficiary claimed to have employment experience that was not listed on the labor certification.

The petitioner and the beneficiary bear the burden of proof to show that the beneficiary was eligible for the position offered. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

It 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Based on the discrepancies set forth above, in any further filings, the petitioner must submit independent, objective evidence of the beneficiary's claimed experience, such

as government or payroll records from the appropriate ministry in Mexico and resolve the discrepancies in the letter set forth above.

For the reasons discussed above, the letters submitted to support the beneficiary's claimed experience fail to establish that the beneficiary has the required experience for the position offered. Thus, the petitioner has not demonstrated by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought.

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.

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.