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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

B6

[redacted]

DATE: JAN 2 5 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

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 preference visa petition was initially approved by the Director, Texas Service Center (Director). The approval was subsequently revoked by the Director.[1] That decision is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a finishing construction business. It seeks to employ the beneficiary permanently in the United States as a composition stone applicator and to classify him 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). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).

Section 203(b)(3)(A)(i) of the Act 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 – which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL – the beneficiary had the qualifications stated on the application. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this case, the ETA Form 9089 – which was accepted for processing by the DOL on October 17, 2005 – specified that a high school education, or a foreign educational equivalent, and 48 months (four years) of "experience in the job offered" was required to qualify for the position.

The petitioner filed its Form I-140, Immigrant Petition for Alien Worker, accompanied by the approved ETA Form 9089 (labor certification), on March 17, 2008. On January 12, 2009, the Texas Service Center approved the Form I-140 petition.

On April 27, 2009, however, the Director issued a Notice of Intent to Revoke (NOIR). In this notice the Director cited a letter in the record from the [redacted] stating that the beneficiary was employed as a stone applicator/stonemason, in a full-time position, from March 1, 1982 to August 31, 1987 – a period of five and one-half years. This information, however, appeared to conflict with another letter in the record, submitted in support of an earlier Form I-140 petition filed by [redacted][2] stating that the beneficiary was

[1] Section 205 of the Immigration and Nationality Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security] may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the Director that the petition was approved in error may be good and sufficient cause for revoking the approval. *See Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

[2] The earlier Form I-140 petition – [redacted] was filed on July 27, 2007, and denied by the Director for lack of sufficient evidence on July 25, 2008.

employed as an auto mechanic by [redacted] in a salaried position from March 1982 to July 1990. Citing online information from Google Maps indicating that Kolbuszowa and Lublin are approximately 162 kilometers (101 miles) apart, the Director expressed his doubt that the beneficiary could have worked in both jobs at the same time. After advising that the labor certifications accompanying both of the Form I-140 petitions were subject to invalidation, the Director invited the petitioner to submit additional evidence to resolve the discrepancies in the two petitions and establish "the true employment of the beneficiary" between March 1, 1982 and August 31, 1987.

The petitioner responded with an affidavit from the beneficiary, dated May 14, 2009, which explained his employment in Poland during the 1980s as follows:

- Job # 1 – March 1, 1982 to August 31, 1987 – the beneficiary states that he worked full-time as a stone applicator/stonemason for the [redacted]
- Job # 2 – March 2, 1982 to August 31, 1987 – the beneficiary states that he worked part-time as a driver for the [redacted] The job location was in Nisko, approximately 52 kilometers (33 miles) from Kolbuszowa.
- Job # 3 – September 1, 1987 to the present – the beneficiary ceased working as a part-time driver and began working as a full-time auto mechanic for the same employer – the PPUP Polish Post Office in Nisko.

The petitioner pointed to language in the previously discussed letter from the [redacted] which appears to confirm that the beneficiary's job location from March 2, 1982 to March 31, 1990 was in Nisko, not Lublin. Since Nisko and Kolbuszowa are only 33 miles apart, the petitioner asserts that it was quite possible for the beneficiary to work a part-time job in the former city at the same time he was working a full-time job in the latter city.

On June 2, 2009, the Director issued a decision revoking the approval of the petition. The Director noted that the labor certification (ETA Form 9089) filed with the instant petition states that the beneficiary was employed in a 40-hour/week job as a stonemason with [redacted] from March 1, 1982 through August 31, 1987. However, the labor certification filed earlier (April 30, 2001) by [redacted] Auto Sales (Form ETA 750)[3] stated that during this same time period (and for another three years up to July 1990) the beneficiary was employed in a different 40-hour/week job as an auto mechanic for PTSL [redacted] After discussing the petitioner's response to the NOIR, and the beneficiary's claim to have worked full-time as a stonemason in one city and part-time as a driver in another city from March 1982 through August 1987, the Director determined that the beneficiary's claims did not correspond to the documentation of record and to the information in the certified Form ETA 750. The Director concluded that the petitioner had failed

[3] The Form ETA 750 was replaced by the ETA Form 9089 on March 28, 2005.

to resolve the evidentiary inconsistencies in the record, and revoked his prior approval of the petition.

The petitioner filed an appeal on June 18, 2009. The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. In support of the appeal the petitioner has submitted copies of documents already in the record, but no new evidence. The thrust of the appeal is that the Director misinterpreted pertinent documentation. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

To determine whether a beneficiary is eligible for an employment-based immigrant visa, United States 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, 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). According to the plain terms of the labor certification in this case (Part H, Line 6 of ETA Form 9089), the proffered position – composition stone applicator – requires four years of "experience in the job offered."

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) provides as follows:

> 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.

In Part K of the ETA Form 9089 – Alien Work Experience – the only job listed for the beneficiary during the 1980s was with [redacted] in Kolbuszowa, Poland, as a stonemason, 40 hours/week, from March 1, 1982 to August 31, 1987. As evidence of this employment the petitioner submitted a letter from the organization, dated August 31, 1987, with an English translation, certifying the dates of employment, that the employer was the [redacted] and that the beneficiary worked as a "stone applicator-stonemason" in a full-time position.

In the labor certification submitted by [redacted] in the earlier immigrant visa petition, the only job listed for the beneficiary in the 1980s was with PTSL [redacted] as an auto mechanic, 40 hours/week, from March 1982 to July 1990 (Form ETA 750, Section 15, item c). As evidence of this employment the petitioner submitted a letter from the organization dated May 29, 2001, with an English translation, certifying the dates of employment as March 2, 1982 to March 31, 1990, that the employer was the [redacted] that the job location was in Nisko, and that the beneficiary worked in a salaried position as a driver and auto mechanic. The record also includes an affidavit from [redacted] dated April 16, 2008, with an English translation, certifying that he worked with the

beneficiary at the [redacted] from 1985 to 1991, and that the beneficiary was employed there as an auto mechanic.

The listing of two completely different jobs on the respective labor certifications is understandable insofar as the proffered positions for which experience was required are different in each case. The labor certifications are irreconcilable, however, insofar as they claim that the beneficiary worked two full-time jobs – totaling 16 hours/day and 80 hours/week in cities 33 miles apart – over a five and one-half year period from March 1982 through August 1987.

In the response to the Director's NOIR, the beneficiary claimed that only his stone applicator/stonemason job with [redacted] was full-time from March 1982 to August 1987, while his job with the [redacted] in Nisko during that time frame was as a part-time driver. Not until September 1987, the beneficiary claimed, after his work with the [redacted] a ended, did his position with the [redacted] office turn into a full-time auto mechanic job. These claims, however, conflict with the information provided in the Form ETA 750 submitted with the prior petition by [redacted] – namely, that the beneficiary's job with the [redacted] was full-time (40 hours/week) during the entire period from 1982 to 1990, and that the beneficiary only worked as an auto mechanic, not as a driver.

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The letter from the [redacted], dated May 29, 2001, does not support the beneficiary's claim that he worked part-time as a driver from 1982 to 1987 and full-time as an auto mechanic from 1987 to 1990. The letter simply states that the beneficiary was employed from 1982 to 1990 as a driver and an auto mechanic. It does not indicate that he worked for some of those years and a driver and for others as an auto mechanic. Moreover, the letter does not indicate that the beneficiary worked for some of those years in a part-time capacity and others in a full-time capacity. The letter states that the beneficiary had a monthly salary of 1,256.10 zlotys, without specifying whether it was for full-time or part-time work and without indicating that the beneficiary's hours of work changed at any time. Thus, while the letter is not entirely clear, it seems to accord more closely with the information in the Form ETA 750 – stating that the beneficiary was employed as an auto mechanic full-time by the [redacted]e from 1982 to 1990 – rather the beneficiary's affidavit of May 14, 2009, claiming that he worked part-time as a driver until 1987 and then full-time as an auto mechanic until 1990. The affidavit in 2008 by the beneficiary's co-worker, [redacted] also makes no mention of part-time versus full-time employment from 1985 onward or of the beneficiary working in any other job beside that of an auto mechanic.

Furthermore, the August 31, 1987 letter pertaining to the beneficiary's alleged employment as a stonemason fails to describe his duties in detail in accordance with the regulatory requirements at 8 C.F.R. § 204.5(g)(1). Therefore, even assuming the credibility of this letter, it would be insufficient to establish that the beneficiary is qualified to perform the duties of the offered position.

For the reasons discussed above, the AAO determines that the petitioner has not resolved the evidentiary inconsistencies in the record. In particular, the petitioner has not adequately explained how the ETA Form 9089 and supporting documentation claiming that the beneficiary was employed full-time as a stone applicator/stonemason by the [redacted] from 1982 to 1987 squares with the Form ETA 750 claiming that the beneficiary worked full-time as an auto mechanic for the [redacted] during those same years. While acknowledging in this proceeding that the beneficiary could not have worked both jobs full-time, the petitioner has not produced persuasive evidence that his employment in the years 1982-1987 was primarily as a stone applicator/stonemason rather than an auto mechanic or driver. Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *See Matter of Ho.*

Based on the foregoing analysis, the AAO concludes that the petitioner has failed to establish that the beneficiary has four years of "experience in the job offered," as required in the ETA Form 9089 to qualify for the proffered position of composition stone applicator.

Since the record does not establish that the beneficiary's credentials meet the requirements for the proffered position set forth in the labor certification, the beneficiary is not eligible for classification as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act. Accordingly, the petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.