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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: DEC 1 2 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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:

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,

Elizabeth McCormack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Vermont Service Center. The Director, Texas Service Center (director) subsequently served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motions will be dismissed, the previous decision of the AAO will be affirmed, and the petition's approval will remain revoked.

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.

In this matter, the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. All evidence submitted on motion was previously available and could have been discovered or presented in the previous proceeding. It is further noted that the petitioner has submitted evidence with this motion that was already submitted with the petitioner's previous appeal. Also counsel has submitted a copy of his same brief that was sent with the previous appeal in support of the motions at hand. Further, the motion to reconsider does not qualify for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel does not assert that the director and the AAO made an erroneous decision through misapplication of law or policy and supported by precedent. Instead the petitioner through counsel seeks to compare the different conditions found in [redacted] and the United States concerning the unavailability of evidence. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Therefore, the motion to reopen and reconsider will be dismissed.

Upon review of the record at hand, Section 205 of the 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. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner describes itself as a gas station. It seeks to permanently employ the beneficiary in the United States as a manager. The petitioner requests classification of the beneficiary as a professional or skilled 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]

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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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The petition is accompanied by a Form ETA 750, Application for Alien 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 February 12, 2001. *See* 8 C.F.R. § 204.5(d).

The director's decision revoking the approval of the petition concludes that the beneficiary did not possess the minimum two years of experience as a manager required to perform the offered position as of the priority date.

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 motion.

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 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 requirements:

EDUCATION
Grade School: 0 years
High School: 0 years
College: 0 years
College Degree Required: N/A.
Major Field of Study: N/A.
TRAINING: None.
EXPERIENCE: Two (2) years in the job offered.
OTHER SPECIAL REQUIREMENTS: None.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a manager with from August 1996 to February 1999. No other experience is listed on the ETA 750B. The beneficiary signed the labor certification on February 5, 2001, 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 from Managing Director, on letterhead stating that the company employed the beneficiary as a manager from August 1996 to February 1999. The letter does not identify the nature of business; however, on the Form ETA 750 the beneficiary listed as a gas station.

A consular field investigation in June 2009 found no evidence of existence. Consular officials reported that the address reported for would have been in a residential area and that no such specific address/lot existed. Additionally, the telephone number for the business was actually registered to a home more than seven miles from the claimed address. The consular officials interviewed a number of long-time residents of the area and no one had ever heard of either or Mr. As such, the consular officials found that the experience letter submitted was false.

The director issued a NOIR on June 3, 2010, notifying the petitioner of the field investigation and the doubts raised about the beneficiary's claimed experience. In response, counsel asserted that did exist but that there was no longer any record of the business because of the length of time that had passed since the petition was first filed. Counsel submitted a document from the dated June 30, 2010, signed by Municipal Commissioner, stating that was registered in the municipality from 1990 to 2003. Given the significant inconsistencies between the claimed gas station and the residential area where the station was said to be located, and the inability of the investigators to find any such address or lot number, the AAO found in the decision on appeal that in order to resolve such inconsistencies in the record, the petitioner must submit objective, independent evidence. *See Matter of Ho*, 19 I&N Dec.

582, 591 (BIA 1988). The petitioner has submitted nothing further into the record. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Counsel also submitted a letter from Managing Director of Counsel states that since neither the beneficiary nor the petitioner knows what became of they are providing an employment experience letter from a customer of In the letter dated June 28, 2010, Mr. stated that the beneficiary "was associated with as a Marketing Manager and was selling & marketing supplies to my establishment during the year 1997 and 1998." The business of is described on its letterhead as This letter does not establish that the beneficiary possessed prior experience as a manager, as it is not from a prior employer. 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.

Further, it is unclear how the beneficiary would have been marketing and selling supplies to a in his duties as the manager of a gas station. Additionally, Mr. description of the beneficiary as "marketing manager" does not match the beneficiary's claimed prior experience as reported on the Form ETA 750 or in the original experience letter.[2] The inconsistency between the job title and duties discussed in the customer letter, original experience letter in the record and on the Form ETA 750 raise questions about the veracity of the information submitted. 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. at 591-592.

On July 29, 2010 the director revoked the approval of the Form I-140 petition, stating that the petitioner had not provided independent objective evidence to refute the results of the consular investigation. The director acknowledged the letters from Mr. and from but asserted that the documents submitted by the petitioner only served to raise additional concerns about the information in the record and did not explain or provide evidence of the beneficiary's prior work experience. Therefore the director stated that the petitioner had not provided sufficient evidence to establish the beneficiary's experience qualifications for the proffered position.

[2] The ETA 750 describes the beneficiary's duties performed while working for as, "Managed station for efficiency and profit. Hired and trained workers. Answered customer inquiries. Takes payments when necessary".

On the previous appeal and now on motion in the Form I-290B, counsel states, that in countries such as [redacted] it is not unusual for people to run businesses out of their home and that this could easily explain the discrepancies in the record. Given that the nature of the business of the qualifying employment was as a gas station manager, this assertion creates more questions than resolves them. If the employer was a gas station on residential property at a nonexistent address, the petitioner must document the seeming anomalies with contemporaneous proof of the business' existence and operations. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, it is unclear how a gas station could have been operated out of a home why the address did not exist or why no residents of the area had any knowledge of the business' existence when interviewed by U.S. consular officials. In a supplemental brief submitted directly to the AAO, counsel asserts that the business address was no longer present because of a road widening project. Counsel submitted a letter from the [redacted] dated September 6, 2010, signed by [redacted], that states that the building and property of [redacted] were demolished in order to widen a road in 2004.

We are not persuaded by counsel's assertions. Neither counsel nor the petitioner has submitted sufficient evidence to refute the findings of the consular investigation. Furthermore, the information submitted in response to the revocation notice has only raised additional doubt about the beneficiary's claimed experience. 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. *Matter of Ho*, 19 I&N Dec. at 591.

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 professional or skilled worker under section 203(b)(3)(A) of the Act.

Furthermore, counsel asserts on motion that the petition is still "approvable" under the terms of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). The AAO does not agree that the terms of AC21 make it so that the instant immigrant petition can be approved despite the fact that the petitioner has not demonstrated its eligibility. As noted above, AC21 allows an application for adjustment of status[3] to be approved despite the fact that the initial job offer is no

[3] The AAO notes that after the enactment of AC21, USCIS altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying visa petition. A USCIS memorandum signed by [redacted] May 12, 2005, provides that if the initial petition is determined "approvable", then the adjustment application may be adjudicated under the terms of AC21. See *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions*

longer valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid" suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, USCIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer. *See Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010).

It is also noted that in *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009), the Ninth Circuit Court of Appeals determined that the government's authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start. The Ninth Circuit stated that if the plaintiff's argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs. Under the plaintiff's interpretation, an applicant would have a very large incentive to change jobs in order to guarantee that the approval of an I-140 petition could not be revoked. *Id.*

The petitioner has not overcome the director's and the AAO's concerns on motion. The petitioner has not established that the beneficiary has the two years of qualifying experience in the job offered, or that he is entitled to port from a petition whose approval has been revoked.

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 motion to reopen and reconsider is dismissed. The petition's approval remains revoked.

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and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313) at 3. This memorandum was superseded by *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010), which determined that the petition must have been valid to begin with if it is to remain valid with respect to a new job.