(b)(6)

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]

DATE: FEB 2 8 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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,

Elizabeth McConnell

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was approved on October 25, 2007 and the approval was revoked on February 8, 2011 by the Director, Nebraska Service Center (the director). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a "retail bakery and coffee" business. 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]

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 April 30, 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 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).

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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.

[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).

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 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: 8 years.
High School: 4 years.
College: "N/A."
College Degree Required: "N/A."
Major Field of Study: "N/A."
TRAINING: "N/A."
EXPERIENCE: Two (2) years in the job offered.
OTHER SPECIAL REQUIREMENTS: "N/A."

The labor certification also states that the beneficiary qualifies for the offered position based on his experience as a manager with [redacted] rom January 1996 until June 1998. 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.

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 February 16, 2005 signed by Owner, on letterhead stating that the company employed the beneficiary as a business manager from January 1996 until June 1998. The letter states that the beneficiary performed the following duties: "he managed our business, both the retail and wholesale, estimated stock requirements, conducted inventory, recommended expansion of the business, remodeling of store, planned to stimulate sales, maintained books of accounts, paid bills, checked invoices, solve[d] customer's issues, prepared work schedules, hired and fired employees." The letter does not state if the job was full-time.

The experience letter signed by and the Form ETA 750 signed by the beneficiary on June 28, 2003 list the same dates of employment. The record also contains an affidavit dated October 18, 2010 signed by the petitioner's owner, stating that he purchased the business in August 1997. In his affidavit, also states that the beneficiary continued to work for him as a "counter person, baking, finishing donuts" and that the beneficiary was "doing the same job before I hired him." The experience letter signed by affidavit provide inconsistent information regarding the beneficiary's employment dates and the duties that he performed while working for Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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).

In response to the director's notice of intent to revoke (NOIR) the approval of the petition, counsel submitted a brief, a second affidavit from and an affidavit from

In his affidavit dated January 13, 2011, states that his company took over the operation of the on or about June 1997. further states that the beneficiary worked for the petitioner as a manager beginning on or about January 2000 and before then, the beneficiary worked for the petitioner as a baker, cashier, and manager. states that he believes that the beneficiary worked for as a manager. Finally, states that the beneficiary's salary has been "far more than a full time cashier or baker with my company."

In his affidavit dated January 13, 2011, states that he is the former partner and 30% shareholder of states that the beneficiary worked as a manager from January 1995 to mid 1997 when the business was sold to the petitioner. states that the beneficiary's duties included managing "all aspects of business, retail and wholesale; estimated stock requirements, conducted inventory, recommended expansion, planned to stimulate sales, prepared work schedules, hired, trained, and fired employees, maintained books of accounts, paid bills, and checked invoices."

The record contains Interal Revenue Service (IRS) Forms W-2 for the beneficiary listing the petitioner as his employer from 2000 to 2009. The petitioner has not submitted objective evidence such as IRS Forms W-2 providing evidence of the beneficiary's employment for the petitioner from 1997 to 1999 or for from 1995 to 1997.

On appeal, counsel states that provided the wrong employment dates for the beneficiary in his October 18, 2010 affidavit because was confused due to his "inability to understand the English language." There is no evidence in the record that is unable to understand English. The affidavit was signed by and he further wrote his initials next to the following sentence: "The statement was given freely and voluntarily, without threat or coercion by an Immigration Officer." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Simply going on record without supporting documentary evidence is not sufficient for the purpose 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)).

Counsel asserts that the beneficiary's employment dates listed on the labor certification are typing errors because the petitioner purchased the business in 1997. There is no evidence in the record that the dates in the labor certification are typing errors. The AAO notes that the years on the labor certification were changed using correction fluid to list the beneficiary's employment from 1996 to 1998. The beneficiary signed the Form ETA 750 on June 28, 2003, more than two years after the form was filed. Further, the dates on the labor certification are consistent with the experience letter from Although the petitioner has submitted another employment letter from the second letter is inconsistent with letter. 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The record does not contain independent, objective evidence resolving the inconsistencies in the record concerning the beneficiary's qualifying employment.

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.

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.