(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**

DATE: MAY 2 3 2013 OFFICE: NEBRASKA 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)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(i)

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center (director), revoked the approval of the employment-based immigrant visa petition on April 13, 2010. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as an Indian restaurant. It seeks to permanently employ the beneficiary in the United States as a "Curry Chef (Non-Veg)." 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).[2] 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). In a Notice of Intent to Revoke (NOIR) the director noted conflicting information about the beneficiary's employment history and, therefore, the petitioner failed to establish the beneficiary met the requirements of the certified labor certification. The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof.

The director's decision revoking the petition's approval concludes that the beneficiary did not possess the minimum two years of experience required to perform the offered position by the priority date. The revocation also raises conflicts in the tax identification number and name on the W-2 statement and the petition. Nothing demonstrated any successor relationship.

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

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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] This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

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.[3]

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 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).

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:

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[3] 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).

EDUCATION
Grade School: None listed
High School: None listed
College: None listed
College Degree Required: None listed
Major Field of Study: None listed
TRAINING: None Required
EXPERIENCE: Two (2) years in the job offered "(Curry Chef (Non-Veg)"
OTHER SPECIAL REQUIREMENTS: None

The labor certification also states that the beneficiary qualifies for the offered position based on his experience as a curry chef with the restaurant in Woodland Hills, California from August 1999 until February 2003. 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 June 26, 2007) from the president of the on company letterhead stating that the company employed the beneficiary as a cook from August 1999 until 2003. In a separate statement not on letterhead dated July 22, 2009, states that he employed the beneficiary as a chef in his restaurant (restaurant unnamed) from August 1999 until 2003. further states that the beneficiary "lived with me in exchange for working in my restaurant." Both letters are deficient for establishing the two years of experience required by the labor certification. In this instance, the priority date is April 30, 2001. If the beneficiary was employed by the on a full-time basis (and the record does not establish this) from August 1999 until some unnamed date in 2003 as stated by the above referenced experience letter, the beneficiary would not have two years of experience between August 1999 and the April 30, 2001 priority date. This is true even if it is assumed that the beneficiary began work on August 1, 1999 for the Further, the letters do not state that the beneficiary was employed on a full-time basis and do not state an end date in the employment. This is particularly true as there is no corroborating documentation to establish that the beneficiary was actually employed as stated since he worked for that employer in exchange for only room and board and there are no W-2 Forms, Forms 1099 or quarterly tax statements to establish employment. The evidence as to the beneficiary's experience is further deficient as the Form ETA 750 states that the beneficiary was employed with the from August 1999 to February 2003. A Form G-325A signed by the beneficiary on July 23, 2009 states that he was employed by the from August 1999 to December 2003. In addition to the inconsistency in dates of employment listed, the length of

experience is not established by the experience letter. Regardless of the foregoing deficiencies, the letter does not establish two years of employment in the position offered before the priority date. As noted above, 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. The petitioner has not, therefore, established that the beneficiary had the two years of experience required by the labor certification as of the priority date and for this reason, the petition must be denied.

On appeal, counsel states that any inconsistencies in dates of employment noted between the Form ETA 750 and the Form G-325A are not material as the employment documentation submitted established two years of experience. Counsel's assertions are not accepted by the AAO for the reasons fully discussed above, as the petitioner must establish that the beneficiary had the required experience by the time of the priority date.

Beyond the decision of the director, the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2). 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). The Form I-140 lists a tax identification number of 20-XXX2699. Tax returns for the petitioner for years 2001 through 2004 list a tax identification number of 95-XXX2996. The petitioner's tax returns for years 2005 through 2008 list a tax identification number of [redacted] Nothing shows a valid successor relationship.[4]

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[4]A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the appellant is a different entity than the petitioner/labor certification employer, it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

An appellant may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor, it does not demonstrate that the job opportunity will be the same as originally offered and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. Accordingly, the petition must also be denied because the appellant has failed to establish that it is a successor-in-interest to the petitioner/labor certification employer.

According to USCIS records, the petitioner may have filed an additional Form I-140 petition on behalf of another beneficiary. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document the priority dates, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. This and the issue of successorship must be satisfactorily addressed before the AAO can conclude that the petitioner can establish its ability to pay the beneficiary the proffered wage. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

The AAO affirms the director's revocation 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. Further, as noted above, the petitioner has not established the ability to pay the proffered wage of the present beneficiary plus any other sponsored workers.

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 foregoing establishes good and sufficient case as the evidence in the record does not establish that the beneficiary was qualified for the position offered.

Accordingly, the petition's approval will remain revoked on the basis identified by the director and would also be denied for additional grounds identified, with each considered as an independent and alternative basis. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER**: The appeal is dismissed.