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: OCT 15 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: On April 15, 2005, United States Citizenship and Immigration Services (USCIS), Texas Service Center (TSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the TSC director (the director) on April 21, 2005. The director, however, revoked the approval of the immigrant petition and the petitioner subsequently appealed the director's decision to revoke the petition's approval to the Administrative Appeals Office (AAO). On December 27, 2012, the AAO remanded the decision to the director because the director had failed to issue a Notice of Intent to Revoke (NOIR) prior to issuing the Notice of Revocation (NOR). On February 27, 2013, the director issued a NOIR and on March 4, 2013, the director issued the NOR. The petitioner subsequently appealed the director's NOR to the AAO. The appeal will be dismissed.

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 is a food market and bakery. 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] It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).[2] The priority date of the Form ETA 750 is April 30, 2001, which is the date the DOL accepted the labor certification for processing. The director's decision revoking approval of the petition concludes that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of experience stated on the labor certification because an employment letter was found to be fraudulent and there were inconsistencies with statements offered by the qualifying employer upon interview. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The director found that the evidence submitted by the petitioner in response to the NOIR failed to overcome the inconsistencies in the record. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.2.

---

[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.

The record shows that the appeal is properly filed, timely 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] On appeal, counsel submits a brief.

The Secretary of DHS has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. *See* Section 205 of the Act; 8 U.S.C. § 1155. This means that notice must be provided to the petitioner before a previously approved petition can be revoked. More specifically, the regulation at 8 C.F.R. § 205.2 reads:

> (a) *General.* Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice to the petitioner** on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS]. (emphasis added).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

> (i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

> A notice of intention to revoke the approval of 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. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

---

[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).

Here, in the NOIR dated January 25, 2013, the director gave the petitioner notice that the experience letter submitted below was found to be fraudulent and that the affidavits and second employment letter submitted by the petitioner to overcome this finding were not sufficient independent, objective evidence to overcome the prior findings of fraud. The director advised the petitioner in the NOIR that the instant case involved misrepresentation of the beneficiary's qualifying experience. The director specifically asked the petitioner to submit additional evidence to overcome the inconsistencies.

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 NOIR sufficiently detailed the evidence of the record, pointing out specific evidence or information relating to the misrepresentation of the beneficiary's qualifying experience in the experience letter and on the Form ETA 750B, that would warrant a denial if unexplained and unrebutted, and thus was properly issued for good and sufficient cause.

As set forth in the director's NOIR and NOR, the issue in this case is whether or not the beneficiary presented a fraudulent experience letter and whether he possesses the minimum required experience on the labor certification. 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: None.
High School: None.
College: Blank.
College Degree Required: Blank.
Major Field of Study: Blank.
TRAINING: None.
EXPERIENCE: Two (2) years in the job offered.
OTHER SPECIAL REQUIREMENTS: None.

Form ETA 750B also states that the beneficiary qualifies for the offered position based on experience as a baker with Pakistan, from January 1999 until September 2004. There is no other experience listed on the Form ETA 750B. The beneficiary signed the Form ETA 750B 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 September 29, 2004, from proprietor, on the letterhead of stating that the beneficiary was employed with as a baker from January 1999 until September 2004. The letter describes the beneficiary's duties as a baker in language identical to the language utilized on the Form ETA 750B to describe the proffered job duties.

An August 23, 2007, site-check of Pakistan by U.S. officials revealed that: the experience letter from letterhead was fraudulent; the beneficiary has never been employed by proprietor of confirmed that the letterhead used for the experience letter is not the genuine letterhead of the company never uses printed letterheads, the signature on the letter is not his and the signature stamp on the

experience letter is bogus.[4] The director informed the petitioner of these inconsistencies in a NOIR dated February 27, 2013.

In response to the director's NOIR the petitioner submitted an experience letter, dated February 2, 2013 from proprietor, on letterhead identical to the letterhead used in the previous experience letter, stating that the beneficiary was employed as a baker from January 1999 until September 2004 at location under the supervision of the branch manager. The letter goes on to describe the beneficiary's duties as ". . responsible to fulfill daily basis requirement as well as special orders of traditional sweets and bakery items . . . also responsible for storage and safety of food stuff." The experience letter was accompanied by affidavits from An affidavit, dated February 25, 2013, indicates that is the owner of with 6 different branches in Pakistan, including a branch on which was run by a branch manager, in 2004; issued the experience letter dated September 29, 2004, utilizing the branch's letterhead and placing a stamp bearing name thereon, but inadvertently failed to inform that he had issued the experience letter; when presented with a copy of the 2004 experience letter failed to notice that it bore the stamp and he consequently failed to verify issuance of the letter with that branch's manager, who was solely responsible for hiring employees at the location; now verifies the genuineness of the experience letter issued in 2004. An affidavit, dated February 25, 2013, from indicates that he was the branch manager of location and that he was authorized to issue the 2004 experience letter to the beneficiary; was unaware of the 2004 experience letter because failed to inform that he had issued the experience letter.

However, the experience letters and affidavits conflict with information previously provided by about the beneficiary's employment at The experience letters and affidavits are also inconsistent with the Form ETA 750B, which indicates that the beneficiary obtained a degree from during the same period claims employed the beneficiary from 1998 to 2000. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, counsel contends that the 2004 experience letter was not fraudulent, but was mistakenly disavowed and later reaffirmed by the qualifying employer. Counsel contends that the director failed to give the new experience letter and affidavits adequate weight. Counsel contends that the director should have accepted the second experience letter and affidavits, as there is no reason for the

[4] provided a specimen of the company's official stamp and his signature and stated that he has never used a signature stamp.

director to discount Mr. s affidavit as not credible. Counsel states that there is a lack of secondary evidence to support the experience letters and affidavits because such documents are not normally available in Pakistan and would be unlikely to remain available after nearly ten years.

The affidavits and letter from are not sufficiently independent and objective to establish that the beneficiary was employed by . clearly stated during his interview with U.S. officials during the site visit that the beneficiary had not been employed by his business and gave no indication that he would not be in a position to verify such employment at any of the locations. stated that the 2004 experience letter was not printed on genuine company letterhead; the company never uses printed letterhead; the stamp on the letter is bogus; and the company's stamp is not genuine. The new experience letter flies in the face of s testimony that the company does not use printed letterhead or that the letterhead on the 2004 experience letter was not genuine as the new experience letter is printed on letterhead nearly identical to the one used on the 2004 experience letter. The stamp used on the new experience letter does not match the specimen given by to U.S. officials. Further, the phone number listed on the new experience letter does not match the specimen given by to U.S. officials or information publicly available about the business. *See* and *Matter of Ho*, 19 I&N Dec. at 591-92. The fact that the affidavits and new experience letter are not contemporaneous with the events, coupled with the lack of other contemporaneous documentation to verify the beneficiary's qualifying employment lessens the probative weight of this evidence. As such the petitioner has failed to provide independent, objective evidence sufficient to overcome the inconsistencies in the record.

The AAO further notes that the job duties for the proffered position, as listed on Form ETA 750 list specialization in "Indian sweets." None of the experience letters or affidavits demonstrate that the beneficiary has any experience specializing in Indian sweets so that he may perform the required job duties.

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.

Beyond the decision of the director,[5] the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the

[5] 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) (noting that the AAO conducts appellate review on a *de novo* basis).

petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[6] If the petitioner's net income or net current assets are not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm'r 1967).

The record before the director closed on February 27, 2013, with the receipt by the director of the petitioner's submissions in response to the director's notice of intent to NOIR. As of that date, the petitioner's 2011 federal income tax return was the most recent return available. However, the record does not any contain annual reports, federal tax returns, or audited financial statements for the petitioner for 2004 through 2011. This issue must be addressed in any future filings. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. Further, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage.

Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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; *Matter of Otiende,* 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed

---

[6] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010).