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: JUN 2 7 2014 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a tree service company. It seeks to employ the beneficiary permanently in the United States as a small engine mechanic. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary was qualified as a small engine mechanic as required by the labor certification. The director denied the petition accordingly.

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.

As set forth in the director's September 25, 2013 denial, the primary issue in this case is whether or not the petitioner has established the beneficiary's 12 months of work experience as required by the approved labor certification. On appeal, we identified an additional issue. We sent a Notice of Intent to Dismiss and Request for Evidence (NOID/RFE) requesting evidence of the petitioner's ability to pay the proffered wage. We mentioned that the beneficiary appeared to have multiple social security numbers. In response, the petitioner established its ability to pay the proffered wage. We will not further examine this issue in this decision.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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 will not look beyond the plain language of the labor certification to determine the employer's claimed intent.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

H.4. Education: None.
H.5. Training: None required.
H.6. Experience in the job offered: 12 months in the job offered.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Not Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: None required.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a small engine mechanic with the petitioner from January 10, 1998 until November 1, 2011; and wit[redacted]lexico from August 14, 1995 until August 22, 1997. 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.

On June 4, 2013 the director issued a NOID. The director indicated that the record contained a letter of experience from [redacted] Owner, on [redacted] letterhead stating that the company employed the beneficiary as a small engine mechanic from August 12, 1998 until July 27, 2000.[1] However, the employment was not listed on the ETA Form 9089, and the director found that the experience letter did not establish the beneficiary's 12 months of experience in the job offered.

[1] This letter was submitted to the record in connection with the adjudication of a previously filed Form I-140 petition filed by the same petitioner on behalf of the beneficiary [redacted]

In *Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

Further, the director noted that the experience letter from conflicted with the dates that the beneficiary worked for the petitioner as claimed in the ETA Form 9089. The director also noted that the dates of employment listed on the beneficiary's Form G-325A (Biographical Information), signed by the beneficiary under penalty of perjury on February 9, 2008 and submitted in connection with a Form I-485 adjustment of status application did not match the employment dates on the ETA Form 9089. On August 7, 2013 the petitioner submitted an affidavit from the beneficiary, and a new experience letter from dated July 9, 2013 in response to the director's NOID. This letter reaffirms the dates of employment indicating in its previous letter.

On September 25, 2013, the director denied the instant petition because the petitioner did not submit independent, objective evidence establishing the beneficiary's 12 months of experience in the job offered

On appeal, the petitioner states that the director failed to consider the evidence it submitted in response to the NOID. Further, the petitioner states that the beneficiary's affidavit and the corroborating work experience letter from Trees Unlimited clearly establish the beneficiary's 12 months of experience in the job offered.

Upon review, the beneficiary's affidavit and the July 9, 2013 work experience letter from do not provide independent, objective evidence of his prior work experience. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

> 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 . . . It is incumbent on 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.

In this case the petitioner has not submitted independent, objective evidence of qualifying employment such as Forms W-2 or 1099 issued to the beneficiary by to resolve the inconsistencies in the dates of employment between the work experience letter and the Form ETA 9089.[2]

[2] As noted above, the work experience letters indicate that the beneficiary worked as a small engine mechanic from August 12, 1998 until July 27, 2000. The Form ETA 9089 filled out by the beneficiary and signed under penalty of perjury indicates that he worked for the petitioner from January, 1998 through November, 2011. This overlap in employment is unexplained by independent objective evidence of record.

We also note that the beneficiary's G-325A states that he was employed by as a laborer in Houston, TX from April 1996 until January 1998. Further, the beneficiary informed the Executive Office of Immigration Review (EOIR) that he had last entered the United States without inspection in December of 1996. This information reported to the EOIR by the beneficiary under penalty of perjury directly conflicts with the beneficiary's work experience on the ETA Form 9089 that he was employed by IESI in Mexico from August 14, 1995 until August 22, 1997. No independent, objective evidence resolves the discrepancies, which casts doubt over the reliability of the evidence provided by the petitioner in support of the beneficiary's claimed 12 months of work experience. Thus, we find it more likely than not that the beneficiary does not possess 12 months of experience as a small engine mechanic as required in the approved labor certification.

Thus, 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.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. 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.