



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **OCT 09 2014** OFFICE: NEBRASKA SERVICE CENTER FILE [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A)

ON BEHALF OF PETITIONER:
[REDACTED]

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 Director, Nebraska Service Center (director), revoked the approval of the immigrant visa petition and affirmed his decision in response to the Motion to Reopen and Motion to Reconsider filed by the petitioner. The petitioner appealed the director's decision to the Administrative Appeals Office (AAO). We dismissed the appeal and the matter is again before us as a Motion to Reopen and Motion to Reconsider. The Motion to Reopen will be granted. Our prior decision will be affirmed. The approval of the petition will remain revoked.

The petitioner describes itself as a business involved in the procurement of chemicals. It seeks to permanently employ the beneficiary in the United States as an Environmental Compliance Inspector. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner checked box "d" in Part 2 of the petition, indicating that it seeks to classify the beneficiary as a member of the professions holding an advanced degree or an alien of exceptional ability pursuant to section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).¹ The priority date of the petition is June 20, 2012, which is the date that the labor certification was filed with DOL.

We conduct appellate review on a *de novo* basis. See 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). Our *de novo* authority has been long recognized by the federal courts. See, e.g., *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted on motion.² An application or petition that fails to comply with the technical requirements of the law may be denied even if the director 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 D.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, at 145.

Procedural History

On October 2, 2012, the petitioner filed a Form I-140 petition on behalf of the beneficiary, which was approved by United States Citizenship and Immigration Services (USCIS) on October 5, 2012. However, on April 3, 2013, the director issued a Notice of Intent to Revoke (NOIR) to the petitioner, informing it of discrepancies in the evidence of record that cast doubt on its business operations in the United States and the *bona fide* nature of the offered position. On April 30, 2013, the petitioner responded to the NOIR. Finding the evidence submitted by the petitioner to be insufficient to overcome the evidentiary deficiencies in the record, the director revoked the petition's approval on June 6, 2013.

¹ See section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); see also 8 C.F.R. § 204.5(a)(2).

² The submission of additional evidence on motion is allowed by the instructions to the Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1).

On June 24, 2013, the petitioner filed a Motion to Reopen and Motion to Reconsider with the director. On July 17, 2013, the director granted the Motion to Reopen and reaffirmed his prior decision. On August 5, 2013, the petitioner appealed the director's decision to this office. We dismissed the appeal on November 27, 2013, finding that the evidentiary inconsistencies in the record prevented the petitioner from establishing the offered position as a *bona fide* job opportunity.

On December 30, 2013, the petitioner filed a Motion to Reopen and a Motion to Reconsider. On June 3, 2014, we issued a Notice of Intent to Dismiss and Request for Evidence (NOID) to the petitioner, seeking additional information regarding its business operations and the duties of the offered position. We consider the petitioner's response to our NOID along with the existing record.

Requirements for Motions to Reopen and Reconsider

The requirements for Motions to Reopen and Reconsider are found at 8 C.F.R. § 103.5(a):

(2) *Requirements for motion to reopen.* A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence

(3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

On motion, counsel for the petitioner asserts that the petitioner is a valid company that has conducted business since 2003 and that the offered position is a *bona fide* job opportunity. In support of these claims, the petitioner submits a range of documents, including statements from [REDACTED] the petitioner's president, dated December 26, 2013 and July 1, 2014; rental invoices for [REDACTED] in Los Angeles, the address the petitioner listed as its main office on the labor certification; assorted bank and credit card statements for the petitioner; purchase orders and invoices for the petitioner's business; photographs of [REDACTED] and a copy of the floor plan for the sixth floor; a statement from the beneficiary, dated December 26, 2013; the beneficiary's 2012 tax return; the Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, issued to the beneficiary by the petitioner from 2005 through 2012; Forms W-2 issued by the City of Los Angeles to the beneficiary from 1996 through 2012; the petitioner's tax returns for the period 2005 through 2012; the petitioner's sales and tax reports from 2007 through 2014; the petitioner's business filings with the California Secretary of State; and documentation of the petitioner's recruitment for the offered position.

Although we do not find the petitioner to have met the requirements for a Motion to Reconsider, the petitioner has stated new facts and has submitted new evidence relating to its operations and the duties of the offered position. Accordingly, we will grant the Motion to Reopen and consider the record in light of this new evidence.

The Roles of the DOL and USCIS in the Immigrant Visa Process

At the outset, it is important to discuss the respective roles of DOL and USCIS in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by DOL. DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to DOL or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).³ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

....

³ Based on revisions to the Act, the current citation is section 212(a)(5)(A).

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is DOL's responsibility to determine whether there are qualified U.S. workers available to perform the duties of an offered position, and whether the employment of a beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if a beneficiary qualifies for the offered position, and whether an offered position and a beneficiary are eligible for the requested immigrant visa classification.

Bona Fide Job Opportunity

A job opportunity must exist, be clearly open to U.S. workers, and be offered to U.S. workers with wages, terms, and conditions as favorable as those offered to the beneficiary. 20 C.F.R. §§ 656.3; 656.10(c)(8); 656.17(f)(3), (5). *See Matter of Silver Dragon*, 19 I&N Dec. 401, 405 (Comm. 1986) (quoting DOL advisory opinion that "requiring the job opportunity to be bona fide clarifies that a true opening must exist, and not be the functional equivalent of self-employment."). Pursuant to 20 C.F.R. §§ 656.10(c)(8) and 656.3, a petitioner has the burden, when asked, to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). Here, for the reasons discussed below, the record does not establish that the offered position of Environmental Compliance Inspector is a *bona fide* job opportunity.

Petitioner's U.S. Operations

In our November 27, 2013 dismissal of the appeal, we found the record to reflect that the address listed on the labor certification as the petitioner's main office (Parts C.1., C.2., and C.3) and the only worksite for the job opportunity (Parts H.1 and H.2.), 6080 Center Drive in Los Angeles, was a virtual office and that no actual business was being conducted by the petitioner at this location. Accordingly, we determined that the petitioner had failed to establish the existence of a valid employment relationship and that a *bona fide* job opportunity was available to U.S. workers.

On motion, [REDACTED] acknowledges in December 26, 2013 and July 1, 2014 statements that the petitioner's [REDACTED] address is, in fact, a virtual office, and a previously submitted copy of an Online Virtual Office Agreement between the petitioner and [REDACTED] reflects that [REDACTED] has been a virtual office since at least May 1, 2012.⁴ Mr. [REDACTED] asserts, however, that the petitioner's transition

⁴ It does not appear that DOL was aware that the [REDACTED] address, which was listed by the petitioner as the only worksite for the offered position, was not a functioning office as of the priority date or at the time it approved the labor certification application. Pursuant to 20 C.F.R. § 656.30(c)(2), a labor certification involving a specific job offer is valid only for the particular job opportunity, the beneficiary for whom certification was granted and for the area of intended employment stated on the labor certification. Here, the worksite listed by the petitioner on the labor

to a virtual office is temporary and that once its full-time position of Environmental Compliance Inspector is filled, the petitioner plans to reacquire physical office space at the [REDACTED] building. Until then, Mr. [REDACTED] reports, the beneficiary will continue to work part-time for the petitioner from home.

A petitioner must establish the elements for the approval of a petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Here, the petitioner filed the labor certification with DOL on June 20, 2012 and listed the beneficiary's primary worksite as its [REDACTED] office, a virtual office where it was receiving mail services. Therefore, pursuant to the regulation at 20 C.F.R. § 656.3, which defines a job opportunity as "a job opening for employment at a place in the United States to which U.S. workers can be referred," there was no *bona fide* job opportunity at the time the petitioner filed the labor certification. While we note Mr. [REDACTED] assertions regarding the petitioner's plans to acquire physical office space at [REDACTED] once it hires an Environmental Compliance Inspector, the petitioner's intent to establish a physical office does not demonstrate that a *bona fide* job opportunity existed at the time the labor certification was filed with DOL. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, at 49 (Comm. 1971). Moreover, neither the petitioner nor its counsel has identified any law or regulation that would permit us to approve the visa petition on speculative changes in the petitioner's operations. Accordingly, the petitioner has failed to establish a valid employment relationship and that the offered position is a *bona fide* job opportunity pursuant to 20 C.F.R. §§ 656.3 and 656.10(c)(8).

We also find the petitioner's filing of the labor certification when it was no longer operating a physical office at [REDACTED] to cast doubt on the reliability of the other information provided in the labor certification. Doubt cast on any aspect of a petitioner's proof may 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. 582, 591-92 (BIA 1988).

Beneficiary's Role in Recruitment Process/Petitioner's Business

The regulation at 20 C.F.R. § 656.17 states in pertinent part:

(l) *Alien influence and control over job opportunity.* If . . . the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a *bona fide* job opportunity, i.e., the job is available to all U.S. workers

"Where the alien for whom labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the sponsoring

certification (Parts H.1. and H.2.) is not a location to which U.S. applicants could be referred. 20 C.F.R. §§ 656.3 (job opportunity); 656.10(c)(8). As a result, it does not appear that the Form I-140 in this matter is supported by valid labor certification. Following our decision, we shall refer the virtual office information and labor certification to DOL, pursuant to our consultation authority at section 204(b) of the Act, 8 U.S.C. § 1154(b), for possible revocation.

employer's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises whether the employer has a bona fide job opportunity."⁵ See *Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*).

In its decision in *Modular Container Systems, Inc.*, the Board of Alien Labor Certification Appeals (BALCA) introduced a totality of the circumstances test to determine whether a job opportunity was clearly open to U.S. workers. As outlined by BALCA, the factors to be considered are whether the alien:

- Is in a position to control or influence hiring decisions regarding the job for which labor certification is sought;
- Is related to the corporate directors, officers, or employees;
- Was an incorporator or founder of the company;
- Has an ownership interest in the company;
- Is involved in the management of the company;
- Is on the board of directors;
- Is one of a small number of employees;
- Has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and
- Is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue in operation without the alien.

Here, the record reflects that the beneficiary's employment with the petitioner began in 2005, that he is the petitioner's only employee in the United States and that he was also its only employee in the United States during its 2012 recruitment for the offered position. Although Part C.5. of the labor certification indicates that the petitioner has three employees, the petitioner clarified in the motion it filed in response to the director's June 6, 2013 revocation of the visa petition's approval that this total included Mr. [REDACTED] and the certified public accountant whose services are retained by the petitioner as an independent contractor, leaving the beneficiary as its only salaried employee. We note that Mr. [REDACTED] in the December 26, 2013 statement he submitted on motion, states that the petitioner employs the beneficiary on a part-time basis as its operations manager and will continue to do so until such time as he can be hired as its Environmental Compliance Inspector. The record reflects that the beneficiary's current responsibilities, e.g., signing contracts and handling business expenses for the petitioner, are those of an operations manager.

To establish that the petitioner's recruitment for the offered position in this matter was not influenced by the beneficiary, our June 3, 2014 NOID requested the name of the individual(s) responsible for accepting applications and interviewing applicants for the offered employment, this individual's position with the petitioner at the time of recruitment, and the submission of evidence that this individual was involved in the operations of the company. In addition, the NOID asked the

⁵ As previously noted, the same standard has been incorporated into the PERM regulations. See 69 Fed. Reg. 77326, 77356 (ETA) (Dec. 27, 2004).

petitioner to describe the interview process for the offered position, including the location(s) where interviews were conducted and whether the interviews were conducted in-person or by telephone. The NOID also requested copies of the petitioner's Program Electronic Review Management (PERM) Recruitment Report reflecting the results of its recruitment efforts, the posting notice for the position, and all online and print advertisements.

In his July 1, 2014 statement, Mr. [REDACTED] asserts that the beneficiary was not involved in the recruitment for the offered position. He states that, as the petitioner's president, he makes all hiring decisions and that he received one resume in response to the recruitment for the offered position, but did not need to interview the applicant "as it was clear from the face of the resume that the individual did not meet the minimum qualifications for the job." In support of Mr. [REDACTED] statement, the petitioner submits copies of its recruitment report, the posting notice for the offered position, the advertisements for the offered position, and the resume referenced by Mr. [REDACTED]

Although Mr. [REDACTED] identifies himself as the hiring official in this matter and claims that the beneficiary was not involved in the recruitment process, his assertion is not persuasive in the absence of supporting evidence. Going on record without supporting documentation is not sufficient to meet the petitioner's burden of proof in this proceeding. *See 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)). The record reflects that Mr. [REDACTED] resides in Tokyo and there is no indication that he traveled to the United States to conduct the petitioner's recruitment for the offered position. Instead, the record indicates that the beneficiary is the petitioner's only U.S. employee and its operations manager. The record contains Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, confirming that the petitioner has employed the beneficiary since 2005; invoices from [REDACTED] that establish the petitioner had an office and received its mail at [REDACTED] during the time of the petitioner's recruitment for the offered position,⁶ and tax returns for the years 2005 through 2012, as well as Forms 941, Employer's Quarterly Federal Tax Returns, for 2012, which demonstrate that he has been the petitioner's only U.S. employee since 2008. Moreover, the invoices, and credit card and bank statements submitted by the petitioner to establish its business operations, demonstrate, by a preponderance of evidence, that the beneficiary is the person responsible for handling all of the petitioner's business activities in the United States. Recruitment advertisements indicated that applicants must reply by mail to the [REDACTED] office; the advertisements also indicated that "no calls" would be accepted. We find no evidence to demonstrate that the petitioner established any special procedures in recruiting for the offered position, including procedures to ensure that responses from job

⁶ These invoices, dated February 14, 2012 and March 13, 2012, were sent to the attention of the beneficiary at [REDACTED] and demonstrate that, during these months, the petitioner was paying \$1,135.68 a month for a single office. The petitioner's newspaper advertisements ran in March 2012. As previously noted, the Online Virtual Office Agreement between the petitioner and [REDACTED] establishes that the petitioner's transition to a virtual office took place on May 1, 2012. The priority date of the visa petition is June 20, 2012.

applicants were handled separately from the other business activities being conducted by the beneficiary at [REDACTED]

The record establishes that during the petitioner's recruitment for the offered position, the beneficiary was its only U.S. employee, was responsible for handling its business activities in the United States and was physically located at the [REDACTED] office and the only employee receiving mail for the petitioner at that location. Without evidence to the contrary, we must conclude that the beneficiary was the person responsible for implementing much of the petitioner's recruitment for the offered position, including the placement of and payment for advertisements, the posting of the Notice of Filing, and the receipt and compilation of resumes that were sent to the petitioner's then office at [REDACTED]. Accordingly, we find it more likely than not that the beneficiary was involved in and had a degree of control over the petitioner's hiring for the offered position. The petitioner has not explained how its president, located in another country, was able to physically post the posting notice for ten days in the appropriate location, and then remove it and attest to its posting and removal, and whether applications were received, pursuant to 20 C.F.R. § 656.10(d). This casts additional doubt on the *bona fides* of the job opportunity. 20 C.F.R. § 656.10(b)(2)(i) (stating that it is contrary to the best interests of U.S. workers to have the alien participate in interviewing or considering U.S. workers). Further, we find the beneficiary's pervasive presence in the petitioner's U.S. operations, i.e., his position as the petitioner's only U.S. employee since 2008, and the only employee familiar with the petitioner's procedures and operations, as well as those of its U.S. suppliers, to make it unlikely that other job candidates would have been considered by the petitioner. Therefore, pursuant to the reasoning in *Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*), the record does not establish the offered position as a *bona fide* job opportunity for this reason as well.

Petitioner's Compliance with DOL Recruitment Requirements

The recruitment report submitted by the petitioner to establish its compliance with DOL recruitment requirements indicates that the petitioner advertised the offered position with [REDACTED] in California for 30 days beginning March 6, 2012; placed print advertisements in the March 11 and March 18, 2012 editions of the [REDACTED] posted the job opportunity on [REDACTED] and [REDACTED] and advertised on [REDACTED] on March 17, 2012. It also reflects that the Notice of Filing for the offered position was purportedly posted for ten business days, from February 29, 2012 to March 14, 2012 at the petitioner's "facility." The recruitment report further states that one resume was received, but that the applicant lacked the required education. As noted above, the recruitment report is accompanied by copies of the [REDACTED] advertisements for the offered position; the posting notice for the offered position; a resume for the applicant who purportedly applied for the offered position;⁷ printouts of the

⁷ The resume is accompanied by a May 9, 2011 letter addressed to this same individual from the [REDACTED] [REDACTED] indicating that his resume will be filed for future reference. The petitioner's purpose in submitting this letter is not clear as it does not appear to relate to the present matter. However, the presence of the letter in the record leads us to question whether the resume found in the record was submitted for

offered position's postings on experience.com, careerbuilder.com.; and an invoice for an on-air advertisement for the offered position.

We note, however, that the copy of the posting notice submitted by the petitioner does not appear genuine and, for the reasons noted below, find it to cast doubt on the petitioner's claim to have conducted a genuine recruitment in connection with the offered position. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, at 591-92.

The regulation at 20 C.F.R. § 656.10(d)(1)(ii) requires a petitioner to give notice of its filing of a labor certification application to its employees by posting a notice of that filing for at least ten consecutive business days in "conspicuous places where the employer's U.S. workers can readily read the posted notice." The information to be included in the posting notice is set forth at 20 C.F.R. § 656.10(d)(3), which states:

The notice of the filing of an Application for Permanent Employment Certification shall:

- (i) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
- (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
- (iii) Provide the address of the appropriate Certifying Officer; and
- (iv) Be provided between 30 and 180 days before filing the application.

Although the Internal Job Notice submitted by the petitioner in response to the June 3, 2014 NOID includes the above information, it does not demonstrate the petitioner's compliance with the regulation at 20 C.F.R. § 656.10(d)(1)(ii). The notice, in addition to providing the required information, includes computer-printed information indicating that it was posted on February 29, 2012 and removed on March 14, 2012, that "0" resumes were received as a result, and that it "remained clearly visible throughout the entire posting period." However, this information would not have been available on the date the petitioner asserts it posted the Internal Job Notice and its pre-printed presence in the notice, therefore, demonstrates that the petitioner did not post this document on February 29, 2012. We note that, even if this notice had been posted, as asserted, it would fail to comply with the purpose of the regulations. Posting such a notice, which suggests that the period to provide information or application has passed, is contrary to the purpose of the

the offered position or a different job opening with the [REDACTED]. The resume submitted by the purported job applicant for the offered position reflects his employment only through 2009, even though he was supposedly applying for a job opportunity in 2011. Moreover, the applicant lists only a post office box on the resume, while the address on the letter from the [REDACTED] reflects a street address. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, at 591-92. In any future filings, the petitioner must provide independent, objective evidence to establish that this resume and letter were received in response to its recruitment efforts.

notice, which is to notify employees or potential applicants of the job opportunity. 20 C.F.R. § 656.10(d). We also find that the submitted notice does not physically reflect that it was posted by the petitioner. Therefore, we will not accept the Internal Job Notice as credible and find its submission by the petitioner to cast doubt on the petitioner's claim to have engaged in a genuine recruitment effort for the offered position. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, at 591-92. For this reason as well, the record fails to establish the offered position as a *bona fide* job offer open to all qualified U.S. workers.⁸

For the above reasons, each of which may serve as the basis of this decision, the petitioner has not established the offered position of Environmental Compliance Inspector as a *bona fide* job opportunity, as required by the regulations at 20 C.F.R. §§ 656.3 and 656.10(c)(8). Accordingly, we will affirm our dismissal of the appeal on this basis.

However, our review of the record on motion has identified additional grounds that support the revocation of the visa petition's approval. These grounds, each of which offers an independent and alternative basis for revocation, are discussed below.

Position of Environmental Compliance Inspector

The regulation at 20 C.F.R. § 656.17 provides the following instruction to petitioners filing labor certifications:

(i) Actual minimum requirements. DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

Therefore, the job duties listed in Part H.11. of the labor certification by a petitioner are to reflect the actual responsibilities of the offered position. In the present matter, Part H.11. of the labor certification states that the beneficiary will be responsible for:

[p]rocurement of petroleum-based chemicals for export to the Japanese Ministry of Defense (J-MOD); [r]esearch of toxicological studies, [their] impact on the environment and cross check between environmental databases around the world; [d]etermines the type of code violations, the actions needed to address violations, and issues notices of violations; [e]xtensive knowledge of chemicals and its toxicology

⁸ Even if we found the Internal Job Notice to be genuine, it would not meet the requirements at 20 C.F.R. § 656.10(d)(1)(ii) as it does not identify the actual physical location of its posting and is not accompanied by an attestation from the petitioner that provides this information. The requirements at 20 C.F.R. § 656.10(d)(1)(ii) may be satisfied by providing a copy of the posted notice and stating where it was posted.

(effects on humans and animals) and epidemiology (study of health events, health characteristics, patterns in a population); [c]onducts safety trainings as well as risk assessments to maintain a safety program at the workplace; [i]nvestigates issues regarding pollution, quality of produce, and labeling laws; [i]nspects facilities for compliance with local, state, and federal regulations.

Our June 3, 2014 NOID informed the petitioner that we did not find the above description of the offered position's duties to be consistent with the position described by Mr. [REDACTED] in a December 26, 2013 statement, which had been submitted by the petitioner in support of its December 30, 2013 Motions to Reopen and Reconsider. In his 2013 statement, Mr. [REDACTED] asserted that the petitioner wished to employ an Environmental Compliance Inspector in order to determine the "environmental feasibility" of its suppliers' products prior to export to Japan and, thereby, avoid being penalized by the Japanese government for the shipment of prohibited ingredients/materials. The NOID, however, indicated to the petitioner that the duties outlined in Part H.11. of the labor certification did not require the beneficiary to determine the environmental feasibility of the petitioner's exports under Japanese law, but, instead, appeared to require him to monitor the petitioner's suppliers' compliance with U.S. environmental regulations, determining and addressing unspecified code violations on the part of these suppliers, and inspecting their facilities for compliance with U.S. regulation.

The NOID also notified the petitioner that we did not find the record to demonstrate that the monitoring and compliance duties described in Part H.11. of the labor certification could be lawfully performed by the beneficiary in the absence of government authorization, and that the job duty requiring the beneficiary to inspect the facilities of the petitioner's suppliers did not appear consistent with the description of the petitioner's business operations that had been provided by Mr. [REDACTED] in his December 26, 2013 statement. In that statement, Mr. [REDACTED] reported that the petitioner's U.S. suppliers shipped their products "directly to the elect forwarder's facilities, where onsite inspections of the products for correctness, flaws, and/or problems are conducted as necessary."

In response to the NOID, counsel for the petitioner maintains that Mr. [REDACTED] discussion of the beneficiary's responsibility for conducting an assessment of the environmental feasibility of products being shipped to Japan in his December 26, 2013 letter is not inconsistent with the job duties listed in the labor certification. She asserts that the labor certification "simply describes in more specific terms what is an overall determination of environmental feasibility of products prior to export." Counsel further contends that we have incorrectly interpreted the job duties in the labor certification as requiring authority from a government agency or contractual source to issue violation notices to the petitioner's suppliers or to inspect their facilities. She also maintains that we have misinterpreted the job duties in the labor certification as requiring the beneficiary to inspect the facilities of the petitioner's suppliers.

In his July 1, 2014 statement, Mr. [REDACTED] responds to the NOID by offering additional information concerning the petitioner's business operations in the United States. In his statement, Mr. [REDACTED] asserts that the petitioner does not deal directly with the Japanese military or J-MOD, but that its contacts are with Japanese suppliers specializing in military procurement. Mr. [REDACTED] reports that

such companies send the petitioner specifications for the materials requested and that the petitioner then contacts U.S. vendors for price quotes, while it examines whether the materials being requested might be considered environmentally hazardous. To make such determinations, Mr. [REDACTED] states, the petitioner relies on the information provided in Material Safety Data Sheets/Product Safety Data Sheets. He further reports that if the petitioner determines that the materials are hazardous, it researches the product and checks whether it may be transported under [REDACTED] or [REDACTED] rules. Purchased materials are shipped directly to a freight forwarder with which the petitioner works to ensure that the materials are properly declared and packaged. If the petitioner concludes that the materials cannot be shipped to Japan, Mr. [REDACTED] indicates that the petitioner may notify the supplier of its conclusions and inquire whether an alternate product is available. The petitioner does not, he asserts, indicate when a supplier is violating U.S. regulations or attempt to act as an agent of the U.S. government.

While the above explanations are noted, neither resolves the inconsistencies identified by the NOID nor demonstrates that the job duties set forth in the labor certification by the petitioner represent the duties that will be performed by the beneficiary in the offered position.

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, 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). 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.

In this case, the duties listed in the labor certification at Part H.11. clearly state that the job being offered to the beneficiary will require him to determine code violations and the actions needed to address such violations, as well as issue notices of violations. They also specify that he will conduct safety trainings and risk assessments to maintain a safety program at the workplace; will investigate issues regarding pollution, quality of produce, and labeling laws; and will inspect facilities for compliance with local, state, and federal regulations. Although counsel claims that these duties simply represent a more detailed description of the beneficiary's responsibility for determining the environmental feasibility of products being considered for export to Japan, her reading of the labor certification ignores the plain language of Part H.11. The duties, as stated, require the petitioner's Environmental Compliance Inspector to perform inspection and compliance duties in accordance with U.S. "local, state, and federal" laws and regulation, not Japanese environmental specifications,

and we may not read them differently. *Rosedale Linden Park Company v. Smith*, at 833. We note that while the United States follows a “local, state, and federal” administrative division, Japan’s government does not utilize this terminology or administrative structure. See <http://www.> (noting that Japan’s government is administratively divided into 47 prefectures). Moreover, counsel’s assertions that the above duties may be subsumed into the determination of environmental feasibility described by Mr. are contradicted by Mr. description of the petitioner’s operations and his assurances that duties such as the determination of code violations, the issuance of violation notices and the inspection of facilities for compliance with local, state and federal regulations will not be performed by the beneficiary.

As the duties listed in Part H.11. of the labor certification are not consistent with the job opportunity later described by Mr. we do not find the labor certification to reflect the actual minimum requirements of the job opportunity, as required by 20 C.F.R. § 656.17(i)(1).⁹ These same discrepancies also cast doubt on the reliability of the entirety of the job description provided by the petitioner in Part H.11. of the labor certification. Doubt cast on any aspect of a petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, at 591-92. As noted above, a labor certification is only valid for the job opportunity stated, 20 CD.F.R. § 656.30(c)(2), and we may not ignore the plain terms of the labor certification. *Rosedale Linden Park Company v. Smith*, at 833. As the labor certification does not state the actual minimum requirements of the offered position, the petitioner has not established that the offered position in this matter requires a professional holding an advanced degree or the equivalent. Accordingly, the petition may not be approved under section 203(b)(2)(A) of the Act for this reason also.

Beneficiary Qualifications

To perform the duties of the offered position, the labor certification requires that the beneficiary have a Master’s degree in Environmental and Occupational Health/Industrial (Parts H.4. and H.4-A.) and one year of experience as an Environmental Compliance Inspector (Parts H.6. and H.6-A.) or an Industrial Hygienist (Parts H.10, H.10-A. and H.10-B.). The labor certification reflects that the beneficiary holds a 2004 Master of Science in Environmental and Occupational Health from (Part J.) and has been employed full-time by the since July 1, 2010 (Part K.).

While we note that the beneficiary has the academic degree and experience required by the labor

⁹ A labor certification is valid only for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c)(2). In that Mr. has indicated that a number of the job duties stated on the labor certification will not be performed by the beneficiary, it does not appear that the Form I-140 in this matter is supported by a valid labor certification. Accordingly, our decision does not preclude our referral, pursuant to our consultation authority at section 204(b) of the Act, 8 U.S.C. § 1154(b), of the labor certification to DOL for review and possible revocation.

certification, we, nevertheless, do not find the petitioner to have established the beneficiary's qualifications for the offered position. As discussed above, the record does not reflect the actual minimum requirements of the offered position and, in the absence of these requirements, the petitioner cannot demonstrate that the beneficiary is qualified for the job offered. Therefore, we will affirm our dismissal of the appeal on this basis as well.

Conclusion

The petitioner has filed a Form I-140 petition on behalf of the beneficiary seeking to classify him as a member of the professions holding an advanced degree pursuant to section 203(b)(2) of the Act. However, for the reasons discussed above, the petitioner has failed to establish the offered position as a *bona fide* job opportunity open to all qualified U.S. workers. Specifically, the petitioner failed to demonstrate that it would actually employ the beneficiary at the [REDACTED] address, where it now has a virtual office, or that the beneficiary, its only employee in the United States in 2012, did not control its recruitment for the offered position. Further, we have determined that the posting notice submitted by the petitioner is not genuine and, therefore, that it casts doubt on the petitioner's claim to have engaged in a good faith recruitment effort for the offered position. Moreover, the statements submitted by [REDACTED] regarding the petitioner's operations in the United States and the position of Environmental Compliance Inspector indicate that the underlying labor certification in this matter does not reflect the actual minimum requirements for the offered position, as required by the regulation at 20 C.F.R. § 656.17(i)(1). Accordingly, the petitioner is unable to establish that a *bona fide* job opportunity exists, that the beneficiary is qualified for the offered position, or that the position requires an advanced degree professional, as defined by section 203(b)(2)(A) of the Act.

A petitioner must establish the elements for the approval of a petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). For the reasons just discussed, each of which provides an alternate and independent basis for our decision, the instant visa petition was not approvable at the time it was filed. Therefore, the visa petition was approved in error on October 5, 2012 and is properly revoked for good and sufficient cause under section 205 of the Act. *See Matter of Ho*, at 590. We will affirm our dismissal of the appeal.

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 Motion to Reopen is granted. Our prior decision is affirmed. The approval of the petition remains revoked.