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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
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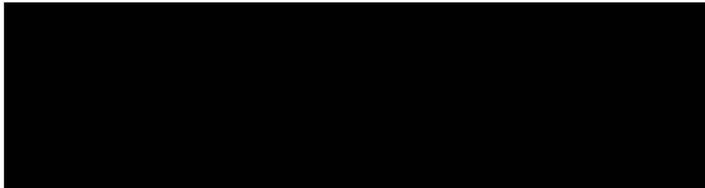
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: OCT 06 2009
LIN 07 094 52003

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

PETITION: Immigrant Petition for Other Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a donut shop. It seeks to employ the beneficiary permanently in the United States as a donut machine operator. As required by statute, the petition is accompanied by a Form ETA 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 it needed the services of a donut machine operator at this location. 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 24, 2007 denial, the single issue in this case is whether or not the petitioner has demonstrated that it needs the services of a donut machine operator at this location.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 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). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

Relevant evidence in the record includes counsel's brief; an undated letter from one of the petitioner's owners, copies of the petitioner's 2005 State of Delaware Unemployment Insurance Forms, copies of photographs of the inside and outside of the petitioner, and a copy of a letter, dated July 31, 2009, from one of the petitioner's owners to counsel. The record does not contain any other evidence relevant to the petitioner's need for a donut machine operator.

The undated letter from one of the petitioner's owners' states:

This letter is designed to better describe what job duties [the beneficiary] currently completes. As our business product mix has changed over the years, his job duties have also changed.

When [the beneficiary] applied to the U.S. Citizenship & Immigration Service, we sold a lot of donuts. Since then we are selling less donuts and more muffins, bagels, and croissants. [The beneficiary] still spends time

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 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).

finishing donuts, but he also spends more than half of his time baking muffins, bagels, and croissants.²

The letter, dated July 31, 2009, from one of the petitioner's owners' to counsel states:

Per our conversation, the following are [the beneficiary's] job duties. [The beneficiary] bakes bagels, bakes muffins, and bakes croissants; he also finishes donuts and serves customers.

In his decision of September 24, 2007, the director stated:

You have submitted this petition seeking the beneficiary as a Doughnut Machine Operator at 1204 Pulaski Highway in Bear, Delaware. On February 21, 2007, the Service sent a Request for Evidence (RFE) seeking "photographs of the physical premises" of the business. On May 15, 2007, your response was received. The response included copies of photographs of both the interior and exterior of your business. The photographs of the interior of your business did not show a donut machine nor show any bakery equipment. Due to this discrepancy, the Service contacted your franchisor, Dunkin Brands, Inc.

According to Dunkin Brands, Inc., there is no bakery at this location. Their records indicate that this franchise only has one bakery located at 196 N. DuPont Highway in New Castle, Delaware. According to Dunkin Brands, a franchise will generally produce the donuts at one location and transport the finished product to other retail outlets. Furthermore, the Dunkin Brands, Inc. employee who oversees this franchise network verified this franchise has only one bakery which is located at the store in New Castle.

The evidence indicates the petitioner presented inaccurate or false information to the Department of Labor and to the Service since there would be no need for a doughnut machine operator at this location.

* * *

² The AAO notes that the job duties as listed on the Form ETA 9089 state:

Operates machine that shapes and fries doughnuts. Mixes ingredients and loads into machine. Slides cutters. Dismantles cutters for cleaning. Works under direct close supervision.

Therefore, the Service has determined this petition and the Form ETA 9089 contain fraudulent information which has cast doubt to the reliability of the remaining evidence.

The petitioner appealed and counsel asserted that the error was a result of the government not requesting "current photographs." Despite counsel's assertions, the petitioner did not submit "current photographs" on appeal.

After a review of the appeal, the AAO initiated its own investigation, and on July 17, 2009, the AAO issued a notice of derogatory information (NDI) informing the petitioner that evidence in the file raised questions related to the beneficiary's prior experience, whether he qualifies for the certified Form ETA 9089 position, and related to the petitioner's need for a donut machine operator.

The AAO specifically informed the petitioner of the following:

On the Form ETA 9089, the "job offer" description for a donut machine operator:

Operates machine that shapes and fries doughnuts. Mixes ingredients and loads into machine. Slides cutters. Dismantles cutters for cleaning. Works under direct close supervision.

Further, the job offered listed that the position required:

Education: none

Major Field Study: none

Experience: 3 months in the job offered of donut machine operator

Other special

Requirements: none

On the Form ETA 9089, the beneficiary listed his relevant experience as: donut machine operator with the petitioner from November 1, 2001 through the present (signed on July 7, 2007). The beneficiary claims to work forty hours per week and operates a machine that shapes and fries doughnuts; mixes ingredients and loads into machine; slides cutters; dismantles cutters for cleaning; and works under direct close supervision. On the Form ETA 9089, the beneficiary further listed his relevant experience as: donut machine operator for Palak Donuts dba/Dawn Donuts at 4460 State Street, Saginaw, MI 48603 from May 1, 2000 through May 1, 2001. The beneficiary claimed to work forty hours per week and operated a doughnut machine that shapes doughnuts; mixed and loaded ingredients into machine; and cleaned machine cutters. The record of proceedings does contain a letter from [REDACTED] dated December 14, 2006, of Palak Corporation at 4460 State Street, Saginaw MI 48603 that stated:

This is to let you know that [the beneficiary] was working as a doughnut machine operator since May 1st 2000 to May 1st 2001. He was sincere and hard worker.

Another letter in the record of proceeding, dated May 7, 2007, from [redacted] of Palak Corporation stated:

This letter is to confirm that [the beneficiary] was working at Palak Corporation as a doughnut machine operator from May 1st 2000 to May 1st 2001. He was an excellent worker.

His main responsibility was including but not limited to bake doughnuts, pastries, cookies [sic], brownies, muffins, turnovers, cakes, croissants, bagels, and other bakery goods.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3), which provides:

(ii) *Other documentation—*

(A) *General.* 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.

(D) *Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

An investigation was initiated into the beneficiary's claimed prior experience by the AAO. The investigation revealed, through public databases, that the beneficiary and [redacted] the signer of the first letter, are related, raising doubt on the reliability of the first letter as evidence of the beneficiary's purported experience as a donut machine operator. The investigation further revealed that [redacted] the signer of the second letter, is one of twelve aliases used by [redacted] [redacted] additionally raising doubts regarding the reliability of the beneficiary's work experience.

Accordingly, it appears that the beneficiary may have misrepresented his prior work experience in order to meet the requirements of the certified Form ETA 9089.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States, unless the petitioner is able to overcome the findings of the AAO's investigation. *See* INA Section 212(a)(6)(c), [8 U.S.C. 1182], regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

A material issue in this case is whether the beneficiary is qualified to perform the duties of the proffered position through meeting the experience requirements of the position offered. The job offered requires three months of prior experience as a donut machine operator. The beneficiary in listing on Form ETA 9089 that he gained this experience with Palak Corporation, and signing that form under penalty of perjury, constitutes an act of willful misrepresentation if the beneficiary was not employed in that position. The listing of such experience misrepresented the beneficiary's actual qualifications in a willful effort to procure a benefit ultimately leading to permanent residence under the Act. *See Kungys v. U.S.*, 485 U.S. 759 (1988), ("materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision.") Here, the listing of false experience is a willful misrepresentation of the beneficiary's qualifications that adversely impacted DOL's adjudication of the ETA 9089 and USCIS's immigrant petition analysis.

Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 9089. *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

Further, doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

With regard to the second issue of whether or not the petitioner has established that it requires a donut machine operator, the investigation revealed, through e-mail communication and telephonically with Dunkin Brands, Inc., that the petitioner, a franchise of Dunkin Brands, Inc., does not have the ability to bake donuts at the address given on the Form I-140 and listed on Form ETA 9089 as the work location, and that the donuts sold at this store are baked at a separate location and delivered to this address. The investigation further revealed that the owner of the petitioner, [REDACTED] along with [REDACTED] operates another franchise located at 196 N. DuPont Highway, New Castle, Delaware. The 196 N. DuPont Highway location is the only franchise location that Mr. [REDACTED] operates which contains a bakery. In addition, photographs submitted in response to a February 21, 2007 Request for Evidence (RFE), issued by the director, do not contain any evidence of the needed equipment to make doughnuts on the premises. The petitioner did not submit any new photographs on appeal. Therefore, the AAO is not convinced that the petitioner requires a donut machine operator at the address listed on the Form I-140.

The petitioner was allotted thirty days from the date of the NDI to respond to the notice with proof that the beneficiary qualifies for the certified Form ETA 9089 position and that the petitioner has a need for a donut machine operator.

In response, counsel submits a brief and the letter, dated July 31, 2009, from one of the petitioner's owners.

Counsel states:

Under *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1998), the Administrative Appeals Office take [sic] consider all pertinent evidence in the record, including new evidence properly submitted on appeal. Under 8 C.F.R. § 103.2(a)(1) allows for the submission of additional evidence upon appeal. It is well settled that under *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), the petitioner has a due process right to confront and resolve any inconsistencies in the record. However, in this Notice of Derogatory Information, it appears that the Administrative Appeals Office is creating a record.

The government is allowing minimal time to respond to significant serious allegations of misrepresentation and fraud on behalf of the beneficiary and maybe even the petitioner while without even providing the derogatory evidence which [it] is citing in the Administrative of [sic] Appeals Office decision.

Common law decisions going back to the days of our forefathers in England have restricted the scope of de novo review to the record. Government wishes to do a fishing expedition, while doing its alleged de novo review, then it must remand the record back to the Service Center, provide a copy of all derogatory information to the respondent(s) to allow for a record to be developed.

It appears the Administrative Appeals Office is trying to wear two hats. That of an appellate authority doing de novo review of the record and that of an investigative authority creating a record. This defines the classic definition of abusive and capricious behavior. Therefore, I have advised my clients that we can not respond to inconsistencies outside of the record which has not been provided to us. This is a case that must go to the Federal Courts. It is only through Administrative Procedures Acts and clear abusive and capricious behavior on the part of the government we can get access to the Federal District Courts.

The government makes an assertion that the experience letter which established the three month of experience needed for the Labor Certification by [REDACTED] to be caste [sic] into doubt for two reasons. First, if there is a relative relationship then apparently it has zero value. With [sic] case law or regulations does the Administrative Appeals Office rely on to make this assertion is unknown.

Going back to the beginning of this country, immigrants have come and worked for one another, usually based off of family ties. Does that mean that the work never occurred? Does this mean a misrepresentation has occurred? These are assumptions on top of assumptions, which the Administrative Appeals Office is drawing a flawed conclusion of law.

The Administrative of [sic] Appeals Office states that through public databases [REDACTED] accordingly has twelve aliases one of them being [REDACTED]. What public databases in the government using? What qualifying information was used to narrow down the search to demonstrate that this [REDACTED] is not one of thousands of others that live and work in the United States? Does this public database use social security numbers, date of birth, region of birth, the other specifies, or is it simply just the name? We don't know. The reason why we don't know is because the mystery record, which allegedly is being created.

Based on this mystery record, the Administrative of [sic] Appeals Office has stated according, "it appears the beneficiary may have misrepresented his prior work experience...." This is classical definition of abusive authority. Let's assume for arguments sake that they are related. How does this draw to misrepresentation? The government is clearly applying no standard towards its behavior. One can only look to the regulations at 8 C.F.R. § 204.5(1)(3) which provides the burden of proof for other workers, that there must be evidence that the alien meets any educational, training, experience, and other requirements of the labor certification. No where in there does it state that one can not work for a relative.

Counsel next turns to the second part of the decision. Again, the Administrative of [sic] Appeals Office is not doing a de novo review of the record, but is doing an independent investigation of with [sic] the facts. Once more, an alleged email communication and telephonic communication with Dunkin Donuts Brands, Inc. took place. Copies of the email communications are [not] part [of] the mystery record. Instead we have the investigation conclusions. The only time the Administrative of [sic] Appeals officer refers to the record is going to the February 21, 2007 Request for Evidence, where pictures of the premises where [sic] submitted. There is no discussion that those photographs are not in fact the photographs of the premises. Again, the Administrative of [sic] Appeals Office should remand this record if it feels that the Service Center missed the fact the photographs of the premises do not have equipment for making donuts on the premises and then let a record be developed.³ Instead the mystery record continues followed by a conclusion of law asserting invalidation of the labor certification and determination of fraud, willful misrepresentation.

The officer does correctly refer to the record when it cites the definition of the Dictionary Occupational Titles for Doughnut Machine Operator. This is a devisable description that has six devisable parts. These are as follows:

- 1) Operates machine that shapes and fries doughnuts.
- 2) Mixes ingredients.
- 3) Loads into machine (machine undefined).
- 4) Slides cutters.
- 5) Dismantles cutters for cleaning.
- 6) Works under direct, close supervision.

³ The director's decision clearly states that "the photographs of the interior of your business did not show a donut machine nor showed any bakery equipment."

This is the record, not an assumption of facts, not in the record. Not an assumption of facts on top of assumption of facts based on the mystery record, which simply the actual statement of the record. Counsel received a fax from [REDACTED] in response to a specific request of what the beneficiary does. Apparently he bakes bagels, bakes muffins, and bakes croissants, and he also finished donuts and serves customers. Which means prima facially if [sic] appears that the beneficiary complies with all the requirements except for one, operates machine that shapes and fries doughnuts. **This is what leads counsel to the real argument.** The Dictionary of Occupational Titles is a system of descriptions that respondents where [sic] forced to use when filing labor certifications. This is a standard itemization of job descriptions. A code specific to that job description had to be cited in the labor certification. This forced employers to pick a job description that “best suited” the job being performed. It was never meant as a strict *black letter rule*, but merely as a guideline for the purposes of standard itemization. This is not an argument that counsel believes can be addressed before the Administrative of [sic] Office. This is an issue that must be addressed towards the Department of Labor as they are the ones with the specific knowledge. Counsel asserts that no deference should be given to [USCIS] for they are not in the business of statistically testing the job market. However, the government does not stop there. The government takes its secret investigation with its mystery record and makes an assertion of misrepresentation and fraud.

Counsel raises these arguments so aggressively for one reason and one reason only. What is the rule of law? What is due process? What is the job of investigators? What is the job of the Service Center? What is the job of the Administrative of [sic] Appeals Office? What happens when these rules get commingled without any standards? Couple with the severity of defining of fraud and misrepresentation on the beneficiary only makes this issue more meaningful. If we are going to change the de novo review of the record to de novo investigation of the facts, let us at least create standards. No mystery record can be allowed. Allow more than thirty days to respond [to] serious charges. Provide notice to respondents and petitioners that when they file and pay a fee for an I-290B, the issues never even raised in the record maybe developed through a de novo investigation of the facts. This entire Administrative Structure would have to be promulgated in order to provide procedural due process to avoid arbitrary and capricious behavior. It is for this reason that counsel is creating a record for the future Federal Court Litigation to demonstrate why public policy demands that we do not want our governments acting this way. How we get to the truth is as important as to what the truth is.

The AAO is not convinced by counsel’s argument. Counsel’s comments and arguments are not dispositive in this proceeding and cannot take the place of evidence-based argument. The assertions of

counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1(2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). See DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv). 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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The regulation at 8 C.F.R. § 103.8 states in pertinent part:

Definitions pertaining to availability of information under the Freedom of Information Act.

- (d) The term *record of proceeding* is the official history of any hearing, examination, or proceeding before the Service, and in addition to the application, petition or other initiating document, includes the transcript of hearing or interview, exhibits, and any other evidence relied upon in the adjudication; papers filed in connection with the proceedings, including motions and briefs; the Service officer's determination; notice of appeal or certification; the Board or other appellate determination; motions to reconsider or reopen; and documents submitted in support of appeals, certifications, or motions.

Counsel contends that the AAO violated the petitioner's right to see the information being used against him by not providing him with a copy of the investigative report. However, the regulation at 8 C.F.R. § 103.2(b)(16)(i) only pertains to "Derogatory information *unknown* to petitioner or applicant" (emphasis added). The regulation does not require that the petitioner be given a copy of the derogatory information. Rather, the regulation only requires that the petitioner "shall be advised" that an adverse decision will be made based on derogatory information considered by USCIS and offered an opportunity to rebut the information and present information on his behalf before the decision is rendered. 8 C.F.R. § 103.2(b)(16)(i). The AAO's NDI complied with the regulation by informing the petitioner of the existence of and the pertinent derogatory information provided by the AAO's investigation.

In response to the NDI, dated July 17, 2009, counsel claims that the AAO is creating a record and is "allowing minimal time to respond to significant serious allegations of misrepresentation and fraud on behalf of the beneficiary and maybe even the petitioner." However, the AAO notes that counsel and the petitioner were fully aware of the issue regarding the petitioner's need to demonstrate that it required a donut machine operator as that issue was the focus of the director's denial. The only new issue presented in the NDI related to the beneficiary's prior experience, and whether he qualifies for the certified Form ETA

9089 position. The petitioner was allotted thirty days in which to respond to the AAO's NDI. While counsel responded to the NDI in a timely manner, he could have requested additional time to submit further evidence to overcome the derogatory information supplied by the AAO. Counsel chose not to do so. Counsel could have addressed the nature of the allegation, whether the beneficiary was related to the individual that wrote the letter, but chose not to. Counsel could have obtained W-2 statements to independently evidence the beneficiary's prior employment, but similarly chose not to. Furthermore, although counsel claims that he did not receive the documentation that the derogatory information was based on, he had ample opportunity to request that documentation through the mail, phone, or fax. Again, counsel chose not to do so. Credibility issues found in its investigation were examined and thoroughly discussed by the AAO in the NDI. Counsel had ample opportunity to address the issues involved or to request additional time to do so. Counsel chose not to do so. There are no statutory or regulatory provisions that require the AAO to hold a Form I-290B in abeyance while the petitioner takes an undetermined amount of time to respond to a NDI.

Counsel states that the AAO "is trying to wear two hats – that of an appellate authority doing de novo review of the record and that of an investigative authority creating a record." However, the AAO notes that there is nothing in the Act, the regulations, or precedent decisions that prohibit the initiation of an investigation at any point in the adjudication process of a visa petition. 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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). 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* 8 C.F.R. § 103.2(b)(16)(i). If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In response to the NDI, counsel claims that the AAO "makes an assertion that the experience letter which establishes the three month[s] of experience needed for the labor certification by [REDACTED] to be caste [sic] in doubt for two reasons. First, if there is a relative relationship then apparently it has zero value. . . .No where in there does it state that one can not work for a relative."

Again, counsel is mistaken. The AAO does not and has not asserted that employment with a relative has "zero value." What the AAO stated in its NDI was that the author of the letter written in support of the beneficiary's experience appears to be related to the beneficiary. When the investigation pointed out that the author of the experience letter was not only related, but also uses several different aliases, the AAO had sufficient cause to require evidence that the beneficiary had not misrepresented his experience with regard to the requirements of the ETA 9089. Counsel has not provided any evidence that explains the relationship between the beneficiary and the author of the letter, nor has he submitted any corroborative evidence of the beneficiary's employment with the author such as Forms W-2, Wage and Tax Statements, Forms 1099-MISC, Miscellaneous Income, Forms 941, Employer's Quarterly Federal Tax Returns, affidavits from fellow employees, etc. that demonstrates that the beneficiary was actually employed by the letter's author. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (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 response to the NDI, counsel claims:

The only time the Administrative of [sic] Appeals Office refers to the record is going to the February 21, 2007 Request for Evidence, where pictures of the premises were submitted. There is no discussion that those photographs are not in fact the photographs of the premises. Again, the Administrative of [sic] Appeals Office should remand this record if it feels that the Service Center missed the fact the photographs of the premises do not have equipment for making donuts on the premises and then let a record be developed.

Again, counsel is mistaken. The AAO is confident that the photographs are of the premises. In fact, in its NDI, the AAO specifically stated that the "photographs submitted in response to a February 21, 2007 Request for Evidence (RFE), issued by the director, do not contain any evidence of the needed equipment to make doughnuts on the premises." The AAO further noted that the petitioner did not submit any new photographs on appeal. Likewise, the petitioner did not submit any new photographs in response to the NDI.⁴

In response to the NDI, counsel stated that he received a fax from one of the owners in response to a specific request of what the beneficiary does. "Apparently, he bakes bagels, bakes muffins, and bakes croissants, and he also finished donuts and serves customers." Counsel claims that this means that the beneficiary complies with all the requirements [of the labor certification] except one, operates machine that shapes and fries doughnuts. Counsel further states:

⁴ On appeal, counsel stated that "at no time did the government request current photographs. Because the government was asking for the square footage of the facility and they were also asking for the original lease, the petitioner sent them the photographs of the facility that were taken on April 10, 1994. Obviously, because the government never disclosed it[s] intention behind the photographs and never specifically requested current photographs, neither counsel or the employer had any reason to question the photographs submitted." The February 21, 2007 RFE from the director stated, "submit original photographs of the physical premises of the office. Photos must be of the inside and outside and show the address of the facility. Do not send copies of photographs." The AAO finds it questionable that the petitioner and counsel would think that thirteen-year old photographs would suffice in response to the request.

This is what leads counsel to the real argument. The Dictionary of Occupational Titles is a system of descriptions that respondents were [sic] forced to use when filing labor certifications. This is a standard itemization of job descriptions. A code specific to that job description had to be cited in the labor certification. This forced employers to pick a job description that “best suited” the job being performed. It was never meant as a strict *black letter rule*, but merely as a guideline for the purposes of standard itemization. This is not an argument that counsel believes can be addressed before the Administrative of [sic] Office. This is an issue that must be addressed towards the Department of Labor as they are the ones with the specific knowledge. Counsel asserts that no deference should be given to the Immigration & Naturalization Service for they are not in the business of statistically testing the job market.

The AAO is not in agreement with counsel. The job duties as provided by the labor certification specifically state that the beneficiary “operates machine that shapes and fries doughnuts. Mixes ingredients and loads into machine. Slides cutters. Dismantles cutters for cleaning. Works under direct close supervision.” USCIS must look to 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, Mandany 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). According to the plain terms of the labor certification, the applicant must “operate a machine that shapes and fries doughnuts. Mixes ingredients and loads into machine. Slides cutters. Dismantles cutters for cleaning. Works under direct close supervision.” At no place does the labor certification state that the beneficiary’s job duties are to bake bagels, muffins, croissants, and finish donuts and serve customers. 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. *See 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 alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification. In addition, neither the petitioner nor counsel has provided any evidence that the petitioner has a donut machine on its premises or that the beneficiary actually makes donuts.⁵ The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Additionally, we note that O*NET has replaced the DOT. O*NET condensed the DOT and includes

⁵ This additionally calls into question the representations of Form ETA 9089 that the petitioner has employed the beneficiary from November 1, 2001 to August 2006 as a donut machine operator.

more generic titles. Despite this, the petitioner listed O*NET code 51-3093 on the labor certification. Counsel did not select a more generic code such as 51-3011 (bakers), etc. which would have encompassed other job duties that better describe the actual duties of the beneficiary.

Finally, counsel speaks to the issue of due process. Although the respondents argue that their rights to procedural due process were violated, they have not shown that any violation of the regulations resulted in "substantial prejudice" to them. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The respondents have fallen far short of meeting this standard. A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. The petitioner's primary complaint is that the director denied the petition. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulation. Accordingly, the petitioner's claim is without merit.

Furthermore, the AAO notes that in spite of counsel's threats of a lawsuit, the AAO is bound by the requirements of the Act and the regulations. The petitioner must provide probative evidence in support of its visa petition.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.