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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

B6

[redacted]

DATE: MAY 2 7 2011 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 manufacturer of lace. It seeks to employ the beneficiary permanently in the United States as a warping machine operator. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to establish that the beneficiary possessed the minimum requirements for the offered position set forth on the labor certification. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 June 18, 2009 denial, at issue in this case is whether or not the petitioner has demonstrated that the beneficiary possessed the minimum requirements for the offered position. The director determined that the petitioner had not submitted sufficient evidence to establish that the beneficiary satisfied the requirement of one year of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

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 petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). *See also*, 8 C.F.R. § 204.5(l)(3)(D). Here, the labor certification application was accepted on April 18, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications

[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).

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). .

Part A of Form ETA 750 states that the offered position requires one year of experience in the job offered. The beneficiary set forth his credentials on Part B of Form ETA 750, and signed it under penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, the beneficiary represented that he worked as a warping machine operator as an independent contractor for "various employers within the NYC area" since 1990.

The regulation at 8 C.F.R. § 204.5(l)(3) 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 certificate

The record contains an employment letter dated March 23, 2001, with certified translation, from [redacted] and [redacted]. The letter states that the beneficiary worked as a warping machine operator at [redacted] in [redacted], from January 1986 to April 1990. However, this alleged experience was not claimed on Part B of Form ETA 750, which specifically solicited information regarding the beneficiary's qualifying experience. *See Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976)(claims of employment experience not stated on the labor certification are less credible). On May 13, 2009, the director issued a Request for Evidence (RFE). The RFE notes that the submitted employment letter was from a company not listed on Part B of Form ETA 750, and instructed the petitioner to provide employment letters from the beneficiary's current or former employers and copies of any contracts or Forms 1099 as evidence of his claimed experience as an independent contractor. In response to the RFE, the petitioner submitted a second letter from [redacted]s and [redacted], also dated March 23, 2001. It is unclear why the former employer would issue two different employment letters on the same day. In addition, even though the letters are different, the purported translations are identical. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits

competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Id.* at 591. The director concluded that the petitioner failed to establish the required one year of experience in the job offered and denied the petition accordingly.

On appeal, counsel asserts that the petitioner had submitted sufficient evidence to establish the beneficiary's qualifying work experience. Counsel claims that El Palacio Industrial was one of the "various employers in the NYC area" on Part B of Form ETA 750. However, this is clearly incorrect. The company that wrote the experience letter is located in Colombia, not "in the NYC area," and the dates of employment on the letter precedes the dates of employment listed on Part B of Form ETA 750. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. 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, Inc. 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).

Counsel also claims that USCIS cannot require it to provide additional evidence beyond the submitted experience letter. Counsel cites to *Lu-Ann Bakery Shop, Inc. v. Nelson,* 705 F. Supp. 7 (D.D.C. 1988) for the proposition that the submission of a single employment experience letter is the only document necessary to prove an alien meets the experience requirements for an offered position. Counsel claims that by requiring the petitioner to provide more that an employment experience letter, USCIS is requiring the petitioner to "produce more than what is required by law."

The facts of *Lu-Ann Bakery Shop* are easily distinguishable from the instance case. *Lu-Ann Bakery Shop* involved the revocation of the approval of a petition. USCIS revoked the petition because the petitioner did not provide contemporaneous evidence of the beneficiary's claimed employment. The court stated that USCIS could have revoked the petition based on a finding that that submitted experience letter was not credible, but if could not revoke simply for the failure to provide contemporaneous evidence. In its holding, the court states:

> [USCIS] is of course free to determine, upon sufficient evidence, that [an employment experience letter] is not accurate or not credible, [however, USCIS] erred by refusing to make such a conclusive determination in Mr. [redacted] case and by again shifting the burden on him to prove by contemporaneous evidence that he actually had the experience to which the employer had attested.
>
> . . .
>
> The Court's ruling does not, of course, mean that [USCIS] must accept as true or accurate the affidavits presented by the petitioner, nor does it mean that [USCIS] may not consider as evidence the lack of contemporaneous evidence in its determination whether the petitioner has the requisite experience. What [USCIS] cannot do, however, is deny or revoke a petition because of the fact that

> contemporaneous evidence has not been presented without making a conclusive determination that the affidavits presented are not accurate or credible or otherwise concluding that the petitioner does not have the requisite experience.

Id. at 11-12. In the instant case, the director denied the petition after concluding that the employment experience letter was not credible, and noting that there exists no other evidence in the record to establish the beneficiary's newly claimed experience. This is consistent with holding of *Lu-Ann Bakery Shop*.

Therefore, for the reasons explained above, the AAO affirms the director's decision that the petitioner failed to establish that the beneficiary possessed one year of experience as a warping machine operator as of the priority date as required by the terms of the labor certification.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.