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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



U.S. Citizenship  
and Immigration  
Services



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DATE: **AUG 23 2012** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:  


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a construction company. It seeks to permanently employ the beneficiary in the United States as a construction supervisor. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).<sup>1</sup>

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is July 9, 2007. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the *minimum experience required to perform the offered position by the priority date.*

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor

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<sup>1</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate about the beneficiary’s qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the job title for the offered position is “Construction Supervisor,” with the following duties:

Measure and mark cutting lines on materials, using ruler, pencil, chalk. Follow established safety rules and regulations and maintain safe and clean environment. Verify trueness of structure, using plumb bob and level. Shape or cut materials to specified measurements, using hand tools, machines or power saw. Assemble and fasten materials to make framework or props. Build or repair cabinets, door, frameworks. Erect scaffolding and ladders for assembling structures above ground level.

The labor certification states that the offered position has the following minimum requirements:

- H.4. Education: None required.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 Months.
- H.8. Alternate combination of education and experience: None accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: None.

The labor certification states that the petitioner employed the beneficiary as a construction supervisor beginning August 1, 1991, and marks “no” to the ETA Form 9089 question J.21 indicating that the beneficiary did not gain any qualifying experience with the petitioner.<sup>3</sup> The labor

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<sup>3</sup> Representations made on the certified ETA Form 9089, which must be signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary’s experience with the

certification also states that the beneficiary was employed 40 hours a week as a "construction worker"<sup>4</sup> for "Nick Angeles Construction" in Agoura Hills, California, from March 1, 1987, until May 1, 1989. This is the only qualifying employment listed on the labor certification; no other experience is listed.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains an experience letter, dated August 8, 2007, from an employee at JP General Building, Inc. identifying himself as the beneficiary's supervisor<sup>5</sup> at "Nick Angeles Construction

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petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position. 20 C.F.R. § 656.17(i)(3) (stating that an "employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire" unless the beneficiary's experience was in a position not substantially comparable to the position offered, or it is no longer feasible to train a worker). Specifically, the petitioner indicates that questions J.19 and J.20, which ask about experience in an alternate occupation, are not applicable. In response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1. that his position with the petitioner was as a construction supervisor, and the job duties are the same duties as the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as he was performing the same job duties more than 50 percent of the time. *Id.* at § 656.17(i)(5) ("a 'substantially comparable' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time"). According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

<sup>4</sup> The job details provided are: "[m]easure and mark cutting lines on materials, using ruler, pencil, chalk. Verify trueness of structure, using plumb bob and level. Shape or cut materials to specified measurements, using hand tools, machines or power saw." The job details also list the name of the beneficiary's supervisor and telephone number.

<sup>5</sup> The individual that signed the letter attesting to the beneficiary's experience has the same surname as the beneficiary and appears to be related.

Company” (hereinafter Supervisor). The letter is issued on JP General Building, Inc. letterhead. The letter states that “Nick Angeles Construction Company” employed the beneficiary full-time as a “Construction Worker” from March 1, 1987, until May 1, 1989. The letter indicates that the beneficiary was responsible for the following job duties: “cutting materials using hand, machines or power saw. Verified structures, using plumb bob and level.”

As the director indicated in his Request for Evidence (RFE), dated February 27, 2009, this experience letter was not written by the beneficiary’s previous employer, nor a person authorized by that company to make representations on its behalf. As the letter was not from the beneficiary’s employer, “Nick Angeles Construction,” the letter does not meet the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A). The director put the petitioner on notice that a letter from the employer is required, stating that third party statements cannot be accepted without evidence demonstrating that the required experience letter does not exist or cannot be obtained, accompanied by corroborating evidence of the beneficiary’s employment. 8 C.F.R. § 103.2(b)(2)(i) (“[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document ... does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence.”) The director informed the petitioner that this secondary evidence should include W-2 forms, employment records, and evidence that the employer no longer exists.

In response, counsel provided an experience letter, dated April 8, 2009, from the president of Angelos Construction,<sup>6</sup> on that company’s letterhead, stating that the company employed the beneficiary “from about 1988 to 1989. In addition, [the beneficiary] worked for me on my house and on site in 1987.” The letter indicates that the beneficiary was an employee of the company from only some time in 1988 to some other time in 1989; exact dates are not provided, which precludes the AAO from determining how long the beneficiary was employed. The letter also does not state whether the beneficiary’s employment was full-time or part-time; thus, the AAO is unable to determine from this letter whether the beneficiary possessed the 24 months of work experience as a construction supervisor, as required by the labor certification.

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<sup>6</sup> According to the California Department of Consumer Affairs, Contractor’s State Licensing Board, the name of this entity appears to be Nicholas E. Angelos, Inc. The record includes a notation that this entity properly registered a fictitious name, and is doing business as Angelos Construction. See <https://www2.cslb.ca.gov/OnlineServices/CheckLicenseII/LicenseDetail.aspx?LicNum=543121> (last accessed August 13, 2012). The petitioner has not provided any explanation to clarify the discrepancy between the name of the prior employer as listed on the labor certification, Nick Angeles Construction, which is repeated in the first and second experience letter from the Supervisor, and the name of the employer listed in the experience letter from Angelos Construction. It is unclear from the record of proceedings whether these companies are one and the same. The petitioner must provide objective, credible evidence to explain these discrepancies in any future filings before the AAO. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (“[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.”)

It also appears that the beneficiary may have been personally employed by the owner of this company during 1987; however, this experience is not indicated on the labor certification separately, therefore, the AAO cannot consider it as relevant. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOI on the beneficiary's labor certification, lessens the credibility of the evidence and facts asserted. As was noted by the director, the letter from the owner of Angelos Construction unambiguously states that it was not incorporated until 1988.<sup>7</sup> As it appears that the corporation was established on September 1, 1988, and the labor certification indicates the beneficiary's employment ended on May 1, 1989, it appears that the beneficiary was employed by this company for less than the claimed 24 months. Further, it appears that the beneficiary's qualifying employment experience as stated on the labor certification is incorrect. The inconsistencies between this letter and the labor certification, as well as the letter from the Supervisor, cast doubt on the credibility of this evidence. *Matter of Ho*, 19 I&N at 591, 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.

In addition, the letter from Angelos Construction does not state the beneficiary's title, which is an important aspect of determining whether the beneficiary possesses the claimed experience. The job duties<sup>8</sup> provided are vague, and are inconsistent with both those provided on the labor certification and those provided in the experience letter from the Supervisor. Therefore, this letter fails to establish that the beneficiary was employed in the job offered, "Construction Supervisor," for the 24 months required on the labor certification.

As the experience in this letter does not amount to the 24 months of experience as a construction supervisor, the petitioner has not demonstrated that the beneficiary has the experience required as of the priority date.

On appeal, counsel provides a sworn declaration from the beneficiary. The beneficiary's declaration is self-serving and does not provide independent, objective evidence of his prior work experience. See *Matter of Ho*, 19 I&N at 591-592 (the petitioner must resolve any inconsistencies in the record by independent, objective evidence). Going on record without supporting documentary evidence is

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<sup>7</sup> According to the California Secretary of State, Nicholas E. Angelos, Inc., was formed on September 1, 1988, and is located in Irvine, California. See <http://kepler.sos.ca.gov/cbs.aspx> (last accessed August 13, 2012).

<sup>8</sup> The owner of Angelos Construction states that the beneficiary's responsibilities were "in demolition, digging, framing, carpentry (rough and finish) and miscellaneous items that were needed to keep a safe and clean environment. He utilized numerous tools to shape and cut materials to specified measurements, and assemble various items to produce an end result, i.e., doors, cabinets, etc."

not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). It is noted that two affidavits from non-parties may be provided in lieu of a required document pursuant to 8 C.F.R. § 103.2(b)(2)(i) if the petitioner can demonstrate the unavailability of the required document and relevant secondary evidence. Here, the petitioner has provided a letter from an entity that appears to be the employer with whom the beneficiary claimed on the labor certification to have gained his qualifying experience, therefore, the presentation of secondary evidence cannot be accepted in lieu of the required evidence.

In addition, counsel has provided a photocopy of a second letter from the Supervisor, dated July 7, 2009, on JP General Building, Inc., letterhead. As discussed above, the first letter from the Supervisor was not sufficient to document the beneficiary's claimed experience because he was not the employer of the beneficiary. Also, as noted above, the letter's author appears to be related to the beneficiary, therefore, the letter would not constitute independent, objective evidence. The addition of the letter from the owner of Angelos Construction introduced numerous inconsistencies to the record, and cast doubt as to the credibility of the evidence in the record. Given the still unexplained inconsistencies in the record, this second letter from the Supervisor, again on "J P General Building Inc." letterhead, cannot be construed to be independent, objective evidence of the beneficiary's employment during the claimed time period.<sup>9</sup>

Even if the AAO were to consider this letter in support of the beneficiary's claimed experience, it introduces even more inconsistencies to the record. The letter from the Angelos Construction states the beneficiary was employed from "about 1988 to 1989." The instant letter states that beneficiary worked for that employer in 1987 before it was incorporated, as it was a "family-owned business." No independent, objective evidence has been provided to document that the business existed in 1987 as a "family-owned business," or that the beneficiary was employed by said business in 1987. In addition, the letter from the Supervisor appears to contradict itself. While it lists specific dates of employment ("from March 01, 1987 to May 01, 1989") and indicates that the employment was full-

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<sup>9</sup> The director indicated in his RFE that any third-party statements confirming the beneficiary's employment experience must be corroborated by evidence such as the beneficiary's W-2 forms, employment records, etc. Despite having notice of this deficiency, and a chance to respond, the petitioner has not provided any independent, objective evidence to document the beneficiary's claimed experience. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Soriano*, 19 I&N at 764; *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Although, similarly, the petitioner failed to submit any independent confirmatory wage evidence on appeal.

time, the letter also states that the beneficiary performed certain duties “throughout 1987,” and that “Nick Angels [sic] Construction Company” employed the beneficiary after its incorporation and continuing “throughout 1989.”

Further, this photocopy of the Supervisor’s letter has been altered by hand to change the name of the owner and his company from an incorrect spelling, “Angeles,” to the correct spelling, “Angelos.” These “corrections” are not initialed or in any other way authenticated by the author. Thus, even if the AAO were to accept this letter as evidence, the internal inconsistencies in this letter, in combination with the inconsistencies in the other evidence discussed above, render this evidence insufficient to document the beneficiary’s claimed employment experience. Therefore, the petitioner has not provided credible evidence that the beneficiary possesses the 24 months of experience in the job offered required on the labor certification.

On appeal, counsel states that the director’s decision was incorrect as the letter from the Supervisor was in fact a letter from a “trainer.” Counsel cites to 8 C.F.R. § 204.5(l)(3)(ii)(A) which states that “[a]ny requirements of training or experience ... must be supported by letters from trainers or employers.” Counsel argues that the regulation stands for “specifically allowing for former trainers to provide a letter of experience.” Counsel’s argument is insufficient to overcome the deficiencies in the record; based on the unresolved conflict in the evidence between the experience letters, neither letter, absent independent, objective evidence, can be accepted. *See Matter of Ho*, 19 I&N at 591-92 (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). The director requested such evidence, however, the petitioner failed to submit any documentation to corroborate the beneficiary’s experience in response to the RFE or on appeal.

The AAO affirms the director’s decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

Beyond the decision of the director, it is also noted that the beneficiary has not signed the certified ETA Form 9089 submitted with the petition. USCIS will not approve a petition unless it is supported by an original certified ETA Form 9089 that has been signed by the employer, beneficiary, attorney and/or agent. *See* 20 C.F.R. § 656.17(a)(1).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Also beyond the decision of the director, the petitioner has failed to establish its ability to pay the proffered wage (\$50,398 per year) as of the priority date (July 9, 2007) and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>10</sup> If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the petitioner appears to have employed the beneficiary and provided his 2007 W-2 statement which shows \$56,130.75 in wages paid by the petitioner. However, the petitioner provided its 2007 federal tax return which shows no wages paid to employees, lists no amounts paid in "day labor," and only \$24,328 in subcontracted labor.<sup>11</sup> Despite the W-2 statement, it is unclear from the tax return that these wages were reported. The discrepancies in the W-2 statement and the tax return submitted cast doubt on the veracity of the evidence. *See Matter of Ho*, 19 I&N at 591. Without an explanation and independent, objective evidence to resolve this discrepancy, the AAO cannot conclude that the petitioner has established its ability to pay the proffered wage from the priority date onward. This issue must be addressed in any further filings.

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.

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<sup>10</sup> *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

<sup>11</sup> The 2007 tax return provided by the petitioner is incomplete, as it does not include Schedule K. A verified tax record, such as an IRS transcript, must be provided in any further filings.