(b)(6)

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

DATE: DEC 21 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,

Rachel M Flowers
for

Ron Rosenberg
Acting 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 an auto repair shop. It seeks to permanently employ the beneficiary in the United States as an auto master mechanic. 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).[1]

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 24, 2006. *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 petitioner filed a motion to reopen on July 17, 2009, which was dismissed on August 11, 2009.

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.[2]

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

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N

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[1] 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.

[2] 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).

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 offered position has the following minimum requirements:

H.4. Education: None.
H.5. Training: None required.
H.6. Experience in the job offered: 36 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: Must be certified by National Institute for Automotive Service in automobile with specialty area in automatic transmission/tranaxle [sic].

The labor certification states that the beneficiary qualifies for the offered position based on experience as a transmission mechanic with: 1) [redacted] California from October 1, 2003 until September 1, 2004; and 2) [redacted] California from August 1, 2002 until April 1, 2003. The labor certification lists the beneficiary's employment with the petitioner as a transmission mechanic from June 1, 2005 until July 24, 2006; however, the petitioner set forth on the labor certification at Section J.21. that the alien did not gain any of qualifying experience with the employer in a position substantially comparable to the job opportunity requested. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

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

> Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name,

address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains an experience letter from , Owner on letterhead dated May 1, 2009, stating that the company employed the beneficiary on a full-time basis as a transmission mechanic from January 2001 until July 2002. At sections J, K, and L of the ETA Form 9089, the beneficiary set forth his credentials and then signed his name under a declaration that the contents of the form are true and correct under penalty of perjury. At section K where the beneficiary is required to list "all jobs [he] has held during the past 3 years" and to "list any other experience that qualifies [him] for the job opportunity for which the employer is seeking certification," the beneficiary failed to list any employment with New Vermont Transmission.

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

The record contains two affidavits from the beneficiary, one dated May 12, 2009 and another dated October 2, 2009. In the affidavit dated May 12, 2009, the beneficiary states that he worked for from August 1, 2002 until April 1, 2003 and that he worked for from October 1, 2003 until September 1, 2004. The beneficiary states that is now closed and that he is unable to obtain a letter of experience from this employer. The beneficiary states that is now under new ownership and, thus, he is unable to obtain a letter of experience from this employer as well. In the affidavit dated October 2, 2009, the beneficiary reiterates the above statements regarding but adds that he also worked for from January 2, 2001 until July 30, 2002. No explanation was provided as to why the beneficiary did not list the employment with in the original affidavit.

The AAO notes that the non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The record contains various Form W-2 Wage and Tax Statements issued to the beneficiary from and an unknown employer located in whose federal employer identification number (FEIN) does not match the other entities above and whose name is not legible on an incomplete copy of a Form W-2 from 2003. The AAO notes that the labor certification does not list any employment

experience with an employer in The record contains an unsigned Form 4852, Substitute for Form W-2, Wage and Tax Statement, or Form 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc., dated February 27, 2004, on which the beneficiary states that he received wages in 2003 from ocated at

The AAO notes that the Forms W-2 from various employers and the Form 4852 do not sufficiently demonstrate the experience of the beneficiary. First, none of these forms meet the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) in that they do not provide a description of the training received or the experience of the alien. They also do not establish whether the employment was full-time or part-time. Second, the evidence submitted includes documents regarding the business entities and the unknown business located in none of which were listed on the labor certification where the beneficiary is required to list "all jobs [he] has held during the past 3 years" and to "list any other experience that qualifies [him] for the job opportunity for which the employer is seeking certification." No explanation was provided in the record to resolve these inconsistencies.

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. Further, 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, counsel asserts that the combination of the beneficiary's eleven months experience at the beneficiary's eight months of experience at and the beneficiary's nineteen months of experience at as stated in the beneficiary's affidavit and the letter of experience from total thirty-eight months of qualifying experience. However, as discussed above, the AAO notes that the petitioner has failed to submit evidence which meets the requirements of the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A). Further, the petitioner has failed to resolve certain inconsistencies in the evidence regarding the beneficiary's claimed prior employment experience.

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.

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.