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

[redacted]

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DATE: DEC 0 8 2012 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based Form I-140, Immigrant Petition for Alien Worker, was initially approved by the Director, Nebraska Service Center (NSC). On October 4, 2010, the NSC Director served the petitioner with Notice of Intent to Revoke the approval of the petition. In her decision dated January 3, 2011, the NSC Director revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer consulting company which seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the Form I-140 is accompanied by a Form ETA 750, Parts A & B, Application for Alien Employment Certification, approved by the United States Department of Labor (USDOL). The director determined that the petitioner had not established that the proffered position in Nebraska ever existed. The director also provided the petitioner an opportunity to respond to the discrepancies found within the beneficiary's past work experience, noting that no response to this request had been received and revoked the approval of the petition for this additional reason.

Section 203(b)(3)(A)(i) of the of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, 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), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

A labor certification for a specific job offer is valid only for the particular job opportunity and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(c)(2).

On appeal, counsel states that whether a business enterprise is expanding into new products or services, or expanding into new geographic markets, it does not have to be operating at the time of

filing the labor certification application for a bona fide job offer to exist. Counsel further states that in fact, a bone fide job opportunity can exist when the offered new product/service or business enterprise is in the process of being created. Counsel argues that the petitioner made definite plans to expand into the Nebraska market and it began by setting up a mailing box by entering into a mailing agreement with with a principal place of business located at To support these assertions, counsel submits an agreement dated June 19, 2003 between the petitioner and Advantage granting the petitioner the use of the address for mailing purposes only with the mail being forwarded to it every two weeks by Advantage until the termination of the agreement. Counsel also submits evidence that the petitioner acquired a lease for commercial space in a building located in Lincoln, Nebraska on January 2, 2007 along with contract documents specifying that it provide 1,824 hours of information technology services at $50 per hour to the State of Nebraska under contract number 29244 04 for the periods from November 13, 2007 through May 12, 2008 and May 13, 2008 through July 16, 2008.

Box 4 of Part A, Offer of Employment, of the underlying labor certification received for processing on November 17, 2003 by the USDOL listed the employer as specified its address as and specified the location where the beneficiary would work as "SAME AS ITEM #6." On September 27, 2004, the Form I-140 was filed by with its address given as The petitioner left blank Part 6, Box 4, "Address where the person will work if different from address in Part 1." The record contain no evidence that the petitioner intended to employ the beneficiary or anyone else at the address on November 17, 2003 (the priority date) or on September 27, 2004 (I-140 filing). Therefore, despite the petitioner's assertions that the proffered position was part of an expansion plan, the record does not establish that a job opportunity exited at the time the Form ETA 750 or the Form I-140 was filed. A petitioner must be an employer desiring and intending to employ the beneficiary in the particular job opportunity in the area of intended employment specified on the labor certification. 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.30(c)(2). As it has not been established that the petitioner intended to employ the beneficiary in Nebraska when the petition was filed and approved, the approval was properly revoked. It is probable that if the petitioner intended to employ the beneficiary when the Form I-140 was filed, it was at a location outside the terms of the Form ETA 750 since the programmer analyst job did not exist in Nebraska at that time. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (Reg'l Comm'r 1979) (change of area of intended employment). The petitioner is not in compliance with the terms of the labor certification and has not established that the proposed employment will be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966). Therefore, the appeal is dismissed for this reason.

The appeal must also be dismissed because the record does not establish that the beneficiary was qualified for the position with two years of work experience in the job offered before the priority date.

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 may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also Madany 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).

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 this case, the labor certification states that the offered position has the following minimum requirements:

<u>EDUCATION</u>
Grade School: Blank
High School: Blank
College: N/A
College Degree Required: Blank
Major Field of Study: Blank
<u>TRAINING</u>: Blank
<u>EXPERIENCE</u>: 2 years in the job offered
<u>OTHER SPECIAL REQUIREMENTS</u>: Blank

The beneficiary signed the Form ETA 750 under a declaration that the contents are true and correct under penalty of perjury. The labor certification states that he qualifies for the offered position based his experience listed below:

1. Employment as a programmer analyst for from April 2003 until the Form ETA 750 was submitted on November 17, 2003.

2. Employment as a programmer analyst for from January 1999 until July 2002.

3. Employment as a programmer analyst for from May 1998 until January 1999.

4. Employment as a programmer analyst for in Bombay, India, from July 1996 until April 1998.

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 in Columbus, Ohio, stating that the company employed the beneficiary as a programmer analyst from April 13, 2003 to December 1, 2003 (Item #1 above). However, on the beneficiary's Form G-325A, Biographic Information, that he submitted on September 27, 2004, he was required to list his employment for the previous five years. He stated that he had been employed by Halcyon Inc. from January 2003 to October 2003.

The record contains an experience letter from of Farmington Hills, Michigan, stating that the company employed the beneficiary as a programmer analyst from January 4, 1999 to July 19, 2002 (Item #2). However, on his Form G-325A, he stated that he had been employed by from January 1999 to December 2002.

The record contains an experience letter from in Lafayette, California, stating that the company employed the beneficiary as a programmer analyst from May 1, 1998 to January 3, 1999 (Item #3). However, on his G-325A, he stated that he had been employed by Ipex from February 1998 to December 1998. Additionally, on another Form ETA 750 that the beneficiary signed on July 19, 1999, he stated that he worked for as a "software developer" from May 1998 to September 1998.

The record contains an experience letter from stating that the company employed the beneficiary as a programmer analyst from July 8, 1996 to April 10, 1998 (Item #4). However on the Form ETA 750 that he signed on July 19, 1999, he stated that he worked for the company as a "development lead" during that period. The

beneficiary also failed to list this experience on his Form G-325 in the section pertaining to "last occupation abroad." The beneficiary left that section blank.

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).

On appeal, counsel provides a new list of the beneficiary's employment history and states that the petitioner and beneficiary made a number of clerical errors in the past and were not diligent in checking the dates of the beneficiary's work history. Counsel further states that this was not an attempt to mislead or defraud USCIS and that the innocent nature of these errors is shown by the fact that most are only a few months off. It is noted that assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). Nevertheless, the record does not contain credible, independent, objective evidence establishing when, exactly, the beneficiary worked at these various positions or explaining how these clerical errors were made in the first place. Although the record contains some Forms W-2 allegedly representing wages earned by the beneficiary while working for these past employers, these do not clarify when the beneficiary began and ended his various employment experiences so that it can be determined that he had at least two full years of work experience in the job offered before the priority date.

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.

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 (9th 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).

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.