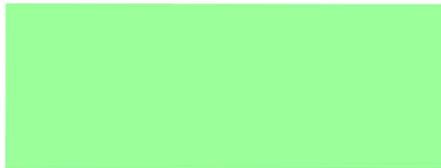




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **JUN 25 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 circuit board manufacturer. It seeks to employ the beneficiary permanently in the United States as a CNC machinist. 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 a Form ETA 750, Application for Alien 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 April 30, 2001. 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>

On appeal, counsel submits only Form I-290B and a brief letter. In his letter, counsel states, "it is my intention to supplement this appeal form with a brief and/or additional evidence." Counsel's letter is dated April 27, 2009. As of this date, more than 36 months later, the AAO has received no other evidence from counsel.

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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).

On appeal, counsel asserts that the beneficiary has the experience which is required on Form ETA 750. Counsel states that the director's findings of inconsistencies in the record are misplaced and that the beneficiary worked for two employers simultaneously.

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 beneficiary's qualifications, U.S. Citizenship and Immigration Services (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'r 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 the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: Not specified.

High School: Not specified.

College: None.

College Degree Required: None.

Major Field of Study: Not applicable.

TRAINING: None Required.

EXPERIENCE: Two (2) years in the job offered.

OTHER SPECIAL REQUIREMENTS: None.

The labor certification also states that the beneficiary qualifies for the offered position based on having held three positions. First, the labor certification states that the beneficiary has experience as a CNC Machinist working for [REDACTED] Wisconsin from October 1999 through the time that the beneficiary signed the labor certification (May 24, 2001). Second, the labor certification states that the beneficiary has experience as a CNC Machinist working for [REDACTED] Wisconsin from October 1998 until April 1999. Third, the labor certification states that the beneficiary has experience as a CNC Operator working for [REDACTED] from July 1996 until October 1998. 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 of proceeding contains three experience letters. The first letter is from [REDACTED] President of [REDACTED] on company letterhead, stating that the company employed the beneficiary as a CNC Pick and Place Machine operator, on a full-time basis, from August 4, 1996 until October 18, 1999. Mr. [REDACTED] goes on to state that the beneficiary worked on a part-time basis from October 1999 until August 30, 2000 at which time his term of employment was concluded.

The experience documented by the letter from [REDACTED] was not identified on Form ETA 750B. Further, the dates of employment articulated by Mr. [REDACTED] conflicted with the beneficiary's claimed employment with [REDACTED] which was listed on Form ETA 750B. Moreover, on Form ETA 750B, the beneficiary claims to have worked for [REDACTED] on a full-time basis and the same claim is made by Mr. [REDACTED]. For these reasons, the director issued a request for evidence on January 26, 2009, asking for additional evidence to substantiate the claimed employment, such as copies of IRS Form W-2 which might have been issued to the beneficiary during the time period in question. On March 9, 2009, the petitioner responded by providing copies of IRS Form W-2 which were issued to the beneficiary by [REDACTED] in 1996, 1997, 1998 and 1999. The petitioner also provided a W-2 statement which was issued to the beneficiary by [REDACTED] in 2000.

Though the petitioner claims that the beneficiary was employed by [REDACTED] from August 4, 1996 until October 18, 1999, on a full-time basis, the W-2 statements provided as evidence were issued by [REDACTED]. In his letter which accompanied the petitioner's March 9, 2009 response, counsel states that [REDACTED] is the successor-in-interest to [REDACTED]. However, counsel provided no evidence to substantiate his assertion.

Simply 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 petitioner was asked to provide objective, independent evidence to substantiate claimed experience which was not articulated on Form ETA 750B. The director noted that the initial claim was dubious, particularly because the experience was not included on Form ETA 750B. 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 beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. For that reason, the director requested competent objective evidence pointing to where the truth, in fact lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner has not supplied such evidence and counsel's assertions do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

The petitioner provided one W-2 statement which was issued by [REDACTED]. This W-2 statement is for the year 2000. However, on its own this document does not demonstrate the nature of the beneficiary's employment, the duties performed or whether the beneficiary worked on a full-time basis.

Further, since the evidence provided in response to the director's request for evidence conflicts with the claims made in the letter by Mr. [REDACTED] and no other objective evidence was provided to clarify the inconsistencies, the letter and its claims cannot be considered demonstrative of the beneficiary's claimed experience.

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 (BIA 1988).

The second letter is from [REDACTED] stating that the company employed the beneficiary since October 31, 1999. This letter, however, does not identify the author or the author's position with the company. Further, the letter does not identify the position which the beneficiary was supposed to have held with [REDACTED] or any of the duties which he was supposed to have performed. The letter does not indicate whether the beneficiary was employed on a full-time basis. Moreover, though the letter contains the name of the company at the top, it does not include a business address or corporate phone number. Rather, the letter merely states that "any questions may be directed to the HR Department - [REDACTED]" and contains a phone number for this individual. In its response to the director's January 26, 2009 request for evidence, the petitioner provided no additional evidence clarifying the deficiencies in this letter. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The third letter is from [REDACTED] Human Resources Manager of [REDACTED] Wisconsin. In his letter, Mr. [REDACTED] states that the company employed the beneficiary from March

3, 1998 to July 22, 1998. However, the letter neither identifies the position which the beneficiary was supposed to have held with the company nor enumerates any of the duties which the beneficiary was supposed to have performed. Further, the dates of employment attributed to the beneficiary in the letter do not correspond with the dates of employment as set forth on Form ETA 750B (October 1998 until April 1999). The petitioner offered no explanation for the discrepancy nor provided additional objective independent evidence, either in response to the director's request for evidence or on appeal, which might have clarified the matter.

On appeal, counsel claims that the director conceded that the beneficiary had obtained the required two years of claimed experience, as required by Form ETA 750, but that the basis of the denial rested in inconsistencies related to the beneficiary's claimed employment with [REDACTED]. Counsel asserts that the beneficiary worked for two employers simultaneously and that this dual employment resolves the inconsistencies.

In the director's March 30, 2009 denial, the director stated:

While it *appears* that the beneficiary has obtained the 2 years experience required by the labor certificate, the omission of this experience on the labor certificate, the overlap with other experience and the differing dates of employment on another experience letter all have not been explained. It is incumbent upon the petitioner to resolve 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). Therefore, the beneficiary can not [sic] be found to meet the requirements of the Form ETA 750 (emphasis added).

The director's decision clearly states that the inconsistencies in the documents which claim to substantiate the beneficiary's experience were not reconciled and therefore do not substantiate the beneficiary's claimed experience. Therefore, the director found that the beneficiary did not satisfy the requirements of the Form ETA 750.

We have addressed the specific inconsistencies and discrepancies in each of the letters which purport to substantiate the beneficiary's claimed experience. The evidence supplied, in an effort to offer clarification, only pertains to one of the three letters and that evidence is not sufficient according to *Matter of Ho* to overcome the inconsistencies, as explained above.

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 (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).

Beyond the decision of the director, the petitioner also failed to establish that it is a successor-in-interest to the entity that filed the labor certification. Further, the entity which filed the appeal has also failed to demonstrate that it is a successor-in-interest to the petitioner and to the entity which filed the labor certification. The labor certification was filed by [REDACTED] Form I-140 was filed by [REDACTED] Form I-290B was filed by an entity identifying itself as [REDACTED]<sup>3</sup> A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. Likewise, if the appellant is different that the entity listed on the labor certification and the entity listed on Form I-140, it must establish that it is the successor-in-interest to both of those entities. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A valid successor relationship may be established for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction which purportedly transferred ownership from [REDACTED] to [REDACTED] or the transaction which purportedly transferred ownership from [REDACTED] Further, the evidence does not demonstrate that the job opportunity will be the same as originally offered. Accordingly, the petition must also be denied because [REDACTED] has failed to establish that it is a successor-in-interest to the labor certification employer and the appellant, [REDACTED] has failed to establish that it is a successor-in-interest to both [REDACTED] and [REDACTED]

Therefore, for this additional reason, the instant petition must be denied.

Beyond the decision of the director, the petitioner has also failed to demonstrate that it intends to

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<sup>3</sup> In a letter dated March 5, 2009, submitted with the petitioner's response to the director's January 26, 2009 request for evidence, [REDACTED] President of [REDACTED] stated "Through the process of mergers and consolidations over the last two years, the progression in business entity identity has progressed from [REDACTED], to [REDACTED] and ultimately merged into [REDACTED]" Mr. [REDACTED] goes on to state, "the latter two companies were successor businesses to the previously listed company." However, Mr. [REDACTED] provided no evidence to substantiate his statements.

comply with the terms of the labor certification with respect to the place of employment for the proffered position.

In filing Form ETA 750, the petitioner identified the address at which the alien would be working as [REDACTED]. The DOL tested the labor market in this area and, agreeing that no suitable candidates for the proffered position could be found within this Metropolitan Statistical Area, certified the labor certification for the proffered position for this area.

In responding to the director's January 26, 2009 request for evidence, in addition to supplying some of the requested evidence, the petitioner also supplied a new Form I-140. In addition to changing the name of the petitioning entity, the petitioner also identified a new address for the proposed employment: [REDACTED]. The new place of employment is located in a different state and in a different [REDACTED].

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(c)(2). It seems that the petitioner intends to employ the beneficiary as a CNC Machinist, at a facility in Elgin, Illinois, outside the terms of the Form ETA 750. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (Reg'l Comm'r 1979) (change of area of intended employment).

Thus, according to this evidence, 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).

For this additional reason, the instant petition must be denied.

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.