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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

[REDACTED]

B6

DATE: **JUL 18 2012** OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (director). The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the appeal will again be dismissed, and the petition will be denied.

The petitioner is an individual. She seeks to permanently employ the beneficiary in the United States as a houseworker. The petitioner requests classification of the beneficiary as an unskilled 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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

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 is September 4, 2003. The proffered wage as stated on the Form ETA 750 is \$11.18 per hour (\$23,254.40 per year). The Form ETA 750 states that the position requires three months of experience in the offered job.

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 director's decision denying the petition concluded that the petitioner did not establish her ability to pay the proffered wage as of the priority date. The AAO's February 3, 2011, dismissal of the petitioner's appeal affirmed the director's finding that the petitioner had not established the ability to pay the proffered wage. The AAO's dismissal of the appeal was also based on the conclusion that "the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with the required education and qualifying employment experience."

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.

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 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).

Upon review of the entire record, the AAO concludes that the petitioner has established the ability to pay the proffered wage as of the priority date. Accordingly, this portion of the AAO's previous decision of dismissal is withdrawn.

However, the question remains as to whether the beneficiary satisfied the minimum qualifications for the job as detailed on the labor certification. 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*, 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 requires eight years of grade school, four years of high school³ and three months of experience as a "houseworker." The labor certification also states that the beneficiary qualifies for the offered position based on experience as a [REDACTED] from June 1988 until August 1992. 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:

³ The AAO's previous decision pointed out that the petitioner had failed to document the beneficiary's eight years of grade school and four years of high school. The petitioner satisfied this deficiency on Motion to Reopen by providing a photocopy of the beneficiary's high school diploma issued by [REDACTED]

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 a March 25, 1997, letter from, [REDACTED] who stated that [REDACTED] lives with me at...Bronx, NY” and that “[REDACTED] helps me with the care of my son, and also around the house. In return for her invaluable help, I provide for her financially.”⁴ The record also contains an undated letter from [REDACTED] who stated that the beneficiary had worked for her in Trenton, New Jersey, “part time babysitting my twins.” [REDACTED] does not indicate the frequency or duration of the beneficiary’s work for her, or the period of time of such work.

These letters do not provide a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). Additionally, 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. Neither [REDACTED] was named as a prior employer on the Form ETA 750. For these reasons, the [REDACTED] affidavits are not sufficient to establish the beneficiary’s qualification for the offered job.

The record contains a March 29, 1997, letter from [REDACTED] who stated that the beneficiary was employed to care for his father “from 1988 until 1992...Upon [the affiant’s father’s] death in 1992 [the beneficiary] continued working in the capacity of housekeeper until February 1996. Subsequently she resumed her housekeeping duties in November, 1996.” It is noted that the beneficiary did not name [REDACTED] as her employer on the labor certification. On Motion to Reopen, the petitioner provided a March 2, 2011, statement from the beneficiary, who asserted that “while receiving my wages through [REDACTED], I actually worked in the home of [REDACTED] and under his direct supervision during the period stated in his experience reference letter.” She notes that [REDACTED] is an agency that employs service workers.

As noted in the AAO’s previous decision, inconsistencies in the evidence should be resolved with independent objective evidence. 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). The petitioner did not submit any payroll records, paystubs, tax returns or other objective indicia of her work for [REDACTED]. 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)).

⁴ It is noted that the beneficiary has not claimed to have worked under the name [REDACTED]

Moreover, these three employment letters contradict the beneficiary's statements on a Form G-325A, Biographic Information, that the beneficiary signed under penalty of perjury on October 3, 1995, and filed in conjunction with another immigration petition. The beneficiary stated on this form that she had no work experience in the United States. The beneficiary's Form G-325A also specifically contradicts the letter from [REDACTED] in that the beneficiary testified that she moved from the Bronx, New York, address listed by [REDACTED] to Trenton, New Jersey, in April 1995, while [REDACTED] asserts that the beneficiary resided with and worked for her as of the date of the letter, March 25, 1997.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon the petitioner to resolve any 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 lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). The petitioner has failed to submit any objective evidence to explain or justify the discrepancies.

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 an unskilled 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 motion to reopen is granted and the decision of the AAO dated February 3, 2011, is withdrawn in part and affirmed in part. The petition is denied.