

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

B6

[REDACTED]

DATE: OCT 10 2012

OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Appellant: [REDACTED]
Beneficiary: [REDACTED]

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director, Nebraska Service Center on February 13, 2003. On January 10, 2011, the director served the appellant with Notice of Intent to Revoke (NOIR) the approval of the petition. On April 8, 2011, the director served the appellant with an amended NOIR. On September 1, 2011, the director served the appellant with Notice of Revocation (NOR), in which the director revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The petitioner appealed the decision to the *Administrative Appeals Office (AAO)*. *The appeal will be dismissed.*

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The appellant describes itself as a plastering company. It seeks to permanently employ the beneficiary in the United States as a plasterer. The appellant 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 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 27, 2001. See 8 C.F.R. § 204.5(d).

The director’s decision revoking 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.²

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. 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.

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

Qualifications for the Offered Position

As noted above, the director revoked the instant Form I-140 on September 1, 2011, after issuing two NOIR requesting evidence of the beneficiary's qualifications for the offered position.

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 appellant 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: None Required.

TRAINING: None Required.

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

OTHER SPECIAL REQUIREMENTS: None Required.

The labor certification states that the beneficiary qualifies for the offered position based on experience as a plasterer with [REDACTED] located in El Cajon, CA, from October 1997

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).

until October 1999. No other prior work experience is listed. The beneficiary signed the labor certification, declaring that the contents are true and correct under penalty of perjury, on April 25, 2001.

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 October 26, 2011, from [REDACTED] letterhead stating that the company employed the beneficiary as a plasterer from January 1998 until March 2000. An experience letter, which is required by regulation as indicated above, was not provided by the appellant or the petitioner prior to this appeal.³ On appeal, counsel states that this letter was unavailable because “appellant⁴ could not locate his former employer.” In an affidavit, dated November 2, 2011, the beneficiary stated that he

³ The AAO notes that this letter was received from the appellant on appeal on November 7, 2011. A letter from the employer with whom the beneficiary claims qualifying experience is required evidence under 8 C.F.R. § 204.5(l)(3)(ii)(A), as indicated above. The appellant did not provide this required regulatory evidence with Form I-140. The director requested a letter from [REDACTED] in his Request for Evidence (RFE) on January 2, 2003. In response, then counsel for the appellant provided pay stubs issued to the beneficiary from [REDACTED] and stated “[the beneficiary] is unable to locate the employer [REDACTED] to verify his employment.” The director’s NOIR on January 10, 2011, noted that the appellant did not provide an experience letter; the NOIR did not explicitly request that one be provided, however, counsel confirmed in his brief that counsel and the appellant understood that the director requested that the appellant “produce evidence that the [beneficiary] possessed two years of experience in the job offered.” Counsel’s response on February 8, 2011, did not include any evidence regarding the beneficiary’s experience. A letter from [REDACTED] was again requested in the director’s amended NOIR on April 8, 2011. At that point, USCIS had notified the petitioner that it lacked this regulatory required evidence three times. In response, counsel provided: an affidavit and supporting documents from another employee of [REDACTED] who has the same surname as the beneficiary and appears to be related to the beneficiary; and three additional pay stubs issued to the beneficiary from [REDACTED]. Counsel did not provide the letter as requested in response to the amended NOIR. The evidence provided cannot be considered to be independent, objective evidence as the appellant did not explain why the regulatory required evidence was not available, and the evidence provided appears to be from a relative of the beneficiary.

⁴ Counsel refers to the beneficiary as “appellant” throughout his brief. The AAO notes that the appellant in this appeal is the successor-in-interest to the petitioner, if the appellant is able to demonstrate that it meets the requirements for a successor-in-interest. The appellant’s representative properly executed a G-28, Notice of Entry of Appearance as Attorney, indicating that counsel is appellant’s attorney.

“was not aware that [REDACTED] was still in business in California.”⁵ Neither the affidavit, nor other evidence in the record, indicate what steps, if any, the appellant took to locate [REDACTED] therefore, the AAO notes that the appellant has not demonstrated that this evidence was not available previously.

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 an appellant has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO may exercise its discretion to not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the appellant had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

Even if director were to consider the experience letter from [REDACTED], the experience letter does not overcome the reason for denial. The beneficiary stated, under penalty of perjury, that he was employed by [REDACTED] from October 1997 to October 1999 on the labor certification.⁶ The record contains a Form G-325, signed by the beneficiary under penalty of perjury, in which he stated that his employment with [REDACTED] was from January 1998 to February 2000. The dates of employment provided by the beneficiary and [REDACTED] are inconsistent, both as to the start and the end of the beneficiary's employment. The appellant has provided an affidavit from another employee of [REDACTED] which states that the beneficiary was employed by [REDACTED] “from September 1997 to December 1999.” The dates of employment provided by the beneficiary, this affiant, and [REDACTED] are inconsistent, both as to the start and the end of the beneficiary's employment. The beneficiary has

⁵ The appellant and petitioner have provided pay stubs for the beneficiary issued in 1997, 1998, and 1999 by [REDACTED]. All of these documents indicate that [REDACTED] mailing address is [REDACTED] California 92021. Further, the beneficiary provided the same address on the labor certification. The letter from the president of that company, dated October 26, 2011, bears the same mailing address. Therefore, it appears that [REDACTED] has utilized the same mailing address in California since 1997; and that the beneficiary was aware of its address, as the beneficiary provided that information on the labor certification. There is nothing in the record to document that the appellant attempted to contact [REDACTED] through the mailing address it has maintained from at least September 1997 to October 2011.

⁶ The ETA Form 750B originally stated the beneficiary's employment with [REDACTED] to be for “over 2 years.” This statement is augmented with the specific dates of employment from October 1997 to October 1999. The change is initialed by the beneficiary but is undated. It is not clear from the record whether this change occurred prior to the issuance of the labor certification or whether this change was accepted by DOL.

provided pay stubs, as well as Forms 1099, indicating his employment with [REDACTED] the earliest pay stub is for work beginning September 10, 1997, and the last pay stub indicates payment on December 10, 1999. The dates of employment indicated by the pay statements, as well as the dates of employment provided by the beneficiary, this affiant, and [REDACTED], are inconsistent, both as to the start and the end of the beneficiary's employment. These inconsistencies must be addressed in any further filings. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

[i]t is incumbent upon the appellant 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.

Further, the letter from [REDACTED] does not indicate whether the beneficiary was employed full-time or part-time. The beneficiary indicated that his employment with that employer was full time (40 hours per week) on the labor certification. However, the record contains pay statements from that employer, which indicate that the beneficiary regularly worked less than 40 hours per week. According to the pay stubs provided, the beneficiary worked from 8 to 40 hours per week. Further, the AAO notes that these there are many weeks where the beneficiary did not document any work at all. Therefore, the pay stubs provided indicate that the beneficiary did not possess the required two years of employment experience required on the labor certification, as he was *not employed on a full-time basis from September 1997 to December 1999*. Further, the beneficiary indicated on the labor certification that his employment with the petitioner began in May 1999, and that said employment was full-time.⁷ The experience claimed by the beneficiary on the labor certification conflicts with the beneficiary's employment as documented in record and raises doubts as to the credibility of the experience letter from [REDACTED] *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

Doubt cast on any aspect of the appellant'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.

Therefore, in any further filings, the appellant must demonstrate through independent, objective evidence that the beneficiary possessed the experience required on the labor certification as of the priority date.

Further, the letter from [REDACTED] is on its letterhead, which includes a contact number for that employer at its Denver, Colorado, office. As noted above, this letter is dated October 26, 2011. The president of [REDACTED] states in this letter that "[i]n 2004, our Colorado

⁷ On Form G-325 in the record, the beneficiary claimed to have been employed by [REDACTED] from January 1998 to February 2000, and with the petitioner/appellant from February 2000 to present.

office had closed.” However, approximately six (6) years later, the company still lists a contact number in Colorado on its stationary. This suggests that the company still operates in Colorado, or, maintains the same means of contact that existed when it employed the beneficiary. This conflicts with the beneficiary’s affidavit, wherein he states that he had no means to contact his prior employer. This throws additional doubt onto the credibility of the letter from [REDACTED] *Id.*

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.

Successor-In-Interest

Beyond the decision of the director, the appellant also failed to establish that it is a successor-in-interest to the entity that filed the petition and labor certification. 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 appellant is a different entity than the petitioner/labor certification employer, it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm’r 1986).

An appellant may establish a valid successor relationship 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 appellant appears to be a different entity than the petitioner. The petitioner held a tax payment identifier, or Federal Employer Identification Number ([REDACTED]) the appellant’s FEIN is [REDACTED]. As the entities possessed different FEIN accounts, they are separate entities. Further, according to the Colorado Secretary of State, the petitioner was dissolved on June 30, 2005, and the appellant was not incorporated until January 12, 2006. *See* www.sos.state.co.us (last accessed September 11, 2012). Therefore, it appears that neither the petitioner nor the appellant was operational from April 8, 2005, to January 11, 2006.⁸ In any further filings, the appellant must document that the petitioner and its successors-in-interest were operational and had the ability to pay the proffered wage to the beneficiary from the priority date onward.

⁸ The Articles of Incorporation provided by the appellant suggest that the petitioner incorporated on January 23, 2004, as [REDACTED]. In any further filings, the appellant must demonstrate the corporate structure of the petitioner, and that it is the successor-in-interest to the petitioner, [REDACTED] if there were an intermediary successor-in-interest or change in corporate structure, the appellant must demonstrate that the intermediary is the same entity as the petitioner, or a successor-in-interest to the petitioner, and that the appellant is a successor-in-interest to the intermediary.

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor, and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. Accordingly, the petition is not approvable because the appellant has failed to establish that it is a successor-in-interest to the petitioner/labor certification employer.

Counsel asserts on appeal that the revocation of the instant I-140 petition should be withdrawn and the petition approved due to the terms of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). The AAO does not agree that the terms of AC21 make it so that the instant *immigrant petition* can be approved despite the fact that the petitioner has not demonstrated its eligibility or the beneficiary's qualifications for the offered position. AC21 allows an *application for adjustment of status*⁹ to be approved despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid" suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, USCIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by

⁹ The AAO notes that after the enactment of AC21, USCIS altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying visa petition. A USCIS memorandum signed by William Yates, May 12, 2005, provides that if the initial petition is determined "approvable," then the adjustment application may be adjudicated under the terms of AC21. See *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* at 3. This memorandum was superseded by *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010), which determined that the petition must have been valid to begin with if it is to remain valid with respect to a new job.

the fact that the job offer was no longer a valid offer. *See Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010).

In *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009), the Ninth Circuit Court of Appeals determined that the government's authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start. The Ninth Circuit stated that if the plaintiff's argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs. Under the plaintiff's interpretation, an applicant would have a very large incentive to change jobs in order to guarantee that the approval of an I-140 petition could not be revoked. *Id.* The circumstances of the instant appeal are similar, in that counsel argues that the petition should be shielded from revocation by virtue of AC21. As the director found that the Form I-140 was not valid, and consequently revoked the petitioner, and the AAO cannot determine that the appellant is a qualified successor-in-interest, or that the beneficiary is qualified for the offered position, the AAO cannot approve the instant I-140 petition.

In any further filings, the appellant must document that it is the successor-in-interest to the petitioner. The appellant must also document that the predecessor entity had the ability to pay the beneficiary the proffered wage from the priority date and continuing until the transfer of ownership, and that the appellant had the ability to pay the proffered wage to the beneficiary from the transfer of ownership onward.¹⁰

¹⁰ The appellant has provided Form 1099-Misc statements documenting that the petitioner paid the beneficiary from 2001 to 2006, and that the appellant paid the beneficiary from 2007 to 2009. However, these documents do not appear to be accurate. For example, the 1099-Misc issued by [REDACTED] to the beneficiary in 2001 states that it paid the beneficiary \$107,825. This figure does not appear to be accurate, as the petitioner has stated on the labor certification that the job offered, plasterer, in which the beneficiary was at that time employed by the petitioner, paid \$15.00 per hour. Further, the beneficiary's pay stubs issued by [REDACTED] and the 1099-Misc forms issued by the petitioner in 2001, 2002, and 2003, list a social security number that begins with [REDACTED]. The 1099-Misc forms issued by the petitioner in 2004, 2005, and 2006, and the 1099-Misc forms issued by the appellant in 2007, 2008, 2009 list a social security number which begins with [REDACTED]. However, Form I-140 states "none" in the section for the beneficiary's social security number, as does the beneficiary's Form I-485. The discrepancy in the claimed social security numbers casts doubt on the veracity of the pay statements from [REDACTED] and the Forms 1099-Misc from the petitioner and appellant. These issues must be addressed in any further filings before USCIS can definitively accept the pay statements and Forms 1099-Misc as evidence. It is incumbent upon the appellant to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N at 591-92. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the

Conclusion

The appellant failed to establish that the beneficiary met the minimum requirements of the offered position as set forth on the labor certification as of the priority date. In addition, the appellant has not established that it is the successor-in-interest to the petitioner. Based on the foregoing, the petition's approval was revoked for good and sufficient cause. *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

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.

truth lies. *Id.* 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 visa petition. *Id.* at 591.