(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: SEP 1 4 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,

for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, approved the employment-based immigrant visa petition on April 24, 2007. On June 26, 2008, the National Visa Center (NVC) returned the petition to the Nebraska Service Center for further review. On September 4, 2008, the director issued a Notice of Intent to Revoke (NOIR). The petition was revoked on October 10, 2008 based on no response. The petitioner filed a Motion to Reconsider the director's decision on October 24, 2008, submitting evidence that a response to the NOIR was timely received. The director reopened the petition and affirmed the revocation. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a heating and air conditioning company. It seeks to permanently employ the beneficiary in the United States as a refrigeration 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 a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).[2] The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is August 5, 1999. *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.[3]

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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. 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] This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B,

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 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:

EDUCATION
Grade School: [BLANK]
High School: "X"
College: [BLANK]
College Degree Required: [BLANK]
Major Field of Study: [BLANK]
TRAINING: [BLANK]
EXPERIENCE: Three (3) years in the job offered as a refrigeration mechanic
OTHER SPECIAL REQUIREMENTS: "Employer checks references. Willingness to work overtime and weekends."

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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).

The labor certification also states that the beneficiary qualifies for the offered position based on the following experience:

- As a full-time[4] Refrigeration & Aircondition[5] with in Punjab, India from November 1997 until October 2005.
- As a full-time[6] Refrigeration & Air Condition Mechanic with in Punjab, India beginning in November 2005 and continuing at least until the date the labor certification was signed, on May 2, 2006.

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 dated October 15, 2005 from in Jalandhar, India. The letter states that the beneficiary was employed with the company as a Refrigeration & Air Condition Mechanic from November 1997 to October 2005. The letter includes a stamp indicating ' with an illegible signature. The letter does not indicate whether the beneficiary was employed full-time or part-time, does not legibly state the writer's name, and does not clearly indicate the writer's position.

The record contains two experience letters from in Jalandhar City, India. The letter dated October 4, 2006 states that the beneficiary was employed with the company as an Air Condition Mechanic from November 2005 and continuing at least until the date the letter was written, on October 4, 2006. The letter includes a stamp indicating "For Prop" with an illegible signature. However, the letter does not indicate whether the beneficiary was employed full-time or part-time, does not legibly state the writer's name, and does not clearly indicate the writer's position. The second letter, submitted in response to the director's September 4, 2008 NOIR, is undated and states the beneficiary "...is working as an A.C. Mechanic in our firm from November 2005 till today." The letter includes a stamp indicating "For

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[4] Fifty (50) hours per week, based on the labor certification.

[5] The "Name of Job" field on the labor certification was filled in as "Refrigeration & Aircondition." It appears the remainder of the job title may not have been included.

[6] Fifty-five (55) hours per week, based on the labor certification.

Prop" signed by [redacted] However, the letter does not indicate whether the beneficiary was employed full-time or part-time and does not clearly indicate the writer's position.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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 AAO notes that the priority date of the instant petition is August 5, 1999. Based on the information on the labor certification and the experience letters submitted, the beneficiary had one year and nine months of experience by the priority date.

In addition, the record contains the following documentation:

- An affidavit dated October 2, 2008 from [redacted] the Repair and Maintenance Contractor who operated [redacted] states that the beneficiary "...worked for us as a regular Refrigeration Mechanic from November 1997 to October 2005... [redacted] was getting cash salary Rs 5500/-per month and overtime extra."
- An affidavit dated September 15, 2008 from [redacted] states that he personally knows the beneficiary and his family and that the beneficiary is currently working as an A.C. mechanic with [redacted]
- An affidavit dated September 16, 2008 from [redacted] states that he personally knows the beneficiary and his family and that the beneficiary is currently working as an A.C. mechanic with [redacted]
- A Registration Certificate from the [redacted] indicating that an individual was registered on March 28, 1966. The petitioner indicates the certificate was granted to the beneficiary's father, [redacted] however, the name on the certificate was not translated.
- An affidavit dated September 18, 2008 from the [redacted] indicating that the beneficiary is not registered with their office.
- An affidavit dated September 15, 2008 from [redacted] the beneficiary's father. [redacted] states that he is a doctor and has a clinic. He also states that the beneficiary is an A.C. mechanic and not a doctor. [redacted] states, "However, some times he sits with me at my shop due to love and affection, for my help."
- An affidavit dated September 19, 2008 from [redacted] the beneficiary's wife. [redacted] states that the beneficiary is an A.C. mechanic and her father-in-law, Madan Gopal [redacted] is a doctor. She indicates that the beneficiary is not a doctor: she states "...sometimes he sits with my father-in-law [redacted] at his shop due to love and affection, for his help."

On June 26, 2008, the petition was returned by the NVC for further review due to the results of a consular investigation. The following information was found during the consular investigation:

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[7] The signature of [redacted] does not match the signature from the letter issued October 4, 2006.

- Per information provided by two of the beneficiary's neighbors, the beneficiary's father was a retired registered medical practitioner (RMP) and the beneficiary is also a RMP. Both the neighbors denied the beneficiary's profession as an A.C. Mechanic.
- When contacted with a request to speak to the beneficiary's wife, replied that was at his clinic and provided a mobile number. When the post contacted the beneficiary's mobile number, the receiver identified himself as and gave his clinic's name as '
- In April 2008, a consular officer visited the address provided by the beneficiary on the immigrant visa application form (DS-230 part I) as a permanent residence. The beneficiary's photograph was shown to the beneficiary's neighbors and, with the exception of one of the beneficiary's relatives, the seven neighbors stated that the beneficiary is a doctor by profession and is practicing in a nearby village. One of the neighbors indicated that he has known the family very well for the last five years. Another neighbor indicated that he has known the family for the last four years, stating that the beneficiary's father was a practicing Ayurvedic doctor and that after his death, the beneficiary started his own practice on the basis of his father's medical degrees.

On appeal, the petitioner asserts that the beneficiary does have the required experience and states that the director failed to give appropriate weight to the evidence initially submitted with the petition and subsequently submitted with the motion to reconsider. The petitioner states that since the business was closed several years ago, the petitioner submitted the available evidence. The petitioner also claims that the director failed to provide a copy of the consular investigation report. With the appeal, the petitioner submitted the following:

- Affidavits from Ram dated February 26, 2009. The affidavits state that the authors know the beneficiary personally and that he works as an A.C. Mechanic. The affidavits also state that the authors know the beneficiary's father, and that he is a doctor working at
- Affidavits from five companies indicating that they had summer contracts with either or The affidavits state that the beneficiary worked on their air conditioners, with repair dates ranging from 2000 through 2008.
- An affidavit dated March 2, 2009 from the beneficiary's former employer. states that he employed the beneficiary as a Refrigeration and Air Condition Mechanic from November 1997 through October 2005 with asserts that all business records were disposed of in 2005, when he liquidated his business.

As previously discussed above, the petitioner must demonstrate that the beneficiary had the qualifications stated on its labor certification as of the priority date. Therefore, while the petitioner

submitted additional affidavits relating to the beneficiary's experience repairing air conditioners. they refer to dates after August 5, 1999.

In addition, the AAO notes that there are inconsistencies in the record. The neighbors interviewed during the consular investigation indicate that the beneficiary is not an A.C. mechanic while the affidavits submitted by the petitioner indicate that he is. One of the affidavits submitted by the petitioner is authored by a neighbor who indicated during the consular investigation that the beneficiary works as a doctor. In addition, the neighbors' statements from the consular investigation in 2008 indicate that the beneficiary's father is deceased; however, the affidavits submitted by the petitioner dated February 26, 2009 indicate that the beneficiary's father is alive and still practicing medicine. Further, USCIS telephonically contacted the beneficiary's former employer, of Fairfax, VA in July 2012. stated that the beneficiary worked for him part-time for three years. The dates and full-time status listed on Form ETA 750 and the affidavits cannot be reconciled with the information provided by 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. 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).

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.

Beyond the decision of the director,[8] the petitioner has also not established that the beneficiary is qualified for the offered position based on the educational requirement. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, 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,*

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[8] 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).

699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires the completion of high school.

On the labor certification, the beneficiary claims to qualify for the offered position based on his certificate of completion from completed in March 1984. The beneficiary also listed that he received a diploma in welding from in November 1985. However, the petitioner failed to submit a copy of the beneficiary's high school certificate, welding diploma, or transcripts.

The evidence in the record does not establish that the beneficiary possessed the required education set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position based on the educational requirement.

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.