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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



BE

DATE: **SEP 24 2012** OFFICE: TEXAS 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, Texas Service Center (director), revoked the approval of the employment-based immigrant visa petition on November 10, 2010. On December 10, 2010, the petitioner filed a motion to reopen the decision and the director dismissed the motion on March 15, 2011 and affirmed her previous revocation of the approval of the employment-based visa petition. The director dismissed the motion stating that the petitioner did not meet the evidentiary requirements for a motion to reopen. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a taxi service. It seeks to permanently employ the beneficiary in the United States as a 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). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 26, 2001. *See* 8 C.F.R. § 204.5(d).

The director's decision to revoke the approval of the employment-based immigrant visa petition concluded that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date because the record contained a fraudulent experience letter.

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 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,

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 has the following minimum requirements:

EDUCATION

Grade School: none

High School: none

College: none

College Degree Required: none

Major Field of Study: none

TRAINING: None Required.

EXPERIENCE: Two (2) years in the job offered

OTHER SPECIAL REQUIREMENTS: N/A.

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

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).

experience as an auto mechanic in India from September 1995 until November 1997. On the Form ETA 750B the beneficiary also stated that he was self-employed from December 1997 to the present and worked with other mechanics on occasion. 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 January 6, 2004 from [REDACTED] [REDACTED] letterhead stating that the company employed the beneficiary as an [REDACTED] [REDACTED]. As stated in the director's revocation, the authenticity of the letter was investigated by the Fraud Prevention Unit, American Embassy, Mumbai, India and determined to be fraudulent. When contacted for verification, [REDACTED] stated that the beneficiary was employed as full time driver and not as a mechanic. The record also contains a statement signed by [REDACTED] stating that he did not sign the letter dated January 6, 2004.

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 states the beneficiary is caught in a family feud between [REDACTED] [REDACTED]. Counsel also states that the petitioner did not respond to the director's July 27, 2010 notice of intent to revoke (NOIR) because [REDACTED] holds a grudge against the beneficiary and did not give the NOIR to [REDACTED]. Counsel also asserts that [REDACTED] was in the United States when the Fraud Prevention Unit, American Embassy, Mumbai, India called to verify the beneficiary's employment and that the investigation report does not appear to be accurate. Counsel does not submit any evidence that [REDACTED] was in the United States during the investigation or that the beneficiary worked at Embassy Travels as an auto mechanic from September 1995 to November 1997. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel also states that Jasmer Singh Gill's statement to the investigator regarding the beneficiary's work as a driver is inaccurate because the beneficiary was 16 years old and could not obtain a driver's license until the age of 18.

The petitioner submitted affidavits from [REDACTED] dated August 10, 2009 stating that the beneficiary worked as an assistant mechanic from September 1995 to November 1997. The affiants state that the beneficiary was trained to “diagnose cars and perform the repairs as needed.” The affiants also state that the beneficiary was able to “change oil, perform brake services and tune-ups, work with both hand and power tools, and repair and replace many car parts.” In his affidavit, [REDACTED] states that the beneficiary worked under his supervision.

The record also contains an affidavit from [REDACTED] stating that [REDACTED] is his father and that the signature on the January 6, 2004 and August 10, 2009 letters is his father’s signature. [REDACTED] also states that his brother [REDACTED] is trying to have the beneficiary “deported.”

The affidavits submitted by counsel are inconsistent with [REDACTED] statements. The record also contains a hand written statement signed by [REDACTED] asserting that the January 6, 2004 letter was not issued by him. Although counsel submits a new affidavit from [REDACTED] stating that the beneficiary worked for him as an assistant mechanic, the affidavit provides no explanation regarding [REDACTED] statements to the investigator indicating that the beneficiary only worked for him as a driver. Further, the new affidavits submitted state that the beneficiary worked as an assistant mechanic and not as auto mechanic as required by the terms in the Form ETA 750 and the letters do not state if the job was full-time.

Finally, the record contains affidavits from [REDACTED] stating that their taxi cab companies were competitors of [REDACTED] and that they knew that the beneficiary was employed by [REDACTED] as an auto mechanic from 1995 to 1997. The AAO notes that the affidavits from [REDACTED] are very similar, include the same misspelling, punctuation, and grammatical errors and all state that the beneficiary “wanted to join our company, but for personal reason[s] he did not do [so].” The affidavits fail to provide concrete information, specific to the beneficiary and generated by the asserted associations with the beneficiary, which would reflect and corroborate the extent of those associations, and demonstrate that the affiants have a sufficient basis for reliable knowledge about the beneficiary’s employment for [REDACTED]. Given this, the affidavits provide little probative value and shall be afforded minimal weight as evidence in support of the petitioner’s claim. The AAO finds that the affidavits lack credibility and are probably not true.

The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for “good and sufficient cause” when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet his burden of proof. The director’s NOIR sufficiently detailed the evidence of the record, pointing out that the record contained a fraudulent work experience letter, that would warrant a denial if unexplained and un rebutted, and thus was properly issued for good and sufficient cause.

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.

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. The approval of the employment-based immigrant visa petition remains revoked.