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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: APR 0 4 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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 M'Cormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based 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 The motion is granted, the previous decision of the AAO will be withdrawn, and the petition will be denied.

The petitioner describes itself as a magazine and video distributor. It seeks to employ the beneficiary permanently in the United States as a skilled worker or professional pursuant to Section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to demonstrate the ability to pay the proffered wage. The director denied the petition on November 23, 2007.

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 January 4, 2005. *See* 8 C.F.R. § 204.5(d).

The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. Specifically, the petitioner provided statements from the petitioning company's two shareholders and from the company's CPA, attesting to the shareholders' willingness to forego their officer compensation in order to pay the proffered wage. The shareholders (a married couple) detailed their household expenses and submitted copies of their personal income tax returns for 2005 and 2006, showing sources of income in addition to their officer compensation from the petitioner and in excess of their stated household expenses. In summary:

Year	Basis of the petitioner's ability to pay the proffered wage
2005	Net income of $15,235 plus officer compensation of $138,400
2006	Net income of $9,497 plus officer compensation of $50,000
2007	Net income of $97,541
2008	Beneficiary paid the proffered wage
2009	Beneficiary paid the proffered wage

Upon review of the entire record, including evidence submitted on appeal, in response to a Notice of Derogatory Information and Request for Evidence issued by the AAO, and on motion to reopen, the AAO concludes that the petitioner has established that it is more likely than not that the petitioner possessed the ability to pay the proffered wage as of the priority date.

However, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

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 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 requires a minimum of three years of college education and three years of experience in the offered position or the related field of marketing director. The labor certification also states that the beneficiary qualifies for the offered position based on his experience as a marketing director with , a recycling business in Dubai, United Arab Emirates, from August 1989 through September 1999. 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

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[1] 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).

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 September 30, 1999, experience letter from [redacted], director of [redacted] in New Delhi, India, stating that the company employed the beneficiary as a marketing director from August 1989 until September 1999. While the beneficiary stated on the labor certification that this company was a "recycling" business in Dubai, the company letterhead describes it as a "manufacturer of concrete blocks" in New Delhi, India. In addition, the beneficiary completed a Form G-325A, Biographic Information, in conjunction with his Form I-485, Application to Register Permanent Residence or Adjust Status, and testified that he was living in New Delhi, India, from September 1997 through September 1999.

Both the beneficiary's employment experience letter and the beneficiary's own statement on Form G-325A contradict the beneficiary's claim of employment on the labor certification. 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 petitioner. 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).

On January 24, 2013, the AAO issued a Request for Evidence (RFE) advising the petitioner of the discrepancies and of the need to overcome these contradictions with "competent objective evidence." In response to the RFE, the petitioner offers explanations for the discrepancies identified by the AAO.

The petitioner first addressed the discrepancy between the beneficiary's statement that he had worked for a "recycling" business and the claimed employer's company letterhead which described the company as a "manufacturer of concrete blocks." Counsel submitted a new affidavit from [redacted] who identified himself as the beneficiary's immediate supervisor. Mr. [redacted] stated that the company manufactures concrete blocks out of recycled materials and added that the company also engaged in the business of the "distribution of foreign magazines and publications." The petitioner also submitted an affidavit from the beneficiary containing a nearly verbatim description of the company's business. However, these statements are not accompanied by any other "competent objective evidence" relating to the nature of the claimed employer, nor do these attestations explain why such a diverse company would use letterhead with such a specific and limited description of its business. Nor was it explained why the beneficiary would use such a narrow description of the business for which he claimed to have worked.

The petitioner next addressed the discrepancy between the beneficiary's statement that he worked at [redacted]. in Dubai, United Arab Emirates, from August 1989 until September 1999, and the claimed employer's statement suggesting that the beneficiary was employed in New Delhi, India. The new letter from [redacted] and the new letter from the beneficiary both declare that the

beneficiary was employed by [redacted] in New Delhi, that the beneficiary was "primarily assigned" to the company's affiliate in Dubai, and that the beneficiary "was required to frequently travel" to Dubai. However, this statement does not explanation why the beneficiary claimed to have been employed in Dubai if the primary place of business of the qualifying employer was in India. Moreover, the statements are not accompanied by any additional "competent affirmative evidence" of the beneficiary's employment or of the business relationship between [redacted] in India and [redacted] in Dubai.

It is incumbent on 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, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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 motion to reopen is granted and the decision of the AAO dated June 22, 2010, is withdrawn. The petition is denied.