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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

DATE: **AUG 01 2013** OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the Director, Nebraska Service Center. The director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition remains denied.

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 petitioner describes itself as a motel. It seeks to permanently employ the beneficiary in the United States as a motel maintenance repairer. 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).<sup>1</sup>

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).<sup>2</sup> The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is May 25, 2001. *See* 8 C.F.R. § 204.5(d).

The director’s decision revoking the approval of the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date of May 25, 2001.

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<sup>1</sup> 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.

<sup>2</sup> 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.

On motion, counsel submits a brief and a new letter from Brham Industries. 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.<sup>3</sup>

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.<sup>4</sup>

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). All evidence submitted was previously available and could have been discovered or presented in the previous proceeding.

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy.

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 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.

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<sup>3</sup> 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).

<sup>4</sup> The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . ." *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).

*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 requirement: Two years in the job offered or in the related occupation of maintenance repair (industrial setting).

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a maintenance repairman with [REDACTED] in India from October 1994 until November 2002. The beneficiary signed the Form ETA 750B on July 2, 2007 and also listed experience as a maintenance repairer with [REDACTED] in India from “October 2006 to the present.” No other experience is listed on the labor certification. As noted in the AAO’s decision dated March 29, 2013, the beneficiary’s employment with [REDACTED] occurred after the priority date of May 25, 2001 and therefore the beneficiary’s employment for [REDACTED] cannot be considered.

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.

In its previous decision, the AAO noted the following regarding the employment letters from [REDACTED] in the record of proceeding:

The record contains an experience letter dated July 2, 2007 signed by [REDACTED] managing director on [REDACTED] letterhead stating that the company employed the beneficiary as a maintenance repairman from October 1994 to November 2002. The letter states that the beneficiary primarily oversaw all plumbing-related aspects related to keeping the water system within specified temperatures and electrical matters related to ensuring that machinery and equipment functioned properly and electrical currents and power supplies were correctly aligned. The record contains an undated second letter executed by [REDACTED] manager on [REDACTED] letterhead restating that the

beneficiary worked as a maintenance repairman from October 1994 to November 2002. The letter states that the beneficiary's duties involved "all plumbing related works related to this industry and its production."

The AAO notes that the letters from [REDACTED] provide inconsistent information regarding the beneficiary's plumbing duties. The letter dated July 2, 2007 states that the beneficiary's plumbing duties were primarily related to keeping the water system within specified temperatures and the second letter states that the beneficiary's duties involved all plumbing related work. Further, the information in the letters is inconsistent with the U.S. Embassy in New Delhi, India memorandum dated April 6, 2010. The memorandum states that during an interview on January 25, 2010, the beneficiary stated through an interpreter that he had no experience as a plumber and that he worked in auto sales, drove a taxi, and was a farmer. The embassy was not able to verify the beneficiary's employment as a maintenance repairman because no one answered the company's telephone number or the phone number listed for his current employer. The memo stated that the beneficiary had no evidence of his maintenance experience in support of the petition.

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 motion, the petitioner, through counsel, submits a new employment letter dated April 24, 2013 from [REDACTED] Managing Director, on [REDACTED] letterhead. As noted above, the 2013 letter is not new and could have been provided previously. In his letter, Mr. [REDACTED] states that the beneficiary worked for the company as a maintenance repairman from October 1994 through November 2002. Mr. [REDACTED] states that the beneficiary's duties included "(1) all types of plumbing related work related to our company and its production, as well as (2) expertise in the area of electrical matters to ensure that our machinery and equipment were properly functioning and that the electrical current and power supply were correctly aligned." Mr. [REDACTED] also states that his statements in the July 2, 2007 letter are correct and that the beneficiary's general duties included all types of plumbing-related duties as well as electrical work. Mr. [REDACTED] adds that the beneficiary's primary duty was to keep the water system within specified temperatures. Finally, Mr. [REDACTED] states that the company's telephone number has not changed since its first letter dated July 2, 2007.

On motion, counsel asserts that the new letter from [REDACTED] reconciles the inconsistent employment information in the record in that the beneficiary performed all of the duties listed in both letters. In his brief, counsel also states that the employer letters in the record list the employer's current phone numbers and that a call during normal business hours would confirm the beneficiary's employment for [REDACTED]. Although the petitioner submitted a new letter from [REDACTED]

the petitioner did not submit new independent, objective evidence such as employment records or paystubs of the beneficiary's employment as a plumber or maintenance repairman. Thus the AAO finds that the petitioner has not overcome the inconsistencies raised by the overseas investigation with independent objective evidence. 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). 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)).

Counsel also states that the beneficiary has not been provided with a copy of the Embassy memorandum. However, the petitioner has received notice of its content and the information in the memorandum has been sufficiently summarized in the director's NOIR, revocation, and in the AAO's previous decision.

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 motion to reopen is granted and the decision of the AAO dated March 29, 2013 is affirmed. The petition is denied.