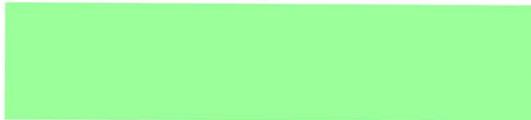


(b)(6)

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

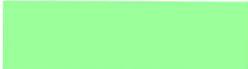


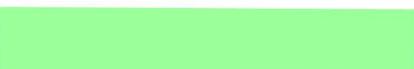
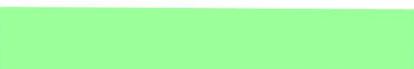
U.S. Citizenship
and Immigration
Services



DATE: **AUG 16 2013**

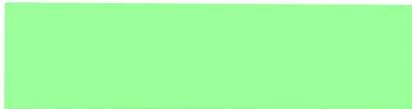
OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 
 Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(iii)

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Texas Service Center. The director later 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 matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Immigration and Nationality Act (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 is an individual and describes himself as an independent financial consultant and private investor. The petitioner seeks to permanently employ the beneficiary in the United States as a live-in child monitor. The petitioner requests classification of the beneficiary as an other, unskilled worker pursuant to section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii).

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 9, 2001. *See* 8 C.F.R. § 204.5(d).

On June 1, 2012, the director issued the petitioner a Notice of Intent to Revoke (NOIR) the approval of the petition on the basis that: (1) the beneficiary was not currently employed by the petitioner; and (2) the petitioner indicated that the beneficiary will not be performing the duties listed on the labor certification. Accordingly, the director requested that the petitioner provide evidence that the beneficiary has been employed by the petitioner since April 9, 2001, and that the job duties stated on labor certification are those the beneficiary will perform.

On July 30, 2012, the director revoked the approval of the petition, concluding that there is no longer a need to care for the petitioner’s children because they are over age 18, and the petitioner’s desire to keep the job open as a “caretaker and housekeeper” does not correlate with the labor certification as approved by DOL.

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.¹

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B,

The threshold issue on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition. As noted above, the Secretary of Homeland Security has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. See section 205 of the Act; 8 U.S.C. § 1155. This means that notice must be provided to the petitioner before a previously approved petition can be revoked. More specifically, the regulation at 8 C.F.R. § 205.2 reads:

(a) *General.* Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS]. (emphasis added).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

A notice of intention to revoke the approval of a visa petition is properly issued for “good and sufficient cause” when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

On appeal, counsel for the petitioner asserts that the director’s NOIR was improper because the petitioner intends to employ the beneficiary full-time once she obtains permanent residence status, the labor certification constitutes “an offer of future employment,” and the petitioner has demonstrated the need for the beneficiary to fill this position. The AAO finds that the NOIR was properly issued pursuant to *Matter of Arias* and *Matter of Estime*. Both cases held that a notice of intent to revoke a visa petition is properly issued for “good and sufficient cause” when the evidence

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).

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 in the record, including letters from counsel and from the petitioner, which indicated: that the beneficiary was employed by the petitioner as a full-time Child Monitor (live-in) from September 1999 to June 2004; that the beneficiary was unemployed in 2007, 2008, and 2009; that the petitioner again employed the beneficiary part-time beginning December 2010 while awaiting adjustment of status; and that the petitioner appears to now seek to employ the beneficiary as a "Full Time Live In Caretaker and Housekeeper," which is not the position offered by the terms of the labor certification. This evidence together would warrant a denial if unexplained and un rebutted; therefore, the NOIR was properly issued for good and sufficient cause.

The director's decision revoking the petitioner's approval found that the petitioner's "children are over the age of eighteen (18); therefore, [the beneficiary] is no longer needed as a child monitor." The director also stated that while the petitioner is willing to offer the beneficiary employment as a "caretaker and housekeeper," this is not the position offered by the terms of the labor certification.

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. *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.

Counsel asserts that a labor certification is for a future job offer, and consequently the petitioner not employing the beneficiary does not warrant revocation of the petition's approval. As noted above, the director's decision found that the petitioner's children were no longer minors, and that a letter

from the employer indicated that the petitioner intended to employ the beneficiary in a different position than the one certified. The labor certification states that the beneficiary must have three months of experience in the job offered and states the job duties as follows:

Observes and monitors play activities or playing games with them. Prepares and serves meals. Assists children to dress. Accompanies children on walks and other outings. Washes and iron clothing. Keeps children's rooms clean and tidy. Cleans other parts of home. Employee is free to leave the premises any time not scheduled to work.

The position offered must be for full-time, permanent employment. See 8 C.F.R. § 204.5(l)(2); 20 C.F.R. §§ 656.3; 656.10(c)(10). The record contains a letter from the petitioner, dated December 15, 2010, stating that he has employed the beneficiary as a full-time child monitor from September 1999 through June 2004. This conflicts with the labor certification and an experience letter from [REDACTED] in the record which both state that the beneficiary was employed by [REDACTED] as a full-time live-in child monitor from 1992 to December 2000. Doubt cast on any aspect of the petitioner's evidence may 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, 591-592 (BIA 1988). 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, in fact, lies, will not suffice. *Id.*

At the time of the priority date, April 9, 2001, the petitioner's daughter was ten years old. At the time the Form I-140 was filed on October 28, 2005, the petitioner's daughter was 14 years old. The record reflects that the beneficiary did not work for the petitioner in at least 2007, 2008, and 2009, at which time the petitioner's daughter was between 15 and 18 years of age. It is unclear whether the beneficiary was employed by the petitioner in the remainder of 2004, or in 2005 or 2006. The petitioner's December 15, 2010, letter states that the beneficiary is currently working for him on a part-time basis. It is unclear when the beneficiary began working part-time, but as stated above, the beneficiary did not work for the petitioner in at least 2007, 2008, and 2009, so this part-time employment appears to have commenced in 2010, when the petitioner's daughter was 19 years of age and no longer a minor. The record does not indicate why the petitioner no longer required the beneficiary's services as a child monitor beginning in June 2004, when the petitioner's child was 16 years of age. However, the record suggests that the petitioner no longer needed the services of a full-time, permanent live-in child monitor, as the petitioner's December 15, 2010 letter states that the beneficiary's current position was as a "Full Time Live In Caretaker and Housekeeper," which is a different job title than is listed on the labor certification.

The evidence in the record demonstrates that the petitioner did not employ the beneficiary for at least 2007, 2008, and 2009, years in which the petitioner's daughter was still a minor. This suggests that the petitioner did not require the beneficiary's services after the time the petitioner's daughter was 15 or 16 years old. As stated above, the job duties stated on the labor certification include: observing and monitoring the child's play activities; playing games with the child; and assisting the

child to dress; accompanying the child on walks and other outings. It is unclear whether these job duties remained accurate at the time the Form I-140 was filed in October 2005, as the record reflects that the petitioner employed the beneficiary only to June 2004, and once the beneficiary did again begin working part-time for the petitioner, in December 2010, it appears to have been in a different capacity.

Counsel is correct that a labor certification is for a future job offer. However, there is not sufficient evidence in the record to establish that a permanent *bona fide* job offer existed as of the date the Form I-140 was filed on October 28, 2005 or afterward. The petitioner has stated that he employed the beneficiary from September 1999 to June 2004, and there is no evidence in the record that the petitioner employed the beneficiary, or anyone else, as a full-time live-in child monitor from the time the Form I-140 was filed through the remaining years that the petitioner's daughter was still a minor. As noted above, the petitioner stated in December 2010 that it is offering the beneficiary a position as a "Full Time Live In Caretaker and Housekeeper." This casts doubt on whether a permanent *bona fide* job offer existed at the time the Form I-140 was filed.

On appeal, counsel informed the AAO that the petitioner has been employing the beneficiary since 2011 and intends to continue to employ the beneficiary. However, the petitioner's daughter is no longer a minor and the record suggests she was no longer in need of a live-in child monitor at the time the Form I-140 was filed. Accordingly, the record indicates that the petitioner intends to employ the beneficiary as a live-in caretaker and housekeeper; however, the record does not indicate that the petitioner has any minor children necessitating a full-time live-in child monitor as described on the labor certification. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Therefore, as of the date the Form I-140 was filed, October 28, 2005, there was not a *bona fide* job offer.

On appeal, counsel for the petitioner states that although the petitioner's daughter is over 18 and is in college, her parents are still "reasonably reluctant to leave her alone in their absence." This statement, without any additional independent, objective evidence, is insufficient to demonstrate that a *bona fide* permanent job opportunity as described on the labor certification exists. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The labor certification was approved for a full-time live-in child monitor to play games with the petitioner's child, assist them to dress, accompany them on walks and outings, and observe their play activities. As the petitioner did not need the beneficiary's services after June 2004, when the petitioner's child was a minor, it appears that there is no need for such a position as of the filing of the Form I-140 in October 2005. As the petitioner's daughter is now in college, and no longer a minor, the time that she would be alone would likely be minimal, thereby diminishing any need for the beneficiary's full-time employment as a live-in child monitor. Counsel has stated in the record that "the labor certification is based on an offer of future employment not current employment." However, the future employment must match the employment offered as certified by DOL. The record indicates

that the petitioner appears to no longer need a live-in child monitor, the position of employment for which the labor certification was certified, as of the filing date of the petition. It is unclear whether the petitioner's offer of employment was permanent as of the date the Form I-140 was filed. *See e.g. Matter of Albert Einstein Medical Center*, 2009-PER-00379 at *41 (BALCA 2011) (indicating that a job offer with a limited term of employment may not be a permanent, *bona fide* job opportunity). Therefore, the petitioner has not established that there is a permanent *bona fide* job offer as described on the labor certification that is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A labor certification for a specific job offer is valid only for the particular job opportunity as stated on the labor certification. 20 C.F.R. § 656.30(c)(2). It seems that the petitioner intends to employ the beneficiary as a caretaker and housekeeper, outside the terms of the position offered. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (Reg'l Comm'r 1979). The petitioner failed to demonstrate that there continues to be full-time, permanent job opportunity as described by the terms of the labor certification.

The approval of the petitioner's Form I-140 remains revoked for the above reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition remains revoked.