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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 23 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,

A handwritten signature in cursive script, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the Director, Nebraska Service Center. In a Notice of Revocation (NOR), the director revoked the approval of the Form I-140, Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook.<sup>1</sup> 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>2</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). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 30, 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 two years' experience required to perform the duties of the offered position by the priority date. The director's decision also notes that the beneficiary is the sister of the petitioner.

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.<sup>3</sup>

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<sup>1</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.

<sup>2</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>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).

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.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

**EXPERIENCE:** Two (2) years in the job offered or in the related occupation of Indian Dessert Specialty Cook.

**OTHER SPECIAL REQUIREMENTS:** None.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a desserts cook/confectioner with [REDACTED] in India from May 1997 until July 2000. 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 two experience letters dated June 11, 2007 and May 1, 2012 from [REDACTED] Manager/Owner on [REDACTED] letterhead stating that the company employed the beneficiary as a Desserts Cook/Confectioner from May 1997 until July 2000.

Based on the record at hand on March 5, 2009, the director approved the immigrant visa petition. The record reflects that, on May 3, 2011, the beneficiary appeared before the Department of State (DOS) Embassy in New Delhi-India. The beneficiary could not explain what sort of cook she would be or where she had worked as a cook in the past. The beneficiary could not explain her job duties or expectations in any detail. The interviewing officer doubted the veracity of the experience claimed in the immigrant petition, the Form ETA 750 and the beneficiary's answers during the interview to questions concerning her work experience. The inconsistencies between the claimed work experience in the application forms and the beneficiary's testimony cast doubt over the evidence of the beneficiary's work experience. Thus, the DOS offered the beneficiary an opportunity to provide additional evidence to support her claims. Upon review, the DOS found that the additional evidence submitted did not overcome the inconsistencies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

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.

Thus, on August 5, 2011 the DOS recommended to the director that the immigrant petition should be reviewed and if warranted, its approval revoked. Upon review, the director sent the petitioner a notice of intent to revoke (NOIR) on April 2, 2012. The petitioner responded to the NOIR by submitting an affidavit from the beneficiary, a copy of the previous experience letter dated January 5, 2012, and five affidavits from persons claiming to know the beneficiary and stating that she had worked at Sharma Sweet. The director found that the evidence submitted did not demonstrate that the beneficiary met the minimum requirements stated on the Form ETA 750.

On appeal, the petitioner through counsel asserts that the beneficiary met the minimum requirements for classification as a "skilled worker"; that the beneficiary overcame the burden of proof regarding her qualifications as an employment-based immigrant; that the beneficiary's relation to the petitioner is an inadequate justification for revoking the approval of the petition, and that the revocation of the approval of the petition was arbitrary. Counsel submitted the same evidence in support of the appeal, previously considered by the director, upon the petitioner's response to the director's NOIR.

The record reflects, that during the visa application process, the beneficiary could not explain her previous employment experience, her future job duties, salary, food recipes or projected benefits with the petitioner, at the time of the interview nor in subsequent phone calls which occurred from May 2011 through July 2011. On May 2, 2012, a year later, the beneficiary declared in an affidavit

that she had appeared for an interview and was not questioned about her previous work experience, but about her current jobs in 2012. The beneficiary states by this time, she was unemployed. The inconsistencies have not been resolved with independent, objective evidence of the beneficiary's prior work experience. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). 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)).

Next, the record also contains five affidavits from individuals that claim to have received phone calls from government investigators inquiring about the beneficiary, her family and past work experience. All of the affidavits confirm the beneficiary's work experience with [REDACTED]. In contrast, other evidence of record indicates that neighbors from the beneficiary's village claim that the beneficiary was not a cook or chef, but a housewife. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). As there is no independent, objective evidence resolving the inconsistencies, we find it more likely than not that the beneficiary did not possess the two years of experience required in the approved labor certification.

Next, beyond the decision of the director, the petition is not supported by a *bona fide* job offer. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). Specifically, it appears from the evidence in the record and the beneficiary's testimony, that she is the sister of the sole proprietor, the petitioner [REDACTED].<sup>4</sup> A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *Matter of Sunmart* 374, 00-INA-93 (BALCA May 15, 2000); *see also Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (en banc).

Based on the relationship described above, and considering the evidence in the record relating to the employer and the job opportunity, the petitioner has failed to establish that the instant petition is based on a *bona fide* job opportunity available to U.S. workers.

Next, the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2).

According to USCIS records, the petitioner has filed at least two additional Form I-140 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

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<sup>4</sup> [REDACTED] has successfully petitioned for additional relatives to work in his restaurant and immigrate to the U.S. The beneficiary indicated that [REDACTED] is her brother. He has petitioned for two nephews and two brothers to work in his restaurant and immigrate to the U.S.

The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. The evidence in the record provides that the petitioner could have supported one new employee at the proffered wage of \$34,528, but not three since 2001. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

The AAO affirms the director's revocation of the approval of the immigrant visa petition because 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 skilled worker under section 203(b)(3)(A) of the Act. Further, the petitioner failed to establish that a *bona fide* job opportunity was available to U.S. workers, and that the petitioner has the continuing ability to pay the proffered wage to the beneficiary and to the beneficiaries of its other petitions.

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.