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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: **FEB 08 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 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,

Rachel Ni Juno
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a trucking company.¹ It seeks to employ the beneficiary permanently in the United States as a truck and trailer frame 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).²

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment 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 June 11, 2007. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concluded that the petitioner failed to demonstrate that the beneficiary possessed the minimum experience required to perform the offered position by the priority date.

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.³

¹ The entity to which this decision is being addressed is identified as the successor-in-interest to the petitioner identified on Form I-140. In response to the AAO's Notice of Intent to Dismiss/Notice of Derogatory Information (NOID/NDI), [REDACTED] provided a "Transfer of Assets and Acquisition of Business Agreement" which demonstrates that it assumed the rights of the petitioning entity on November 15, 2009 after the filing of the instant petition and appeal. Both entities are located in [REDACTED] and are, therefore, within the same Metropolitan Statistical Area, according to the Census Bureau (<http://www.whitehouse.gov/sites/default/files/omb/assets/bulletins/b10-02.pdf> (accessed January 3, 2013)).

² 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.

³ 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).

On appeal, counsel submits a brief; and a letter dated June 24, 2009 from the [REDACTED]. On appeal, counsel asserts that the beneficiary worked full-time, as a police sergeant, from December 1993 to June 1999, but that he worked "24-hour shifts, only 7 days per month." Counsel further asserts that, "[i]n the time period from March 31, 1997 to June 1, 1999, the alien also worked as a truck and trailer frame repairer; also on a full-time basis." For this reason, counsel asserts that the beneficiary obtained the required two years of experience in the job offered.

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:

- H.4. Education: None.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: None.

The labor certification states that the beneficiary qualifies for the offered position based on experience as a truck and trailer frame repairer with [REDACTED] from March 31, 1997 until June 1, 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 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 from [REDACTED] president on [REDACTED] letterhead, stating that the company employed the beneficiary as a "frame repair person" from March 31, 1997 to June 1, 1999.

However, there are deficiencies with the letter. First, the letter is supposed to have been written by the owner of a business located in Plovdiv, Bulgaria. However, the record does not contain a copy of the employment letter in Bulgarian with a certified translation. Rather, the record contains only the English version, which is not accompanied by a certification from a translator, attesting to his or her competence in translating from the foreign language into English, as required by 8 C.F.R. § 103.2(b)(3). Second, the letter does not state whether the beneficiary worked on a full-time basis. Third, the letter is not dated, which is problematic due to the following issue. The director noted at least two deficiencies with the letter, which was initially submitted with the petition submission (e.g., the letter did not contain the specific dates of employment, and the author did not identify his position with the company). The director issued a request for evidence (RFE), noting the problems with the employment letter, and asked the petitioner to provide a new letter with the required information. The petitioner responded by providing an English letter, as identified above, with the two requested pieces of evidence incorporated into the letter. Other than the two new pieces of evidence, the letter is identical to the document, which was submitted with the initial petition submission. This is unusual, given the fact that the petitioner would have had to contact the employer in Bulgaria, request certain pieces of specific information, and then have the new document translated into English. The fact that the two letters are precisely the same, with the addition of only the numerical date for the days of the month and the title of the author, casts doubt upon the veracity of the petitioner's claim of having obtained a new document from the foreign employer. Further, doubt is cast upon the letters by the fact that the record contains no original documents in the foreign language.

Doubt cast on any aspect of the petitioner's proof may, of course, 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 (BIA 1988).

In the May 7, 2009 denial, the director noted that he had obtained another of the beneficiary's A-files, which contained a statement from the beneficiary in which he claimed to have been a police officer and a prison guard at the [REDACTED] from December 1993 until June 1999. The director noted that the work experience, which the beneficiary claimed in the instant case, conflicted with the claim made in a prior case, because the dates of employment overlapped.

On appeal, counsel submits a letter dated June 24, 2009 from [REDACTED]

In his letter, [REDACTED] states that the beneficiary worked as a jailer from January 16, 1995 until January 27, 2000. [REDACTED] further states that the beneficiary "was working under prepared monthly schedule consisting of 24-hourly working duty and 72 hourly rest" [sic].

Counsel asserts that, since the beneficiary worked as a police sergeant only seven days per month, he was able to work full-time as a frame repairer for [REDACTED]

However, according to the letter from [REDACTED] the beneficiary worked a 24-hour shift, followed by 72 hours off duty.⁴ This amounts to at least 48 hours of work per week. Such a schedule would make it unlikely that the beneficiary would be able to work a second job on a full-time basis. Further, since the letter from [REDACTED] neither identified the beneficiary's typical work schedule, nor claimed that he worked on a full-time basis, the letter from [REDACTED] alone does not resolve the inconsistency cited by the director in his denial.

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*, at 582, 591-592.

The petitioner provided no independent, objective evidence substantiating the work experience with [REDACTED] such as personnel records, pay statements, etc. The experience claimed with the [REDACTED] was made previously under oath before an officer of the Immigration and Naturalization Service (INS) and, therefore, testimony on its own without independent, objective evidence in support of the experience claimed with [REDACTED] 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)).

It should also be noted that, in the other application cited by the director, the beneficiary claimed to have worked for the [REDACTED] from December 1993 until June 1999. In the letter submitted on appeal, [REDACTED] stated that the beneficiary worked for the [REDACTED] from January 16, 1995 until January 27, 2000. Counsel provided no explanation or substantiation for the

⁴ Using this formula, the beneficiary would have worked eight (8) days per month.

discrepancies in the dates of claimed employment. Further, according to USCIS records, the beneficiary entered the United States on July 1, 1999, seven months prior to the date claimed by [REDACTED] as the conclusion of the beneficiary's employment. Therefore, the documentation provided as evidence on appeal contains additional inconsistencies, which have not been resolved.

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.

Beyond the decision of the director,⁵ 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 predecessor ([REDACTED]) has filed three I-140 petitions on behalf of other beneficiaries, and the successor ([REDACTED]) has filed one I-140 petition on behalf of another beneficiary. 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).

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. However, the filing dates, approval, and priority dates of the petitions have been obtained through USCIS electronic records.⁶ Three of the four petitions have been approved, and none of the beneficiaries have obtained permanent residence. 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.

⁵ 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); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

⁶ According to USCIS records, [REDACTED] was filed on December 18, 2007 and approved on April 23, 2009. The priority date conferred by the approval of this visa petition is September 4, 2007. The beneficiary of the visa petition has not obtained permanent residence. [REDACTED] was filed on March 15, 2007 and approved on August 21, 2007. The priority date conferred by the approval of this visa petition is January 4, 2007. The beneficiary of this visa petition has not obtained permanent residence. [REDACTED] was filed on May 28, 2004 and approved on June 17, 2004. The priority date conferred by the approval of this visa petition is June 26, 2003. The beneficiary of this visa petition has not obtained permanent residence. [REDACTED] was filed on June 8, 2012 by [REDACTED] and is still pending.

Beyond the decision of the director, the petitioner has also failed to establish that it will be the actual employer of the beneficiary. See 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.3.

In determining whether the petitioner will be the beneficiary's actual employer, USCIS will assess the petitioner's control over the beneficiary in the offered position. See *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"); see also Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. See *Clackamas*, 538 U.S. at 448-449; cf. New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

The evidence in the record does not establish that the petitioner will be the beneficiary's actual employer. According to the petitioner's [REDACTED] U.S. Income Tax Return for an S Corporation (Form 1120S) for 2006, it paid no salaries or wages, but paid \$1,450,804.00 to sub- and independent contractors. In 2007, the petitioner paid only \$9,000.00 in total salaries and wages, but \$1,971,251.00 to sub- and independent contractors. As evidence of wages paid to the beneficiary, the petitioner supplied copies of IRS Forms 1099 for 2007 and 2008. In 2007, Form 1099 bears the beneficiary's name and identifies the sum issued to him. In 2008, Form 1099 identifies the name of a company, [REDACTED] and indicates that \$404,747.80 was paid to this entity. This is a sum, which far exceeds the proffered wage. The company has the same address as the beneficiary's place of residence. According to the website of the Illinois Secretary of State, [REDACTED] is a company, which is owned and operated by [REDACTED]. In fact, on appeal, counsel states that the beneficiary operates this company from his home. The fact that the petitioner compensated the beneficiary's company at a rate, which is approximately 800 percent of the proffered wage of \$49,462.40, suggests that the beneficiary employs other workers. Given the fact that the petitioner pays little to no wages or salaries, but compensates sub- and independent contractors, and the fact that the petitioner claims and has substantiated that the beneficiary operates his own business (likely with other workers) and that the petitioner pays the beneficiary's business on a contractual basis, suggests that the petitioner is not intending to employ the beneficiary. Rather, the evidence suggests that the petitioner will utilize the beneficiary's services as an independent contractor.

Therefore, the petition must also be denied because the petitioner failed to establish that it will actually employ the beneficiary.

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.