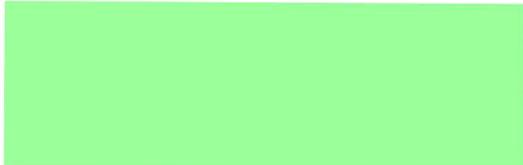


(b)(6)

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

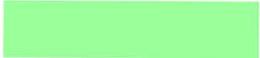


U.S. Citizenship
and Immigration
Services



DATE: JUN 04 2013

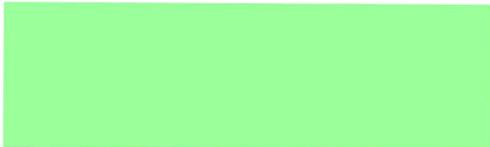
OFFICE: NEBRASKA SERVICE CENTER

FILE: 

IN RE: Petitioner: 
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:

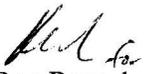


INSTRUCTIONS:

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,


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 director denied a subsequent motion to reopen and motion to reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 an Indian restaurant. It seeks to permanently employ the beneficiary in the United States as a “North Indian Curry Cook.” 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).¹

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 February 5, 2002. *See* 8 C.F.R. § 204.5(d).

The director’s decision denying the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date. The director also noted that the petition was signed by the beneficiary’s uncle.

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.²

¹ 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.

² 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

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:

EDUCATION

Grade School: none

High School: none

College: none

College Degree Required: n/a

Major Field of Study: n/a

TRAINING: none

EXPERIENCE: Two years in the job offered or in the related occupation of curry cook (North Indian)

OTHER SPECIAL REQUIREMENTS: none

The labor certification also states that the beneficiary qualifies for the offered position based on

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).

experience as a North Indian curry cook with [REDACTED] in India from November 1999 until January 14, 2002, the date that the beneficiary signed the labor certification. 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 from [REDACTED] Director. The first letter on [REDACTED] letterhead dated January 30, 2002, states that the company employed the beneficiary as a chef from November 1999 until January 30, 2002, the date the letter was signed. The letter states that the beneficiary is “an expert in preparing and cooking meat and vegetarian dishes such as Dal Makahni, Shahi Paneer, Palak Paneer, Mushroom Mattar, Channa Masala, Chicken Curry, Chicken Do Piazza, Patiala Shahi Chicken and Chicken Korma, Lamb Vindloo, Lamb Curry, Punjabi Fish Curry etc. He is responsible for ordering ingredients to be used in cooking as well as defining and select specific kitchenware used for cooking.” However, the letter does not state if the job was full-time.

With its motion, the petitioner submitted a second experience letter dated July 29, 2011. The declaration is signed by [REDACTED] and states that the beneficiary worked for the “[REDACTED]” from November 1999 to March 2002. The AAO notes that the declaration did not list Mr. [REDACTED] title, the address for the employer, the beneficiary’s job duties, or if the job was full-time. Further, it appears that the two letters are inconsistent. Mr. [REDACTED] states that the beneficiary worked as a “chef” in his letter dated January 30, 2002 and as a “cook” in his letter dated July 29, 2011. Mr. [REDACTED] did not provide the duties for a “cook” in his 2011 letter and therefore, the AAO is unable to determine if the positions are similar. Finally, the AAO notes that in the labor certification, the beneficiary lists his position as “North Indian Curry Cook” and not as chef.

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).

In the NOIR, the director stated that the beneficiary appeared for an initial interview at the U.S. Embassy in New Delhi on February 7, 2011 and during that interview the beneficiary was unable to name the last restaurant where he worked and could not explain how he received an offer of employment in the United States. The director also stated:

An investigative unit telephoned the beneficiary's home village. They spoke to five individuals who stated the beneficiary was most certainly not a cook, but was a well known [REDACTED]. It appears that the beneficiary did not qualify as an employment-based immigrant under section 203(b)(3)(A)(i) of the Immigration and Nationality Act, as amended because he did not have the requisite 2 years experience as a North Indian Curry Cook at the time the ETA 750 was accepted for processing.

In response to the NOIR, the petitioner stated that the beneficiary had more than two years of experience as a cook and that the beneficiary was never asked the questions noted in the NOIR. The petitioner stated that, although the beneficiary is a [REDACTED] he had previously worked as a cook.

In his revocation, the director stated his concerns as stated above in the NOIR and also noted that the Form I-140 was signed by the beneficiary's uncle and that the beneficiary did not submit evidence contradicting the findings of the Department of State (DOS) other than the beneficiary's statement.

On appeal, the petitioner re-states its assertions from its response to the NOIR and indicates that the assertions of the five people interviewed are unsupported assertions. Counsel states that the five villagers would not know about the beneficiary's work as a cook in the city. Counsel argues that telephonic evidence is not documentary 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)).

The only evidence in the record that refutes the DOS investigation is the beneficiary's statement. As noted by the director, the investigation yielded evidence that the beneficiary did not have the required experience for the proffered position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* The record contains no independent objective evidence of the petitioner's experience as a North Indian curry cook.

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,³ it is also noted that the petition may not be supported by a *bona fide* job offer. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). Specifically, the evidence in the record reveals that the beneficiary is the petitioner's nephew. Under 20 C.F.R. § 626.20(c)(8) and § 656.3, the petitioner must demonstrate that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See also C.F.R. § 656.17(l); *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). 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 a *bona fide* job opportunity available to U.S. workers. This must be addressed with any further filings.

Also beyond the decision of the director, the petitioner has 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 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).

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. 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 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.

³ 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).