



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 04 2013

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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 Director, Texas Service Center (director), approved the employment-based preference visa petition. The Acting Director, Texas Service Center (acting director), however, served the petitioner with a 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 Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204.” The director’s realization that the petition was approved in error may constitute good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner owns and operates a nursing and rehabilitation center. It seeks to permanently employ the beneficiary in the United States as a licensed vocational nurse. 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 an ETA Form 9089, Application for Permanent 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 September 11, 2006. *See* 8 C.F.R. § 204.5(d).

The director’s decision revoking the petition’s approval concludes that the petitioner failed to demonstrate that the beneficiary possessed, as of the petition’s priority date, the minimum two years of full-time experience required to perform the offered position.

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 also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *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 clear, e.g., prescribed by regulation, USCIS must examine "the language of the labor certification job requirements" to determine the required qualifications for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the job requirements 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.

In the instant case, the labor certification states the following requirements for the offered position of licensed vocational nurse:

- H.4. Education: Vocational nursing license.
- 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 the following full-time experience in the job offered: five months with [REDACTED] California from February 1, 2006 until July 1, 2006; 21 months with [REDACTED] California from September 2, 2004 to June 20, 2006; three months with [REDACTED] California from June 14, 2004 to September 15, 2004; and two months with [REDACTED]

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).

California from April 15, 2004 to June 30, 2004. No other experience is listed. The beneficiary signed the labor certification, declaring 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 AAO finds that the acting director properly issued the NOIR pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases hold that a notice of intent to revoke a visa petition's approval is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if not explained and rebutted, would warrant the petition's denial based upon the petitioner's failure to meet its burden of proof.

In her NOIR, the acting director cited numerous discrepancies in the record regarding the beneficiary's employment history.³ For example, the beneficiary claimed on the labor certification to have obtained 21 of the required 24 months of experience in the job offered, from September 2, 2004 to June 20, 2006, with [REDACTED]. On the beneficiary's Form G-325A, Biographic Information, however, which he submitted with his application for adjustment of status in July 2007, the beneficiary stated that he worked with [REDACTED] for only 16 months, from September 2004 to February 2006. See *Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of the petition). In addition, the beneficiary's Form G-325A did not include the five months of experience with Accel and the two months of experience with [REDACTED] that he claims on the labor certification. *Id.*, at 591-592 (the petitioner must resolve inconsistencies in the record by independent, objective evidence).

Because the discrepancies in the record at the time of the NOIR's issuance cast doubt on whether the beneficiary possessed the required 24 months of full-time experience in the job offered, the AAO finds that the evidence, if not explained or rebutted, would have warranted the petition's denial. The AAO therefore finds that the acting director issued the NOIR for good and sufficient cause.

In response to the NOIR, the beneficiary states in a signed "declaration" that he "could have made an honest mistake" regarding the end date of his employment with [REDACTED] on the Form G-325A. He

³ The acting director also issued the NOIR based on the petitioner's failure to provide evidence of the beneficiary's vocational nursing license and counsel's failure to sign the labor certification. In response to the NOIR, however, the petitioner submitted copies of the beneficiary's vocational nursing license and certificate, and counsel signed the labor certification. The beneficiary's educational qualifications and previously unsigned labor certification are not at issue in this appeal.

states that he completed the form “based on [his] recollection of the dates of employment” and did not refer to the end dates indicated in the labor certification or in a letter from the employer. A previous Form G-325A, which the beneficiary signed in June 2002 in connection with an earlier adjustment application, states that he was “unemployed” from May 1997 to June 2001 and worked for the petitioner as a “CNA” (certified nursing assistant) from June 2001 to at least June 2002. But, in the declaration, the beneficiary states that he “did not tell [his] previous lawyer that [he] was unemployed from May 1997 to June 2002.” Rather, the beneficiary states that he worked as a cook with [REDACTED] from June 1997 to February 2006 and joined the petitioner in late February 2006 in the offered position of licensed vocational nurse.

The beneficiary’s statement that he worked as a cook with [REDACTED] from June 1997 to February 2006 casts doubt on whether the beneficiary possessed the required experience in the job offered before assuming the offered position with the petitioner in late February 2006. Neither the petitioner nor the beneficiary has explained how or whether the beneficiary worked full-time in the offered position for [REDACTED] from April 2004 to July 2006, as he states on the labor certification, while also working as a cook with [REDACTED] for most of that period. *See Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on any aspect of the petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of the petition).

As the director found in his NOR, the petitioner also did not submit evidence to support the beneficiary’s declaration. For example, the petitioner did not submit copies of the beneficiary’s W-2 forms, payroll records and/or letters from employers to confirm the employment history stated in the declaration. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See 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).

Moreover, evidence in the record contradicts the beneficiary’s declaration. The beneficiary claims that he did not join the petitioner until late February 2006. In a previous employment-based petition for the beneficiary, [REDACTED] submitted a copy of his Internal Revenue Service (IRS) Form W-2 Wage and Tax Statement for 2001, showing that the current petitioner paid him \$5,801.27 in 2001. The record does not contain a 2001 W-2 form for the beneficiary from [REDACTED] the employer with which he claimed to have been working as a cook in 2001. A copy of the beneficiary’s 2001 federal tax return also shows that his wage from the petitioner was his only income that year. Also, copies of [REDACTED] California quarterly wage and withholding reports from the fourth quarter of 2000 to the fourth quarter of 2001 do not identify the beneficiary as an employee.⁴ *See Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on any aspect of the petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition).

In addition, in support of the previous petition for the beneficiary, [REDACTED] submitted a copy of a W-2 form showing that [REDACTED] paid the beneficiary \$4,856.38 in wages in

⁴ The quarterly wage reports identify an employee who shares the beneficiary’s family name but has a different Social Security Number than the beneficiary.

2003. The beneficiary, however, does not identify [REDACTED] as a previous employer on the instant labor certification or on his most recent Form G-325A. *See Matter of Ho*, 19 I&N Dec. at 591-92 (the petitioner must resolve inconsistencies in the record by independent, objective evidence).

On appeal, counsel asserts that the discrepancies in the beneficiary's employment history "are inconsequential and did not adversely affect much less negate the work experience the beneficiary acquired while working with the five different employers named in the [c]ertified ETA [Form] 9089." Counsel argues that: letters from the beneficiary's previous employers support the beneficiary's employment history, as stated on the labor certification; that the beneficiary, in his declaration, has explained the discrepancies; and that the director "relied on technicalities to justify the revocation."

The record, however, shows that the inconsistencies in the beneficiary's employment history cast material doubt on whether he possessed 24 months of full-time experience in the job offered, as of the priority date, as required by the labor certification. The labor certification states that the beneficiary did not gain any of the qualifying experience with the petitioner. Rather, it states that the beneficiary gained about 26 months of full-time experience in the job offered with four employers from April 15, 2004 to July 1, 2006. The beneficiary did not identify two of these four employers – [REDACTED] – as prior employers on his Form G-325A, casting doubt on whether the beneficiary truly worked for these companies. Further, while the beneficiary states on the labor certification that he worked with [REDACTED] from September 2004 to June 2006, he claims on the Form G-325A that he worked there from September 2004 to only February 2006. Even assuming that the beneficiary worked for about three months with [REDACTED], as he states on the labor certification, the petitioner has not demonstrated that the beneficiary worked the required 24 months in the job offered if the beneficiary worked with [REDACTED] for only about 16 months. The discrepancies cited above are therefore not mere "technicalities," but cause material doubt about the beneficiary's qualifications for the offered position.

As counsel indicates, the record contains letters from the purported previous employers of the beneficiary, which mostly match the employment history he claims on the labor certification. But the letters do not explain the other discrepancies regarding the beneficiary's employment history on the Forms G-325A, the W-2 forms, and in the beneficiary's declaration. *See Matter of Ho*, 19 I&N Dec. at 591-92 (the petitioner must resolve inconsistencies in the record by independent, objective evidence). Moreover, some of the letters do not comply with the regulation at 8 C.F.R. § 204.5(I)(3)(ii)(A), which requires the petitioner to support the beneficiary's claimed experience with letters from employers giving the name, address, and title of the employer, and a description of the alien's experience.

The July 20, 2006 letter from [REDACTED] Director of Staff Development, on [REDACTED] letterhead, does not provide an address of the employer, does not state any of the beneficiary's duties, and does not indicate when the beneficiary's employment ended. The September 5, 2006 letter from [REDACTED] Administrator, on [REDACTED] letterhead, does not provide a description of the beneficiary's experience

there.⁵ Therefore, even if other evidence in the record did not contradict the content of these letters, they would be unacceptable proof of the beneficiary's prior employment because they do not comply with the regulation at 8 C.F.R. § 204.5(I)(3)(ii)(A).

Finally, contrary to counsel's assertion that the beneficiary's declaration explains the discrepancies in the record, the declaration raises additional questions, which it does not answer. In the declaration, the beneficiary claims he worked with [REDACTED] as a cook from May 1997 to February 2006, before joining the petitioner in the offered position in late February 2006. As discussed above, the declaration casts doubt on whether the beneficiary obtained the required 24 months of full-time experience in the job offered between April 2004 and July 2006 as he claims on the labor certification. The beneficiary does not explain whether he obtained the required experience during that time while simultaneously working as a cook for [REDACTED] and, if so, how he was able to manage working two full-time jobs, in addition to the overlapping experience stated on the labor certification.

Because the discrepancies in the record cast material doubt on whether the beneficiary possessed the required 24 months of full-time experience in the offered position, the AAO finds that the director revoked the petition's approval for good and sufficient cause.

Beyond the decision of the director, the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. In general, the regulation at 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. "In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." 8 C.F.R. § 204.5(g)(2) (emphasis added).

On the instant petition, the petitioner claimed to employ more than 105 workers. The director therefore accepted an October 11, 2006 letter from the petitioner's administrator as evidence of its ability to pay the beneficiary's proffered wage of \$17.77 per hour for a 40-hour work week (or \$36,961.60 per year). Given the record as a whole and the petitioner's filing of multiple petitions, however, we find that USCIS should not exercise its discretion to accept the letter from the petitioner's administrator. See *Louisiana Philharmonic Orchestra vs. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 2000), *aff'd*, 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001) (the decision of a service center or district director never binds the AAO).

USCIS records indicate that the petitioner has filed at least 14 other Form I-140 petitions since 2002. Consequently, USCIS must consider the petitioner's ability to pay the beneficiary's proffered wage in the context of its overall recruitment efforts. The petitioner has filed and obtained approval of the labor certifications on the representation that it intends to employ all of its beneficiaries upon

⁵ This letter states that the beneficiary "performed all the duties and responsibilities of a LVN as duly outlined in the regulation of Board of Nursing." The referenced nursing regulation is not provided. Further, such a broad generalization cannot be accepted as a description of the duties actually performed by the beneficiary.

approval of the petitions. Therefore, the petitioner must demonstrate that it has the ability to pay the wages of all of the individuals it seeks to employ from the priority dates of the petitions until the beneficiaries obtain lawful permanent resident status. *See* 8 C.F.R. § 204.5(g)(2); *see also Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). Given the number of immigrant petitions that the petitioner has filed, USCIS cannot rely on a letter from the petitioner's administrator referencing its ability to pay a single beneficiary.

The record contains no other evidence of the petitioner's ability to pay the proffered wages of the beneficiary and the other sponsored workers, as the regulation at 8 C.F.R. § 204.5(g)(2) requires. The evidence in the record also does not establish 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, the AAO concludes 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 may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center did 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 at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

In summary, 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. The beneficiary therefore does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act. The AAO also finds that the petitioner has failed to establish its continuing ability to pay the beneficiary's proffered wage since the priority date.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal. 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. The petition's approval remains revoked.