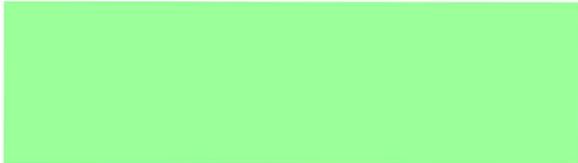




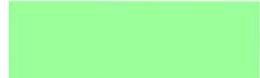
U.S. Citizenship
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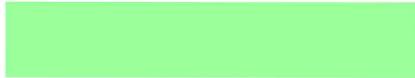


DATE: JUN 12 2013

OFFICE: TEXAS SERVICE CENTER FILE:

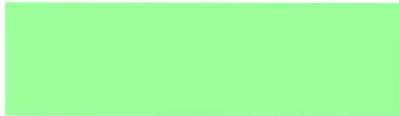


IN RE: Petitioner:
Beneficiary:



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 Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. The petitioner filed a late motion to reopen or reconsider and the motion was rejected. The petitioner then filed the instant motion. The motion will be granted. The previous decision of the AAO will be affirmed. The petition remains denied.

The petitioner describes itself as a business that designs and builds machinery. It seeks to permanently employ the beneficiary in the United States as an electromechanical technician. 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 July 27, 2004. *See* 8 C.F.R. § 204.5(d).

The AAO's decision denying the appeal concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date. Further, the AAO noted that the record contains inconsistent information regarding the beneficiary's social security number.

On January 3, 2012, the petitioner filed an untimely motion to reopen the AAO's dismissal of the appeal. In the instant motion, counsel explains that the motion was filed through the U.S. Postal Service's (USPS) Express Mail with guaranteed delivery by December 27, 2011. USPS delivered the petitioner's motion on December 30, 2011. The motion was untimely filed unbeknownst to counsel or the petitioner. The AAO accepts that the late delivery of the previous motion was beyond the petitioner's control. The instant motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. 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: Blank

High School: 4 years

College: Blank

College Degree Required: Blank

Major Field of Study: Blank

TRAINING: Blank

EXPERIENCE: Two (2) years in the job offered of electromechanical technician

OTHER SPECIAL REQUIREMENTS: Blank

The labor certification also states that the beneficiary qualifies for the offered position based on experience as an electromechanical technician with [REDACTED] in Commack, New

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).

York from August 1997 until March 2002. 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], on [REDACTED] letterhead stating that the company employed the beneficiary full-time as a lathe operator, milling machine technician, polisher, and machinery mechanic from March 1, 1994 until July 4, 1997. However, the letter does not list the title of the signatory or describe the beneficiary's duties in detail.

As noted in the AAO's previous decision, the beneficiary did not list his employment with [REDACTED] on the Form ETA 750B or on the Form G-325A, Biographic Information. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by the DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

On motion, the petitioner submits a copy of a labor certification purportedly filed by [REDACTED] for the beneficiary as evidence that the beneficiary worked for [REDACTED]. The labor certification submitted does not list a DOL file number and the word "canceled" is written across the first page of the labor certification. The labor certification for [REDACTED] lists [REDACTED] as the beneficiary's employer from January 1994 to April 1997. The duties listed include "installed, repaired and serviced paper converting machinery. Troubleshooting." The AAO notes that the employment dates listed are inconsistent with the employment dates listed on the experience letter from [REDACTED].

On motion, counsel also submits a second experience letter from [REDACTED], on [REDACTED] letterhead stating that the company employed the beneficiary full-time as a lathe operator, milling machine technician, polisher, and machinery mechanic from March 1, 1994 until July 4, 1997. The letter lists the following duties for the beneficiary: he regulated and repaired electromechanical systems; read and followed blueprints; verified measurements using precision instruments; tested systems for operations; and trained new employees.

Although counsel submits a copy of a labor certification purportedly filed by [REDACTED] as evidence of the beneficiary's previous employment with [REDACTED] the record does not contain independent, objective evidence of the claimed employment such as pay stubs or tax returns. 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).

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.

Further, as noted in the AAO's decision dated November 25, 2011, the petitioner has established its ability to pay the proffered wage. However, the record contains inconsistent social security numbers for the beneficiary. Specifically, the beneficiary's Internal Revenue Service (IRS) Forms W-2 for 1997 to 2000 lists the beneficiary's social security number as [REDACTED] and the IRS Forms W-2 for 2004 to 2006 list the beneficiary's social security number as [REDACTED]. On motion, counsel states that the beneficiary used various social security numbers. Initially, the beneficiary used a social security number that did not belong to him in order to work and later used the social security number assigned to him by the Social Security Administration (SSA). Further, counsel states that the SSA credited the social security wages worked under the wrong social security number to the beneficiary. Counsel submits a copy of the beneficiary's social security statement listing the beneficiary's wages for 1997 to 2000. The petitioner has submitted competent objective evidence indicating that it is more likely than not that the beneficiary used different social security numbers but was the recipient of the wages paid by the petitioner. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion is granted. The previous decision of the AAO is affirmed. The petition remains denied.