(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 14 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:

SELF-REPRESENTED

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,

Josh K
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially denied by the Director, Nebraska Service Center and came before the Administration Appeals Office (AAO) on appeal. The director's decision was affirmed and the appeal was dismissed by the AAO on September 26, 2012. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motion will be granted. The previous decision of the AAO, dated September 26, 2012, will be affirmed, and the petition will remain denied.

The petitioner describes itself as a meat distribution business. It seeks to employ the beneficiary permanently in the United States as an maintenance repairer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL). As set forth in the director's decision issued on June 8, 2009, the director determined that the petitioner had not established that the beneficiary met the experience requirements of the labor certification. The director denied the petition accordingly. The petitioner appealed the director's decision to the AAO. The AAO affirmed the director's decision on September 26, 2012.

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 or motion.[1]

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)(l), (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

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1).

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: None Required.
TRAINING: None Required.
EXPERIENCE: Two years in the job offered.
OTHER SPECIAL REQUIREMENTS: None Required.

The position offered is for employment as a "maintenance repairer," with the following duties: "repairs and maintains physical structures of apartments, building. Paints structures, and repairs woodwork with carpenter's tools. Repairs plumbing fixtures. Repairs and lays brick."

The labor certification states that the beneficiary qualifies for the offered position based on experience as: (1) a maintenance repairer with the petitioner beginning in September 1999 until May 29, 2001, the date of signature; and (2) as a maintenance repairer for California from March 1994 to August 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 the petitioner, dated December 18, 2007, which attests to the beneficiary's work experience in the position offered beginning in September 1999. This letter describes the beneficiary's duties in substantially the same terms as provided for position offered on the labor certification, including the repairing of apartments. As noted by the AAO in its decision on September 26, 2012, the period of time from September 1999 to the June 4, 2001 priority date, is a period of only 21 months and does not meet the experience requirements of the labor certification.

The record contains a second letter from the petitioner, dated April 8, 2008, which states the beneficiary is employed as a "plant manager" and that his job duties are to "overseas [*sic*] the general maintenance of our facility such as: trouble shooting any fixtures in the warehouse that need to be corrected and keeping up with the daily office maintenance." These duties appear to exceed the duties of the position offered including overseeing aspects of the petitioner's warehouse and office maintenance. The AAO notes that on the labor certification the petitioner indicated the beneficiary was supervised by the petitioner's owner, and that the beneficiary did not supervise any

employees. Further, it is unclear whether the position offered actually included the repair of apartments, as specified on the labor certification, as the petitioner claims to be a meat distributor. Doubt cast on any aspect of the petitioner's evidence may 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, 591-592 (BIA 1988). These letters cannot be accepted as credible evidence of the beneficiary's work experience because of these conflicts and no independent, objective evidence is in the record to explain the discrepancies. It is incumbent upon 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. *Id.*

On motion, the petitioner states that "refused to released [*sic*] any proof of employment." The AAO noted in its prior decision that the record does not contain any evidence to reconcile the inconsistencies of the beneficiary's claimed experience with and that "[w]ithout evidence to reconcile the inconsistencies the beneficiary's experience with as listed on the labor certification, has not been established." The record on motion does not contain any evidence to corroborate the beneficiary's experience with or to corroborate the petitioner's assertion on motion. 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)). 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).

The record also contains an experience letter from [. which states that the beneficiary worked there "repairing and maintaining physical structures of commercial and industrial establishment" from 1994 to 1999. This letter does not state the months this work began and does not state whether this work was full-time, preventing the AAO from determining the length of the claimed employment. This experience is not stated on the labor certification. 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 DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. The beneficiary's experience with also conflicts with the labor certification, which states that the beneficiary worked for as a "maintenance repairer" from March 1994 to August 1999, the same years of the beneficiary's employment with This casts doubt on the beneficiary's claimed full-time employment, as this purported full-time employment with two employers was not disclosed on the labor certification and only first arose after the director's RFE. Doubt cast on any aspect of the petitioner's evidence may 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, 591-592 (BIA 1988). It is incumbent upon 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. *Id.*

On motion, the petitioner asserts that the beneficiary's W-2 Statements from Inc. for 1994 and 1997, allegedly owned by demonstrate the beneficiary was employed there full-time as a maintenance repairer to qualify the beneficiary for the instant position. However, there is no evidence in the record as to what the beneficiary's work experience was at in order for this employment to be considered toward meeting the experience requirements of the labor certification. The petitioner previously provided a W-2 Form from . for 1998 and 1999; the petitioner has not explained why the beneficiary would have received W-2 Statements from a difference employer if the claimed employment was the same from 1994 to 1999. The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). W-2 Statements are insufficient evidence to establish the duties performed, or hours worked. Further the wages reported appear to indicate that any employment was part-time, and not full-time as alleged. Doubt cast on any aspect of the petitioner's evidence may 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, 591-592 (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 skilled worker under section 203(b)(3)(A) of the Act.

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. The previous decision of the AAO will be affirmed.

ORDER: The motion is granted, and the decision of the AAO dated September 26, 2012 is affirmed. The petition remains denied.