



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: JUN 25 2013 OFFICE: TEXAS SERVICE CENTER

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 appeal will be dismissed.

The petitioner provides construction workers to contractors in the Midwest and East Coast regions of the United States.<sup>1</sup> It seeks to permanently employ the beneficiary in the U.S. as an electrician. 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).<sup>2</sup>

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).<sup>3</sup> The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is December 26, 2006. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner failed to establish that the beneficiary possessed the minimum employment experience required to perform the offered position as of the petition's 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.<sup>4</sup>

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<sup>1</sup> On Form I-140, Immigration Petition for Alien Worker, the petitioner identifies its type of business as "construction of buildings." However, as discussed in this decision, this description of the petitioner's business is inaccurate.

<sup>2</sup> Section 203(b)(3)(A)(i) of the Act 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 grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

<sup>3</sup> The DOL certified the labor application for a different foreign worker. Upon the filing of its petition on July 9, 2007, the petitioner requested permission to substitute the beneficiary for the original worker named in the labor certification. The regulation at 20 C.F.R. § 656.11(a) prohibits the substitution of an alien labor certification beneficiary after July 16, 2007. Because the petitioner filed the instant petition before the regulation took effect and no other beneficiary obtained lawful permanent resident status based on the labor certification, the director granted the requested substitution.

<sup>4</sup> The instructions to Form I-290B, Notice of Appeal or Motion, which 8 C.F.R. § 103.2(a)(1) incorporates into the regulations, allow submission of additional evidence on appeal. The record in

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the petition's priority date. 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 determining the minimum 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 of an offered position are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" to determine the minimum qualifications for the position. *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 ETA Form 9089 states the following minimum requirements for the offered position of electrician:

- H.4. Education: High School.
- 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: GED [General Educational Development] and 24 months experience.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: None.

This petition involves the substitution of the labor certification beneficiary. The DOL formerly permitted the substitution of beneficiaries. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and

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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, 766 (BIA 1988).

since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

The ETA Form 9089 containing the instant beneficiary's information states that the beneficiary qualifies for the offered position, as of the December 26, 2006 priority date, based on a bachelor's degree, 52 months of full-time employment experience and 35 months of part-time employment experience as an electrician. The labor certification states that the beneficiary worked 20 hours per week as an electrician for [REDACTED] from February 2003 to January 2006. The labor certification also states that the beneficiary worked full-time for 28 months for [REDACTED] from February 7, 2000 to June 20, 2002 and 24 months for [REDACTED] from February 2, 1998 to February 4, 2000.

In addition, the labor certification states that the beneficiary worked full-time for seven months as an electrical engineering specialist for [REDACTED] from July 1, 2002 to January 31, 2003 and full-time for the petitioner in the offered position since October 2007. No other experience is listed.

The labor certification also states that the beneficiary obtained a bachelor's degree in electromechanics from the [REDACTED] in 1997. On December 21, 2007, the beneficiary signed the labor certification, declaring under penalty of perjury that the information about him was true and correct.

The regulation at 8 C.F.R. § 204.5(I)(3)(ii)(A) requires the petitioner to support any experience requirements with letters from employers "giving the name, address, and title of ... the employer, and a description of ... the experience of the alien."

With the petition, the petitioner submitted a June 18, 2006 letter from the manager of human resources of [REDACTED], stating that the company employed the beneficiary as an electrician from February 1, 2003 to January 31, 2006.

In response to the director's Notice of Intent to Deny of November 29, 2007, the petitioner submitted two more experience letters for the beneficiary. A December 17, 2007 letter from a [REDACTED] district manager states that [REDACTED] employed the beneficiary full-time from February 7, 2000 to January 31, 2003. The letter states that the beneficiary worked as an electrician from February 7, 2000 to June 30, 2002, and as an electrical engineering specialist from July 1, 2002 to January 31, 2003.

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<sup>5</sup> The labor certification identifies the employer as [REDACTED]. The letterhead on the employer's experience letter for the beneficiary, however, states [REDACTED].

Also, a December 17, 2007 letter from the department of human resources of [REDACTED] states that [REDACTED] employed the beneficiary full-time as an electrician from February 2, 1998 to February 4, 2000.

As the director found in his February 8, 2008 decision, the letter from [REDACTED] states that the beneficiary performed duties that do not match the job duties of the offered position. The duties indicated in the [REDACTED] letter – which include the design of transmission and distribution lines, the coordination of construction operations, and the writing of engineering specifications - appear to be the duties of an engineer or engineering technician. The duties of the offered position of electrician stated on the labor certification include assembling, installing and maintaining electrical wiring and connecting wires to circuit breakers, transformers and other components. Because the labor certification does not permit experience in an alternate occupation, the experience letter from [REDACTED] does not demonstrate the beneficiary's qualifying experience for the offered position.

The experience letters from [REDACTED] state that the beneficiary performed the job duties of the offered position. But, on Form G-325A, Biographic Information, dated July 19, 2007, the beneficiary states that he worked for [REDACTED] as an electrical engineer from February 2000 to January 2003. The beneficiary's statement on the Form G-325A contradicts the statement in [REDACTED]'s experience letter that it employed the beneficiary from February 7, 2000 to June 30, 2002 as an electrician, and from July 1, 2002 to January 31, 2003 as an electrical engineering specialist. *See Matter of Ho*, 19 I.&N. Dec. 582, 591-92 (BIA 1988) (the petitioner must resolve inconsistencies in the record by independent, objective evidence).

Also, in a combined Notice of Derogatory Information and Notice of Intent to Dismiss the appeal, dated January 4, 2013, the AAO notified the petitioner of a letter in support of an E-2 nonimmigrant work visa petition for the beneficiary that contradicts the experience letters of [REDACTED] and [REDACTED]. The June 20, 2007 letter from the vice president of [REDACTED] states that [REDACTED] employed the beneficiary as an engineer since February 1, 2000. The letter from [REDACTED] vice president contradicts the dates of employment and the job positions stated in [REDACTED]'s experience letter. The letter from [REDACTED] vice president also conflicts with the dates of employment indicated in [REDACTED]. These inconsistencies cast doubt on the beneficiary's claimed qualifying experience. *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 remaining evidence in support of the petition).

Moreover, federal court records show that the petitioner's former counsel, who signed the instant petition and the labor certification accompanying it, pled guilty in 2008 to conspiracy to commit immigration fraud. In a written and signed plea agreement, the petitioner's former counsel admitted that he and his family members operated [REDACTED] and two other staffing companies, supplying foreign electricians to companies in Virginia. Court records state that [REDACTED] "leased" the foreign electricians to the companies in exchange for hourly fees, a portion of which the petitioner's former counsel retained. The petitioner's former counsel admitted that he helped obtain as many as

24 U.S. work visas for aliens by falsely stating that they would work as lifeguards at swimming pools in Virginia. Court records state that the aliens actually worked as electricians upon arrival in the U.S.

In addition, documentation in the E-2 visa petition for the beneficiary identifies one of the three equal owners of ProFourcing as the human resources manager of [REDACTED] who signed the employment experience letter for the beneficiary in the instant case.

Former counsel's fraud, his operation of [REDACTED] the company's furnishing of foreign electricians who fraudulently entered the U.S., and the ownership interest of one of the beneficiary's purported former employers in the company cast further doubt on the validity of the beneficiary's claimed qualifying experience for the offered position. *See Matter of Ho*, 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 response to the AAO's notices, which provided the petitioner with copies of the court records and notified it of the [REDACTED] letter and the ownership interest of the [REDACTED] officer in the company, the petitioner submits a February 1, 2013 letter from its vice president. The vice president states that the petitioner was unaware, at the time, that its former counsel submitted false documents to USCIS. He states that the petitioner fully cooperated with federal prosecutors of the attorney.

The petitioner's vice president states that the petitioner did not learn of [REDACTED] E-2 letter for the beneficiary until it received the AAO's notices. He asserts that the petitioner's former counsel and [REDACTED] vice president submitted the E-2 letter to USCIS<sup>6</sup> and that the letter was "fraudulent." He states that [REDACTED] referred the beneficiary to the petitioner and that the petitioner has employed him in the offered position since 2007. He states that the quality of the beneficiary's work shows that the beneficiary was fully qualified when he began work for the petitioner. The petitioner's vice president states that the company relies on the previously submitted letters from [REDACTED] to demonstrate the beneficiary's qualifications. The petitioner also submits copies of payroll records and Internal Revenue Service (IRS) Forms W-2 Tax and Wage Statements as evidence of its employment of the beneficiary since 2007.

The evidence fails to establish the beneficiary's qualifying experience for the offered position. The statements of the petitioner's vice president do not dispel doubts about the validity of the beneficiary's claimed qualifying experience based on the inconsistencies in the record and former counsel's fraud, as discussed above. Indeed, the vice president's statement that [REDACTED] referred the beneficiary to the petitioner for employment suggests that the beneficiary may have been one of the foreign electricians for whom the petitioner's former counsel arranged fraudulent entries into the U.S. and raises additional doubts about the reliability of the evidence of his qualifications. *See*

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<sup>6</sup> The record shows that the petitioner's former counsel did not sign the E-2 visa petition for the beneficiary and that a different attorney at his firm signed the Form G-28, Notice of Entry of Appearance, included in the E-2 petition.

*Matter of Ho*, 19 I&N Dec. at 591. In its notice, the AAO requested objective, documentary evidence to overcome the inconsistencies in the record. The AAO noted that the petitioner may provide payroll records or other evidence to establish the beneficiary's purported experience. In response, the petitioner has only submitted the experience letters that were discussed in the AAO notice. Therefore, no evidence has been submitted to overcome the inconsistencies in the record.<sup>7</sup>

Because the record lacks sufficient, reliable evidence of the beneficiary's qualifying experience for the offered position, the AAO finds that the petitioner has not established the beneficiary's qualifications for the offered position as set forth on the labor certification.

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. *See* 8 C.F.R. § 204.5(g)(2). The labor certification states the proffered wage as \$23.27 per hour, or \$48,401.60 per year based on a 40-hour work week.

According to USCIS records, the petitioner has filed at least 37 I-140 petitions on behalf of other beneficiaries since 2003.<sup>8</sup> Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages of relevant beneficiaries from the priority date of the instant petition until the beneficiaries obtained lawful permanent resident status, or until their petitions were withdrawn, denied or revoked. *See* 8 C.F.R. § 204.5(g)(2); *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence of record does not establish: the priority date, proffered wage or wages paid to each relevant 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. The AAO requested this evidence in its notice, but the petitioner failed to provide the requested evidence in its response. The regulation at 8 C.F.R. § 204.5(g)(2) states that USCIS may request additional evidence of the petitioner's ability to pay the proffered wage in appropriate cases. Although specifically and clearly requested, the petitioner declined to provide the requested information about its other I-140 beneficiaries. This information would have indicated the total amount of proffered wages it must have the ability to pay. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Thus, the AAO

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<sup>7</sup> The petitioner also submitted a diploma, transcripts, Romanian licenses, and professional certificates of the beneficiary. These documents, however, cannot establish the beneficiary's employment experience, as they do not confirm his employment.

<sup>8</sup> USCIS records show that 18 of the petitions were filed in the petitioner's name, while 19 were filed in the name of its wholly-owned subsidiary in [REDACTED]. The labor certification accompanying the instant petition identifies [REDACTED] as the area of intended employment. The petitioner's vice president states that it filed the petition for its subsidiary in [REDACTED], which he claims has the same federal employer identification number (FEIN) as the petitioner. *See* 20 C.F.R. §§ 656.3, 656.17(i)(5)(i) (for labor certification purposes, the DOL considers entities with the same FEINs to be the same "employer"). The petitioner's name and FEIN appear on copies of the beneficiary's W-2 tax and wage statements from 2007 through 2011.

concludes that the petitioner has not established its continuing ability to simultaneously pay the proffered wages of the instant beneficiary and the relevant 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 director 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 (9<sup>th</sup> 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 the beneficiary's qualifications for 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. The AAO also finds that the petitioner has not established its continuing ability to pay the beneficiary's proffered wage from the priority date onward.

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.