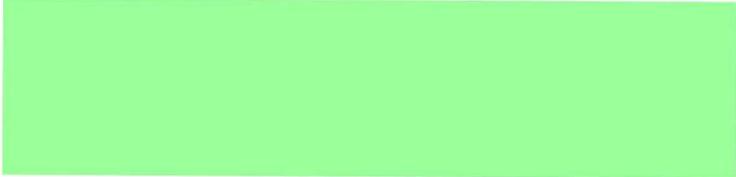




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 26 2013 OFFICE: NEBRASKA 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, Nebraska Service Center (director), initially approved the petition for the employment-based immigrant visa petition. On further review of the record, the director revoked the approval of the petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

On the petition, the petitioner describes itself as a [REDACTED]” The petitioner did not respond when asked when it was established, or how many employees it had. It seeks to permanently employ the beneficiary in the United States as a pastoral assistant. 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).²

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 August 14, 2003. See 8 C.F.R. § 204.5(d).

The director’s decision revoking the petition’s approval concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date. Specifically, the director found that the record contained several inconsistencies which rendered the record unreliable. 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 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.³

¹ On the Form ETA 750, Part A, the petitioner described itself as a “non profit religious organization and school.”

² 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.

³ 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 provides no reason to preclude consideration of any of the documents newly submitted on appeal.

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:

EXPERIENCE: Two (2) years in the job offered or in the related occupation of a pastoral assistant.

OTHER SPECIAL REQUIREMENTS: None.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a pastoral assistant with the Central Board of Education, in [REDACTED] from January 1997 through March 2000. No other experience gained before the priority date 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,

See Matter of Soriano, 19 I&N Dec. 764 (BIA 1988).

address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The first employment verification letter submitted into the record from the Central Board of Education was written by [REDACTED], Executive Secretary, and was dated September 7, 2001. The letter is signed and a seal was applied to the signature. This letter states that the beneficiary “worked as a religious teacher” from January 1997 through August 2001 at [REDACTED] Secondary School. However, the letter does not discuss any training or experience that the beneficiary would have gained during his employment. Additionally, the letter, which is written by the Executive Secretary of the Central Board of Education, does not explain how the author has any knowledge of training or experience gained at [REDACTED] Secondary School, nor does the letter explain any connection between these entities. Furthermore, the dates of employment listed on the letter were inconsistent with the dates claimed by the beneficiary on the Form ETA 750.

The director issued a Notice of Intent to Revoke (NOIR) the petition’s approval, noting several inconsistencies in the record. Among these inconsistencies were the divergent dates of employment noted above. In response, the petitioner provided a new employment verification letter dated March 28, 2003. This letter stated that the beneficiary was employed by the Central Board of Education as a teacher and pastoral assistant from January 1, 1997 through March 1, 2000. The letter does not mention anything about [REDACTED] Secondary School. Although the letter contains a signature of someone purporting to be the Executive Secretary, it does not bear the seal present on the prior letter.

The director found that the petitioner failed to adequately address the inconsistencies in the beneficiary’s employment history, and revoked the petition’s approval accordingly. On appeal, counsel asserts that the two letters are not inconsistent. Counsel argues that the first letter states that the beneficiary was employed as a “religious teacher” from January 1997 through August 2001, while the second letter states that the beneficiary was employed as a “pastoral assistant *and* teacher” from January 1997 through March 2000. Counsel asserts that the beneficiary worked only as a teacher from March 2000 through August 2001.

Nothing in the record aside from counsel’s argument supports this claim. We first note that 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). Next we note that even if counsel’s assertion could be supported by the record, the letters fail to establish that the beneficiary possessed two years of experience in the proffered job of a pastoral assistant. Counsel suggests that the beneficiary’s duties were split between teaching and being a pastoral assistant but nothing in the record suggests what percentage of time was devoted to each field. Thus, it is not demonstrated from the letters and counsel’s argument that the beneficiary had the required minimum experience in the proffered job.

Additionally, the letters fail to adequately address who actually employed the beneficiary during the alleged dates. From the record, it is not demonstrated that the beneficiary worked for the Central Board

of Education as claimed on the labor certification. If the Central Board of Education employed the beneficiary, no letter from a trainer or supervisor, who had knowledge of the beneficiary's training and experience, with that organization was submitted into the record. Additionally, no explanation was provided as to why one document would bear an official seal, while the second letter bore none.

The director's revocation noted more inconsistencies than those present in the employment verification letters. The director noted that a site visit was conducted by USCIS officers on August 9, 2007, however, the petitioner's doors were locked, and officers could not gain admittance. USCIS later interviewed the petitioner's president with counsel. However, during the interview, when asked for evidence necessary for the petition's approval, the president appeared to be completely unaware of the petitioner's organization and operations. Counsel claimed the president's lack of knowledge was due to the presidency changing hands every two years. However, on appeal, counsel states that the presidency changes hands every three years.

The record does not contain any evidence establishing that the presidency actually changes on a regular schedule, nor when the president interviewed by USCIS officer assumed responsibilities. Neither scenario explains how the leader of an organization would be completely ignorant of basic aspects of the petitioner's operations.

Also, the president was asked for various documents and evidence needed to support the petition, among which was a list of employees. The petitioner, through counsel, responded with a list of five employees. However, a review of USCIS records shows that while this petition was active, the petitioner has had at least fourteen I-129 petitions, five I-140 petitions, and eight I-360 petitions filed with USCIS. The number of employment based visa petitions filed by the petitioner and the number of employees it claims to employ are inconsistent. Nothing was provided to address this inconsistency.

Beyond the decision of the director,⁴ 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).

As noted above, according to USCIS records, the petitioner has filed fourteen I-29 petitions, five I-140 petitions, and eight I-360 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages or provide support 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).

We note that the evidence in the record does not document the priority date, proffered wage or proof of support, or wages paid to each beneficiary, whether any of the other petitions have been withdrawn,

⁴ 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).

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.

We note that the record contains copies of the checks purportedly from the petitioner to the beneficiary. However, the record contains no evidence that these checks were cashed or were for salary or wages.

Therefore, the petitioner has failed to establish that it possessed the continued ability to pay the proffered wage from the priority date onward.

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.

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.