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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 27 2013

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

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 describes itself as a residential management business. It seeks to permanently employ the beneficiary in the United States as a maintenance repairer/worker. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).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 December 13, 2007. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the 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.²

On appeal, counsel asserts that the director's denial was based on an issue not previously stated in the director's prior Notice of Intent to Deny (NOID). The regulation at 8 C.F.R. § 103.2(b)(8) clearly states that a petition shall be denied "[i]f there is evidence of ineligibility in the record." The regulation does not state that the evidence of ineligibility must be irrefutable. Where evidence of record indicates that a basic element of eligibility has not been met, it is appropriate for the director to deny the petition without a request for evidence. If the petitioner has rebuttal evidence, the administrative process provides for a motion to reopen, motion to reconsider, or an appeal as a forum for that new evidence. In the present case, the evidence indicated that the petitioner failed to establish the beneficiary possessed the requisite experience for the proffered position. Accordingly,

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.

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 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).

the denial was appropriate, even though the petitioner might have had evidence or argument to rebut the finding.

Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

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:

- H.4. Education: None required.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months in the job offered as a maintenance repairer/worker.
- 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: "Please note that the position DOES NOT require the alien to live on the employer's premises. The Employer is a company that owns and manages a large apartment complex. The position that is being offered is for a maintenance repairer/worker for the apartment complex. The Employer is a residential management company and the alien does not have any ownership interest in the company. The alien pays rent to live at the apartment complex and lives there out of convenience, not as a requirement of the position."

The labor certification also states that the beneficiary qualifies for the offered position based on the following experience:

- A part-time maintenance/repair worker for an individual in Maryland from October 2000 until April 2001, and from March 1999 until October 2000
- A maintenance repairer with the [REDACTED] in the District of Columbia from October 2000 until November 2007
- A maintenance worker with [REDACTED] in the Philippines from June 1998 until January 1999
- A repairer/worker with [REDACTED] in the Philippines from June 1995 until December 1997.

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(1)(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 a copy of an experience letter dated April 10, 2001 from the proprietor of [REDACTED] stating that the company employed the beneficiary as a construction worker from June 1995 until December 1997. The letter is on plain paper, and is not on company stationery. The letter does not indicate whether the position was full- or part-time, or provide a detailed description of duties. Therefore, this letter does not meet the regulatory requirements for an experience letter.

On appeal, counsel submits a copy of a second experience letter from the [REDACTED] dated December 28, 2012. This letter is on [REDACTED] letterhead, confirms the

beneficiary's employment dates and position title, and provides a description of the beneficiary's job duties. The employer states that the beneficiary's duties included "using, maintaining and cleaning that various tools used to construct and repair building structures; putting up and taking down scaffoldings; cleaning work areas; mixing construction material to right consistency" The beneficiary's experience as a construction worker does not appear to match the proffered job description as a maintenance repairer/worker. Therefore, the AAO is prevented from considering this experience as qualifying the beneficiary for the proffered job. It is also noted that the petitioner indicated on Part H.10. of the labor certification that experience in an alternate occupation is not acceptable. To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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). Because this experience appears to be as a construction worker, constructing and repairing buildings, it does not appear to document the experience in the position offered, maintenance repairer/worker.

The record contains a copy of an experience letter from the current president of [REDACTED] of [REDACTED] on letterhead, dated December 28, 2012, stating that the institution employed the beneficiary as a maintenance worker from June 1, 1998 until January 31, 1999. The letter contains only a vague description of the beneficiary's duties. This letter would only document eight months of experience.

The record also contains a copy of an experience letter, dated March 23, 2001, an administrative officer on [REDACTED] letterhead stating that the institution employed the beneficiary as "Maintenance" from June 1998 until January 1999. Pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A), the letter does not meet the regulatory requirements because it fails to contain a description of the beneficiary's duties or experience.

The record contains a copy of an experience letter from an individual confirming that the beneficiary worked for him part-time at his personal residence in Maryland from March 1999 to October 2000. The letter provides a vague description of the beneficiary's job duties, stating "gardening and minor repairs to the house and adjoining structures;" these duties do not appear to be the same duties as those required for the position offered. It is unclear that maintenance to a personal residence would be similar to the position offered, which is as a maintenance/repairer worker for an apartment complex.

Based on the above, the beneficiary's experience fails to total the required 24 months of experience in the job offered as a maintenance repairer/worker. The record fails to contain any other experience letters.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary

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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 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 appeal is dismissed.