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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

[Redacted]

DATE: OFFICE: TEXAS SERVICE CENTER FILE: [Redacted]

MAR 18 2013

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[Redacted]

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 employment-based preference visa petition was initially approved by the Director, Texas Service Center. In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a restaurant. It seeks to permanently employ the beneficiary in the United States as a specialty cook. The petitioner requests classification of the beneficiary as a 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 March 14, 2001. See 8 C.F.R. § 204.5(d).

The director's decision revoking the approval of 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 submits a brief; corporation documentation for the beneficiary's qualifying Brazilian employer; paycheck stubs for the beneficiary; a new experience letter for the beneficiary; and copies of documentation previously provided.

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 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 *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *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: None.

High School: None.

College: None.

College Degree Required: None.

Major Field of Study: None.

TRAINING: None.

EXPERIENCE: Two (2) years in the job offered.

OTHER SPECIAL REQUIREMENTS: None.

The labor certification describes the proffered position as:

Prepares fillets, sautees, grills and cooks pasta and American specialty dinners and desserts. Prepares and cooks meats and seafood.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a specialty cook with [REDACTED] in Malden, Massachusetts from October 8, 1999 until November 11, 2000; and as a cook with [REDACTED] in Itaperuna, Rio de Janeiro, Brazil from January 1993 until February 1998. 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] General Manager, on [REDACTED] letterhead stating that the company employed the beneficiary as a chef from January 4, 1993 until February 21, 1998. However, the letter does not state if the job was full-time. Additionally, the director raised concerns because the business did not have a Cadastro Nacional da Pessoa Juridica (CNPJ).³ In support of the beneficiary's experience letter the petitioner submitted company information from an unnamed source indicating that the company was registered and active. The CNPJ number is listed in different font and is also handwritten as [REDACTED]. On appeal, the petitioner submits an inquiry with the Junta Comercial do Estado de Rio de Janeiro (JUCERJA) indicating that the business is inactive and is not registered as a small business company or microenterprise. As noted by the director, the CNPJ submitted by the petitioner for [REDACTED], does not exist in the CNPJ database. It is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. at 591-592.

On appeal, counsel submits an article written by Mariza Teofilo concerning the Brazilian Economy and usual registration practices with the CNPJ of small businesses. Counsel contends that the article establishes that the concerns the director had over the CNPJ number would not necessarily mean that the business did not exist. However, on appeal counsel submits a Registration Receipt of Cadastral Situation from the Governo Do Estado Do Rio de Janeiro indicating that [REDACTED] was registered on November 1, 1977 and had its trade registration canceled on September 1, 1979; however, the state registration number (NIRE) on this document, [REDACTED], does not match

³ The CNPJ is a unique number given to every business registered with the Brazilian authority. In Brazil, a company can hire employees, open bank accounts, buy and sell goods only if it has a CNPJ. The Department of State has determined that the CNPJ provides reliable verification with respect to the adjudication of employment-based petitions in comparing an individual's stated hire and working dates with a Brazilian-based company to that Brazilian company's registered creation date. The CNPJ database can be accessed online at <http://www.receita.fazenda.gov.br/>.

the NIRE number found on JUCERJA's database, NIRE number [REDACTED] and the address, [REDACTED], does not match the address for the business given on the experience letter, [REDACTED]. It is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. at 591-592. Furthermore, the documentation shows that the business has been inactive since 1979. Given the inconsistencies in the record and the lack of independent, objective evidence such as a Brazilian work book, social security records, or other documentary evidence of the beneficiary's employment, municipal tax or license records, utility bills, bank records, or other indicia of the Brazilian employer's operation during the time of the qualifying employment, the AAO finds that the evidence submitted does not establish that the beneficiary was employed by [REDACTED].

The record also contains an experience letter from [REDACTED] Owner, on [REDACTED] letterhead stating that the company employed the beneficiary as a cook from October 1999 until November 2000. Attached to the letter is a secondary letter from [REDACTED] reiterating the information in the experience letter and stating that his father, [REDACTED] owned [REDACTED] which is now closed. However, the letter does not state that the job was full-time. Even if the experience letter were accepted as evidence of full-time employment, it would only account for one (1) year of relevant experience.

On appeal, counsel submits an experience letter from [REDACTED], Owner, stating that [REDACTED], which is now closed, employed the beneficiary as a cook from March 1, 1998 until July 1, 1999. The letter does not state that the job was full-time. The beneficiary failed to list the claimed qualifying experience with [REDACTED] on the labor certification. The Form ETA 750 requires the beneficiary to list any prior employment that qualifies him for the proffered job. By completely excluding his experience with [REDACTED] on the labor certification, the beneficiary implicitly indicates that his experience, outside his claimed experience with [REDACTED] and [REDACTED], did not involve job duties relevant to the position of specialty cook. 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. Further, the experience letter is inconsistent with information provided by the beneficiary on a Form G-325, Biographic Information, submitted in connection with an Application to Register Permanent Residence or Adjust Status (Form I-485). While the beneficiary listed employment at the same address provided on the experience letter, he indicated that he was employed by "[REDACTED]." Moreover, counsel submits paycheck stubs for the beneficiary which reflect that the beneficiary was employed by "[REDACTED]" at the address provided on the experience letter. It is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. at 591-592. Given the inconsistencies in the record and the lack of independent, objective evidence, the AAO finds that the evidence submitted does not establish that the beneficiary was employed full-time by [REDACTED] for one year.

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.

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.⁴ If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967).

The record before the director closed on June 19, 2009 with the receipt by the director of the petitioner's submissions in response to the director's notice of intent to revoke. As of that date, the petitioner's 2008 federal income tax return was the most recent return available. However, the record does not any contain annual reports, federal tax returns, or audited financial statements for the petitioner for 2001 through 2008. The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

Additionally, in the instant case, the Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, issued to the beneficiary from the petitioner in 2003 indicates that the petitioner did not pay the beneficiary the full proffered wage. Furthermore, according to USCIS records, the petitioner has filed multiple I-140 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages 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). The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or

⁴ See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010).

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.

The petitioner also has not established that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage considering the totality of the circumstances.⁵ Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

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

⁵ The petitioner submitted its 2000 tax return; however, its net income and net current assets for 2000 were not equal or greater to the proffered wage and the gross income and wages paid do not reflect an ability to pay the proffered wage.