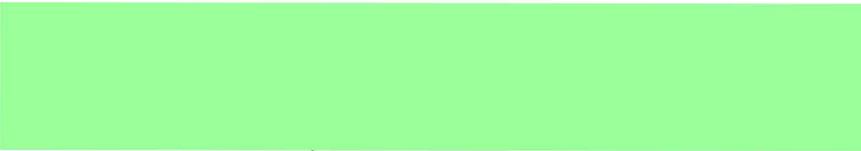


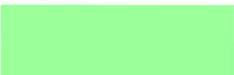


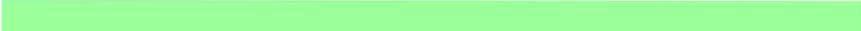
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 27 2013** OFFICE: NEBRASKA SERVICE CENTER

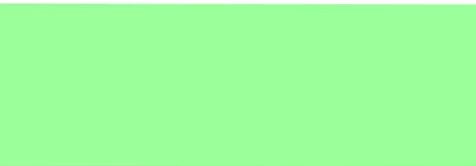
FILE: 

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), 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 bakery. It seeks to permanently employ the beneficiary in the United States as a pastry decorator. 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).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).² The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 30, 2001. *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.³

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. 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.

² This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. 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 since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

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. *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 *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: None.

TRAINING: None.

EXPERIENCE: Two (2) years in the job offered or two (2) years in the related occupation of baker, pastry decorator, bakery finisher, or cake decorator.

OTHER SPECIAL REQUIREMENTS: None.

The petitioner did not provide a Form ETA 750B for this beneficiary, and consequently an evaluation of the beneficiary’s minimum experience as listed on the labor certification is not possible.⁴

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

⁴ In a Notice of Intent to Deny (NOID) dated February 13, 2009, the director specifically requested a completed Form ETA 750B for the instant beneficiary. Although counsel, in his March 12, 2009, response to the NOID, references that Form ETA 750B was included, no Form ETA 750B was submitted for the beneficiary.

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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], Manager on [REDACTED] letterhead, with the address of “[REDACTED] Kadi Dist-Mehsana.” The letter is dated August 9, 2004, and states that an entity named [REDACTED] employed the beneficiary as a baker and pastry decorator from March 1996 until November 1998.

The director informed the petitioner that a consular investigation had taken place. In its decision, the director misspelled the employer’s business as “[REDACTED]” However the actual consular investigation bears the correct spelling. The investigation states that [REDACTED] does exist at Kadi, Hesana, and the sole owner’s name is [REDACTED]. In a telephonic interview with an investigator, [REDACTED] stated he was the sole owner for the past 25 years. According to [REDACTED] no one named [REDACTED] has ever worked there. Furthermore, [REDACTED] states that the beneficiary never worked at that establishment, nor did he provide an experience letter on the beneficiary’s behalf.

On appeal, counsel asserts that the petitioner was prejudiced by not having more precise information regarding the consular investigation. Counsel suggests that the incorrect spelling of the shop could mean the consular investigator contacted the wrong business.

In response to the director’s NOID, the petitioner submitted an affidavit signed by [REDACTED] co-owners, [REDACTED]. The [REDACTED] affidavit states that [REDACTED] was employed at their business until November 2004, and that he was authorized to write the prior experience letter. The affidavit states that the original owner, [REDACTED] died in December 1999, and the undersigned sons took over the business at that time. This affidavit is inconsistent with the consular investigation in several places. First, the investigator was told that [REDACTED] was the sole owner of the business, and had been such for 25 years. Additionally, the experience letter in the record states the beneficiary was employed by [REDACTED] not “[REDACTED]”

The beneficiary also provided an affidavit, wherein he recalls a conversation with [REDACTED]. According to the affidavit, [REDACTED] told the beneficiary he had not been approached by an investigator. The beneficiary’s affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). 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)).

With the appeal, the petitioner provided an English language translation and what appears to be an original Certificate for Registration of Firm. The name of the business on this form is [REDACTED] not [REDACTED]. The petitioner also provided several color photographs of a shop in what could be India. The pictures show bakery items, but do not show any decorated cakes. This is inconsistent with the experience claimed in the employment verification letter which describes the beneficiary's use of icing to decorate and "form designs on cake."

Doubt cast on any aspect of the petitioner's proof may, of course, 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 (BIA 1988).

Furthermore, we note that the petition purports to be accompanied by an application for labor certification with the DOL/ETA Case Number 5TGE-I RF. A copy of the certified labor certification bearing that number is in the file. However, that labor certification bears the information for a different beneficiary. Although the file contains a request for substitution, it does not contain an updated Form ETA 750B with the instant beneficiary's claimed experience and signature.

The substitution of beneficiaries was formerly permitted by the DOL. 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 since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution may be permitted. However, the petitioner failed to provide an original Form ETA 750B signed by the petitioner and beneficiary.

As noted above, the petitioner has not claimed any valid experience on the Form ETA 750B gained by the beneficiary prior to the priority date. The information in the letter submitted with the petition cannot be verified.

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 AAO also finds that the beneficiary provided fraudulent evidence in an attempt to show he met the minimum experience requirements as laid out on the application for labor certification. The AAO finds that the beneficiary provided the evidence in an attempt to gain an immigration benefit. *See* section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

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.

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ORDER: The appeal is dismissed.