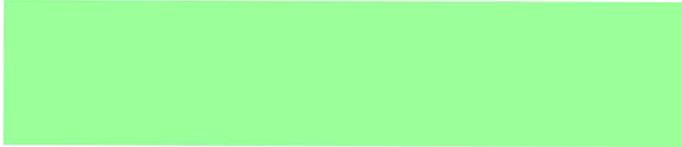
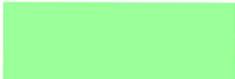




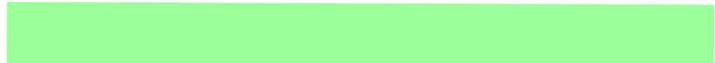
U.S. Citizenship  
and Immigration  
Services

(b)(6)



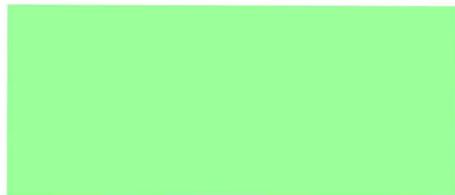
DATE: OFFICE: NEBRASKA SERVICE CENTER FILE: 

**MAR 29 2013**

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 employment-based preference visa petition was initially approved by the Director, Nebraska Service Center. 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 describes itself as a motel. It seeks to permanently employ the beneficiary in the United States as a motel maintenance repairer. 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>1</sup>

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).<sup>2</sup> The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is May 25, 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.

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<sup>1</sup> 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.

<sup>2</sup> 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.

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>3</sup>

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:

EDUCATION

Grade School: None.

High School: None.

College: None.

College Degree Required: None.

Major Field of Study: None.

TRAINING: None.

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<sup>3</sup> 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).

EXPERIENCE: Two (2) years in the job offered or in the related occupation of maintenance repair (industrial setting)

OTHER SPECIAL REQUIREMENTS: None.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a maintenance repairman with [REDACTED] in India from October 1994 until November 2002. The beneficiary signed the Form ETA 750B on July 2, 2007 and also listed experience as a maintenance repairer with [REDACTED] in India from "October 2006 to the present." 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 dated July 2, 2007 signed by [REDACTED] managing director on [REDACTED] letterhead stating that the company employed the beneficiary as a maintenance repairman from October 1994 to November 2002. The letter states that the beneficiary primarily oversaw all plumbing-related aspects related to keeping the water system within specified temperatures and electrical matters related to ensuring that machinery and equipment functioned properly and electrical currents and power supplies were correctly aligned. The record contains an undated second letter executed by [REDACTED] manager on [REDACTED] letterhead restating that the beneficiary worked as a maintenance repairman from October 1994 to November 2002. The letter states that the beneficiary's duties involved "all plumbing related works related to this industry and its production."

The AAO notes that the letters from [REDACTED] provide inconsistent information regarding the beneficiary's plumbing duties. The letter dated July 2, 2007 states that the beneficiary's plumbing duties were primarily related to keeping the water system within specified temperatures and the second letter states that the beneficiary's duties involved all plumbing related work. Further, the information in the letters is inconsistent with the U.S. Embassy in New Delhi, India memorandum dated April 6, 2010. The memorandum states that during an interview on January 25, 2010, the beneficiary stated through an interpreter that he had no experience as a plumber and that he worked in auto sales, drove a taxi, and was a farmer. The embassy was not able to verify the beneficiary's employment as a maintenance repairman because no one answered the company's telephone number or the phone number listed for his current employer. The memo stated that the beneficiary had no evidence of his maintenance experience in support of the petition.

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 also contains letters on [REDACTED] letterhead. These employment letters reflect experience obtained after the priority date and therefore any experience obtained cannot be considered. Further, the beneficiary's employment with [REDACTED] was not listed in the Form ETA 750B. 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.

The record also contains an affidavit dated June 21, 2010 from the beneficiary stating that he is an independent contractor who works as a plumber and maintenance worker. The beneficiary also stated that he worked in various jobs on a part-time basis including auto sales, driving a taxi, and farming ancestral land inherited from his father. The beneficiary asserts that he has years of experience working as a plumber both full-time and part-time and refers to the employment letters in the record as evidence of his work experience. The beneficiary states that there was some miscommunication that occurred during his interview and that he must have misunderstood the questions asked. Although the beneficiary refers to the employment letters as evidence of his past and current employment, the Embassy's memorandum states that it was unable to verify the beneficiary's current and past employment. The record contains no independent objective evidence such as employment records or paystubs of the beneficiary's employment as a plumber or maintenance repairman.

On appeal, the petitioner, through counsel, references evidence submitted in response to the director's NOIR and restates arguments previously raised in the brief submitted in response to the NOIR. In his brief, counsel submits new telephone numbers for the beneficiary's employers and states that the numbers were changed. Counsel states that the new employer letters list the employer's current phone numbers. The record contains no statements from the employers saying that the phone numbers were changed or provide a reason for the change. The petitioner did not submit new objective independent evidence of qualifying employment following the NOIR from [REDACTED] or on appeal.<sup>4</sup> Thus the AAO finds that the petitioner has not overcome the inconsistencies raised by the overseas investigation with independent objective evidence. 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). Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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<sup>4</sup> The second letter from [REDACTED] is undated and does not meet the regulatory requirement of 8 C.F.R. § 204.5(g)(1) in that it does not list the name of the signatory, which is illegible. The beneficiary's affidavit dated June 21, 2010 is neither objective or independent evidence. The experience from [REDACTED] is not relevant as it is after priority date.

(b)(6)

Page 6

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 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.