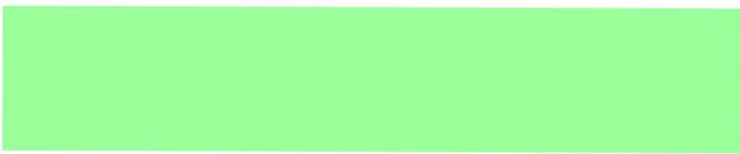


(b)(6)

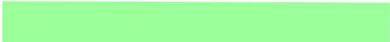
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



DATE: **MAY 08 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a IT consulting and related services business. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that a bona fide employer-employee relationship will exist between the petitioner and the beneficiary. The director also found that the labor certification failed to indicate that the beneficiary may work in unanticipated locations, and that the petitioner failed to require the proper prevailing wage determination and post proper notice to U.S. citizens as required by 20 C.F.R. § 656.17. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely 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.

As set forth in the director's October 31, 2011 denial, the issues in this case include whether or not a bona fide employer-employee relationship exists between the petitioner and the beneficiary and whether or not the petitioner provided adequate notice of the beneficiary's work location and obtained a proper prevailing wage determination.

Counsel stated on the Form I-290B, Notice of Appeal that he would submit a brief in 30 days. As of the date of this decision, more than 17 months later, the AAO has not received any additional evidence from counsel or from the petitioner. Therefore, the record is complete.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), provides that "the term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

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>1</sup>

---

<sup>1</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 the regulation at 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).

It is unclear that the petitioner will be the beneficiary's employer and was authorized to file the instant petition. The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." In addition, the Department of Labor (DOL) regulation at 20 C.F.R. § 656.3<sup>2</sup> states:

*Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation. employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification can not be granted for an *Application for Permanent Employment Certification* filed on behalf of an independent contractor.

In this case, the petitioner has failed to establish what company would actually employ the beneficiary. On the Form I-140, the petitioner describes itself as an IT consulting and related services company and its tax returns state that its business activity is "outsourcing" and its product or service is "personnel."

Whether the petitioner is a U.S. employer is material to the benefit sought, as only a U.S. employer may petition for an immigrant worker. Form I-140, Petition for Immigrant Worker, may only be filed by a U.S. employer. 8 C.F.R. § 204.5(c) ("[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section ... 203(b)(3)"). This applies to professional workers. 8 C.F.R. § 204.5(l)(1) ("any United States employer may file a petition on Form I-140 for classification of an alien under [Immigration and Nationality Act] section 203(b)(3) as a skilled worker, professional, or other (unskilled) worker.")

Prior to filing Form I-140, the U.S. employer must obtain a labor certification. INA § 203(b)(3)(C) ("Labor certification required. An immigrant visa may not be issued to an immigrant ... until the consular officer is in receipt of a determination made by the Secretary of Labor"); 8 C.F.R. §204.5(a)(2) (I-140 petition must be accompanied by an approved individual labor certification).

As the Form I-140 can only be approved in this circumstance if it is accompanied by an approved labor certification, USCIS may rely on the definition of employer utilized by the Department of

---

<sup>2</sup> The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

Labor (DOL) during the permanent labor certification process. An employer permitted to utilize the labor certification process is a “person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States.” 20 C.F.R § 656.3 (definition of “Employer”). An employer “must possess a valid Federal Employer Identification Number (FEIN).” *Id.* Further, DOL excludes certain entities from the definition of an employer, including “[p]ersons who are temporarily in the United States.” *Id.* Thus, an employer eligible to obtain a labor certification for permanent employment on behalf of a foreign worker must be physically located in the U.S. not on a temporary basis, and possess a FEIN.

In the present matter, it is unclear that the petitioning employer would be the beneficiary’s actual employer. In considering whether or not one is an “employee,” U.S. Citizenship and Immigration Services (USCIS) must focus on the common-law touchstone of control. The common law definition of the master-servant relationship, which focuses on the master’s control over the servant. The definition of “servant” in the Restatement (Second) of Agency § 2(2) (1958): “a servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of services is subject to the other’s control or right to control.”<sup>3</sup> The Restatement additionally lists factors for consideration when distinguishing between servants and independent contractors, “the first of which is ‘the extent of control’ that one may exercise over the details of the work of the other.” *Id.* (citing § 220(2)(a)).

The record contains no evidence that the petitioner will exercise any control over the beneficiary’s work. In its response to the director’s notice of intent to deny (NOID) dated July 25, 2011, the

---

<sup>3</sup> Section 220, Definition of a Servant, in full states:

- (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.
- (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
  - a. The extent of control which, by the agreement, the master may exercise over the details of the work;
  - b. Whether or not the one employed is engaged in a distinct occupation or business;
  - c. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
  - d. The skill required in the occupation;
  - e. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
  - f. The length of time for which the person is employed;
  - g. The method of payment, whether by the time or by the job;
  - h. Whether or not the work is a part of the regular business of the employer;
  - i. Whether or not the parties believe they are creating the relation of master and servant; and
  - j. Whether the principal is or is not in business.

petitioner stated that the beneficiary will work off-site and possibly out-of-state for the petitioner's clients. The petitioner has not established that the beneficiary will continue to work under any of the contracts between the petitioner and its clients in the record and therefore, the AAO is unable to determine whether or not the beneficiary will work under the control of the petitioner or the petitioner's clients. From the record, it is unclear that the petitioner will be the beneficiary's actual employer. In his decision denying the petition, the director stated that the petitioner left the Part 6 – 4 field blank on the Form I-140. That question asked the petitioner to list the address where the beneficiary would work if the address was different from the address in Part 1. The petitioner also listed the beneficiary's primary work site on the ETA Form 9089 as the petitioner's headquarter's address. The director notes that the Form I-140 and ETA Form 9089 do not indicate that the beneficiary will work at unanticipated locations or off-site.

In his decision, the director also noted that the address provided by the petitioner is for a "virtual office" leased by the petitioner. The director stated that the beneficiary would not be able to work at a virtual office and that the record does not provide evidence that the petitioner obtained the correct prevailing wage determination and posted proper notice to U.S. citizens. In his response to the director's NOID, the petitioner stated that only four of its 19 employees work in Colorado and did not state that any employees work at its headquarter's address.

The director further notes that although the job postings indicate that the applicant must be able to accept unanticipated assignments anywhere in the U.S., the labor certification did not provide the same information and USCIS cannot ignore the terms of the labor cert or impose additional requirements.

In response to the NOID, the petitioner quoted from *Matter of Amsol, Inc.*, (BALCA, Sept. 3, 2009) stating that when the work location is unanticipated, the filing location is at the petitioner's main or headquarter's office. The petitioner's quote references Employment and Training Administration (ETA) memorandum no. 48-94 (May 16, 1994). Although not noted in the petitioner's response to the director's NOID, the ETA memorandum quoted also states that Part A, Item 7 of the ETA Form 9089 should indicate that the beneficiary will be working at various unanticipated locations in the U.S. and a short statement should be included explaining why the locations cannot be anticipated at the time of filing. The petitioner did not indicate that the beneficiary would be working at various locations on the labor certification and it did not submit a statement indicating why the work locations could not be anticipated at the time of the filing. Therefore, the petitioner did not comply with the requirements in the memo.

In evaluating 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 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.

Finally, the director determined that the petitioner had not established that a bona fide employer-employee relationship will exist between the petitioner and the beneficiary.

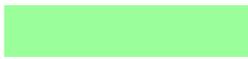
The petitioner asserts that USCIS has already determined that the petitioner has control over the beneficiary's work since USCIS has approved an H-1B petition for the beneficiary in the past. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. USCIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither USCIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

In addition, the petitioner has filed Form I-129 and Form I-140 petitions for more workers. The petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

Although the Consulting Agreement in the record states that [REDACTED] will not treat consultants as employees for tax purposes, nothing in any of the agreements with [REDACTED] indicates that the petitioner will retain control and direction over the beneficiary's work; in fact, the Professional Services Agreement states that "consultants will perform work as specified by [REDACTED]"

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.

(b)(6)



Page 7

**ORDER:** The appeal is dismissed.