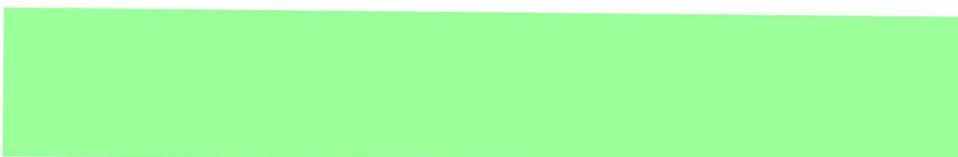


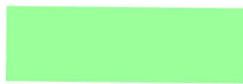
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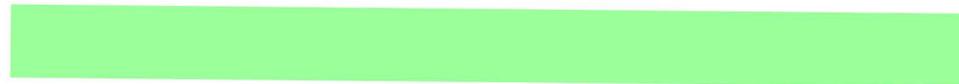
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

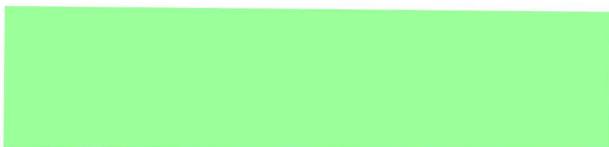


DATE: **MAY 3 1 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: 

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 visa petition was initially approved by the Director, Nebraska Service Center (director). The director subsequently 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 subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion to reopen and motion to reconsider. The motions will be granted, the previous decision will be affirmed, and the petition remains revoked.

The petitioner describes itself as a bakery and ice cream store. It seeks to permanently employ the beneficiary in the United States as a manager. 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). 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 revoking the approval of the petition concludes that the petitioner did not establish that the beneficiary possessed the minimum experience required to perform the offered position by the priority date. The AAO affirmed the director's decision on March 18, 2013.

The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy. Specifically, the petitioner provided a new affidavit from the beneficiary's claimed former employer and asserted that the AAO had incorrectly based its decision upon derogatory information.

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 motion.²

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 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 requires a minimum of two years of experience as a manager of a bakery and ice cream store. The labor certification also states that the beneficiary qualifies for the offered position based on her experience as a manager at [REDACTED] India, from December 1994 through August 1999. The beneficiary also claims on the Form ETA750B signed on February 2, 2003, to have worked as a manager for [REDACTED] DBA [REDACTED] Illinois, since February 2000. 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 a May 21, 2003, employment letter on [REDACTED] letterhead signed by [REDACTED] Mr. [REDACTED] states that the beneficiary worked there as a store manager since March

2000, but did not identify his own position with the company. The letter does not indicate that the beneficiary worked full-time as a manager since March 2000. The letter does not state the title of the author, nor does it offer a description of the beneficiary's work experience; therefore, the letter does not meet the regulatory requirements detailed at 8 C.F.R. § 204.5(l)(3)(ii)(A). The petitioner's motion did not address the deficiencies in this documentation.³

The record also contains a September 23, 1999, experience letter on letterhead from [REDACTED] and signed by [REDACTED] who was identified as the "Manager, Administration." This letter asserts that the beneficiary worked at [REDACTED] "as a Food Service Manager from December 1994 to August 1999." However, the record also contains a facsimile letter dated February 14, 2007, from [REDACTED] who identifies himself as General Manager of [REDACTED] India. Mr. [REDACTED] states that "no one by name Mr. [REDACTED] Manager Administration has worked with us."

On April 29, 2009, the director issued a Notice of Intent to Revoke (NOIR) in which he advised the petitioner of the derogatory information regarding the beneficiary's experience letter. The director reminded the petitioner that the burden of proof in these proceedings rests solely with the petitioner and pointed out that doubt cast on any aspect of the petitioner's proof may 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).

In response to the NOIR, the petitioner submitted a statement from the beneficiary. The beneficiary explained that she "never claimed to be working at the main [REDACTED]" However, the beneficiary's statement is at variance with the labor certification, on which she claimed "[REDACTED]" as her employer from December 1994 through August 1999.

The director concluded that the petitioner had failed to overcome the derogatory evidence and, therefore, had failed to establish that the beneficiary possessed the minimum required employment experience as of the priority date. Therefore, on June 11, 2009, the director revoked the approval of the petition.

On appeal, the petitioner submitted a new employment letter from [REDACTED] dated June 26, 2009. Mr. [REDACTED] stated that his restaurant was "near the [REDACTED]" My restaurant was a small café, because we are near [REDACTED] everyone would call us "[REDACTED]" Mr. [REDACTED] further explained

³ Moreover, as stated in the AAO's previous decision, even if the work experience letter satisfied all of the regulatory requirements, the beneficiary's claimed experience for [REDACTED] since March 2000, would account for a maximum of just fourteen months of experience as of the April 30, 2001 priority date, whereas the labor certification requires two years of experience. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

“I did not even have a letterhead for the store. When [the beneficiary] asked for a job letter, I had a friend make the letterhead, and then I had him make the letter, and I give it to [the beneficiary].”

On motion the petitioner submits another affidavit from Mr. [REDACTED] who again explained that he used the name ‘[REDACTED]’ on his letterhead because his café was located close to the [REDACTED] and because that was a popular pseudonym for the business among its patrons. He also explained that the person who created the letterhead included “a picture of a tall building because he thought the letterhead will look good.”

While Mr. [REDACTED] has issued multiple letters to explain why he created a letterhead bearing an admitted pseudonym, it is significant that Mr. [REDACTED] has not once stated the actual name of his restaurant. This was noted in the AAO’s dismissal of the appeal, but still on motion, the petition fails to provide the actual name of the beneficiary’s previous employer. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The explanations from the beneficiary and from Mr. [REDACTED] do not even provide the most basic verifiable information such as the true name of the claimed employing business. These statements are not supported by any independent objective evidence and are insufficient to overcome the inconsistencies in the record.

The AAO again 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. The approval of the petition remains revoked.