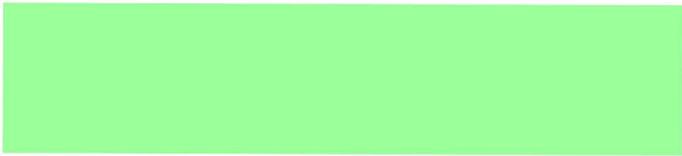




U.S. Citizenship
and Immigration
Services

(b)(6)



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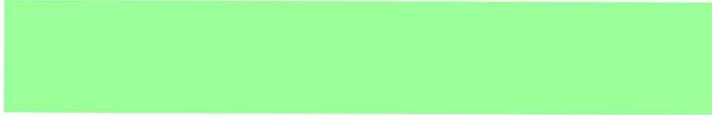
OFFICE: TEXAS SERVICE CENTER



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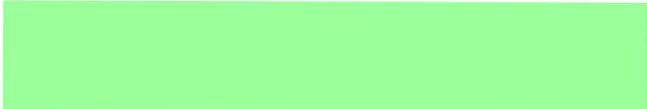
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. In a decision dated June 25, 2013, the Administrative Appeals Office (AAO) dismissed the appeal. The matter is now before the AAO on the petitioner's motion to reopen and reconsider. The motion will be granted, the AAO's decision will be affirmed, and the petition will remain denied.

The petitioner provides construction workers to contractors in the Midwest and East Coast regions of the United States. It seeks to permanently employ the beneficiary in the United States as an electrician. The petitioner requests classification of the beneficiary as a professional or skilled worker under section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).¹

An ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), accompanies the petition. The petition's priority date, which is the date the DOL accepted the labor certification for processing, is December 26, 2006. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner failed to establish the beneficiary's qualifying employment experience for the offered position by the petition's priority date.

The AAO affirmed the director's decision and also found that the petitioner failed to demonstrate its continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward.

On motion, the petitioner asserts that the AAO erred in finding that it failed to demonstrate both the beneficiary's qualifications for the offered position and its continuing ability to pay the proffered wage. The petitioner also submits new evidence of the beneficiary's employment experience and its ability to pay.

The petitioner's motion to reopen and reconsider complies with the regulations at 8 C.F.R. §§ 103.5(a) (2), (3). It states new facts supported by documentary evidence and asserts that the AAO erred in applying law or U.S. Citizenship and Immigration Services (USCIS) policy. The AAO will therefore grant the motion.

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 review on a *de novo* basis. See *Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). The

¹ Section 203(b)(3)(A)(i) of the Act allows the granting of 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 affords the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal and motion.²

On motion, the petitioner asserts that its former counsel caused the inconsistencies in the record regarding the beneficiary's employment experience by submitting fraudulent documents and information to USCIS in other matters and that the discrepancies "are not germane to the merits and good faith" of the instant petition. In a letter dated July 24, 2013, the petitioner's vice president claims that the petitioner was unaware of former counsel's fraud at the time. He asserts that federal authorities seized all of its immigration files in connection with the 2008 conviction of its former counsel on charges of conspiracy to commit immigration fraud. The petitioner's vice president asserts that "[i]t is not possible that we explain inconsistencies related to documents that we never had knowledge of and that were never in our possession." He claims that the petitioner fully cooperated with federal prosecutors and was never found at fault. The petitioner also submits copies of letters from the [REDACTED] and a statement from the beneficiary as additional evidence of his qualifying employment experience.

In determining that the instant petitioner failed to demonstrate the beneficiary's qualifying experience for the offered position, the AAO did not find or accuse the petitioner or its former counsel of fraud or any other wrongdoing. However, the burden of proof remains on the petitioner to establish the beneficiary's qualifications for the offered position. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Contrary to the petitioner's assertions, the discrepancies in the record regarding the beneficiary's employment experience cast material doubt on his qualifications for the offered position.

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must examine the job offer portion of the labor certification to determine the requirements for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

The labor certification states that the offered position requires 24 months of experience in the offered position of electrician. The beneficiary claims on the labor certification to qualify for the offered position based on 52 months of full-time experience and 35 months of part-time experience in the offered position. The labor certification states that the beneficiary worked:

² The instructions to Form I-290B, Notice of Appeal or Motion, which 8 C.F.R. § 103.2(a)(1) incorporates into the regulations, allow the submission of additional evidence on appeal and motion. The record in the instant case provides no reason to preclude consideration of any documents newly submitted on motion. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

- full-time for about 24 months at [REDACTED] from February 2, 1998 to February 4, 2000.
- full-time for about 28 months at [REDACTED] from February 7, 2000 to June 20, 2002; and
- 20 hours per week for about 35 months at [REDACTED] in [REDACTED] from February 2003 to January 2006;

The labor certification also states that the beneficiary worked full-time for 7 months as an electrical engineering specialist at [REDACTED] from July 1, 2002 to January 31, 2003 and full-time for the petitioner in the offered position since October 1997.

The petitioner must support the beneficiary's claimed qualifying experience with letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A).

The record contains three experience letters from the beneficiary's purported former employers. A December 17, 2007 letter from a representative of the department of human resources on [REDACTED] stationery states that the company employed the beneficiary full-time as an electrician from February 2, 1998 to February 4, 2000. A December 17, 2007 letter from a district manager on [REDACTED] stationery states that the company employed the beneficiary full-time as an electrician from February 7, 2000 to June 30, 2002, and full-time as an electrical engineering specialist from July 1, 2002 to January 31, 2003. Finally, a June 18, 2006 letter from the manager of human resources on [REDACTED] stationery states that the company employed the beneficiary as an electrician from February 1, 2003 to January 31, 2006.

As the AAO found in its prior decision, the beneficiary's stated job duties in the [REDACTED] letter (designing transmission and distribution lines, coordinating construction operations, and writing engineering specifications) do not match those of the offered position (assembling, installing and maintaining electrical wiring and connecting wires to circuit breakers, transformers and other components). The [REDACTED] letter therefore does not demonstrate the beneficiary's qualifying experience for the offered position.

The experience letters from [REDACTED] state that the beneficiary performed the job duties of the offered position. But the [REDACTED] letter contradicts the beneficiary's Form G-325A, Biographic Information, dated July 19, 2007, which he submitted with his application for adjustment of status. The [REDACTED] like the labor certification, states that he worked for the company first as an electrician and later as an electrical engineering specialist. On the Form G-325A, however, the beneficiary states that he worked for Transelectrica as an electrical engineer for his entire tenure there, from February 2000 to January 2003.

Also, a letter in support of an E-2 nonimmigrant visa petition for the beneficiary contradicts the labor certification and all three experience letters. A vice president of the E-2 petitioner, [REDACTED] purportedly signed the June 20, 2007 letter, which states that [REDACTED] had

employed the beneficiary as an engineer since February 1, 2000. [REDACTED] letter therefore contradicts the labor certification and the experience letter of [REDACTED] regarding the beneficiary's positions and start date of employment at [REDACTED] letter also contradicts the experience letters of [REDACTED] regarding the beneficiary's dates of employment with those companies. These inconsistencies cast doubt on the beneficiary's claimed qualifying experience. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (the petitioner must resolve any inconsistencies in the record by independent, objective evidence).

As discussed in the AAO's notices and decision, the petitioner's former counsel, who signed the instant petition and its accompanying labor certification, admitted that he and his family members operated [REDACTED] and supplied foreign-born electricians to companies in Virginia. Former counsel also admitted that he helped obtain as many as 24 U.S. work visas for foreign electricians by falsely representing their intended field of employment in the U.S. on their visa applications. The petitioner's vice president has stated that ProFourcing referred the beneficiary to the petitioner for employment. Further, documentation in the E-2 visa petition identifies one of [REDACTED] three owners as the human resources manager of [REDACTED] who signed the beneficiary's employment experience letter in the instant petition.

Former counsel's conviction on charges of conspiracy to commit immigration fraud in other matters does not establish that he attempted to commit fraud in this matter or that his conspiracy otherwise affected this petition. But his admitted operation of [REDACTED], his misrepresentations to obtain U.S. work visas for foreign-born electricians, [REDACTED] referral of the beneficiary to the petitioner, and [REDACTED] partial ownership by one of the beneficiary's purported former employers cast further doubt on the veracity of the beneficiary's claimed qualifying experience. *See Ho* at 591 (doubt cast on any aspect of the petition's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of the petition).

On motion, the petitioner submits copies of two letters, with English translations, from the [REDACTED] both dated July 22, 2013. As translated, one ministry letter states that the beneficiary has no "outstanding balance for the fiscal years 1998-2000 as a previous employee of [REDACTED] The other letter, as translated, states that the beneficiary has no "outstanding balance for the fiscal years 2000-2005 as an employee of [REDACTED]

In a July 24, 2013 statement, the beneficiary asserts that these letters "are the only additional official materials that [he] could obtain, (with help of [his] immediate family members residing in Romania) to further document that [he] was indeed employed by the ... two companies and to corroborate the experience letters submitted by [him] in December 2007 in support of the I-140 petition." The beneficiary states that, after taxes were subtracted from his biweekly wages in Romania during these time periods, he received his pay in cash. Therefore, he states that he cannot provide copies of tax returns or payroll records to corroborate his employment in Romania at that time.

The ministry letters, as translated, seem to indicate that the beneficiary owes no employment-based income taxes to the Romanian government for the fiscal years indicated on the letters. But the beneficiary does not explain the letters in his statement, and the petitioner provides no other evidence of their meaning.

Also, as translated, the ministry letters ambiguously state that the beneficiary has no outstanding balance “as an employee” of [REDACTED] or “as a previous employee” of [REDACTED]. The letters do not state whether the ministry’s records actually identify the beneficiary as an employee of [REDACTED] during the fiscal years stated on the letters, or whether the ministry records simply reflect no outstanding balances for him as an employee of those firms. If the ministry records do not identify the beneficiary’s employers during the identified years, the letters have no probative value in establishing his qualifying experience for the offered position. In that case, the beneficiary could lack outstanding balances as employees of those companies because he never worked for those companies or because he did not work for those companies during the years indicated.

In addition, one ministry letter appears to contradict the labor certification and experience letters regarding the beneficiary’s dates of employment at [REDACTED]. As translated, the ministry letter suggests that the beneficiary worked at [REDACTED] from fiscal year 2000 to fiscal year 2005. However, the labor certification and the experience letters of [REDACTED] state that the beneficiary worked at [REDACTED] from February 2000 until only January 2003, before serving part-time as an electrician at [REDACTED] from February 1, 2003 to January 2006. The inconsistencies in the identification of the beneficiary’s employers and his dates of employment with them cast doubt on the veracity of the ministry letter. *See Ho* at 591-92 (the petitioner must resolve inconsistencies in the record by independent, objective evidence). Because both ministry letters are ambiguous regarding the beneficiary’s employment with the relevant companies and one appears to contradict other evidence in the record, the AAO finds that the letters do not corroborate the beneficiary’s statement and do not establish the beneficiary’s claimed qualifying experience.

The petitioner also asserts on motion that prosecutors’ seizure of its immigration files from the office of its former counsel prevents it from demonstrating its continuing ability to pay the beneficiary’s proffered wage. The petitioner’s vice president asserts that, because the petitioner does not have its immigration files, it cannot provide information and evidence regarding I-140 petitions it has filed for other beneficiaries. The petitioner submits copies of its audited financial statements from 2003 through 2012 as evidence of its ability to pay the proffered wage.³

As the AAO indicated in its prior decision, USCIS records show that the petitioner has filed at least 37 I-140 petitions for other beneficiaries since 2003. Accordingly, the petitioner must establish its continuing ability to pay the combined proffered wages of all beneficiaries whose petitions were pending from the priority date of the instant petition until the instant beneficiary obtains lawful

³ The petitioner’s 2012 audited financial statements are stamped as “draft” copies. Therefore, it is unclear whether they reflect the petitioner’s correct financial figures for that year.

permanent resident status. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977); 8 C.F.R. § 204.5(g)(2).

The evidence in the record does not document the priority dates, proffered wages, or wages paid to the other beneficiaries. The record also does not establish: whether any of the other petitions have been withdrawn, revoked, or denied; or whether any of the other beneficiaries have obtained lawful permanent residence.

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). A petitioner must demonstrate that required documentation does not exist or cannot be obtained, and submit secondary evidence of the facts at issue. *Id.* If both the required and secondary evidence do not exist or cannot be obtained, the petitioner must demonstrate the non-existence or unavailability of both forms of evidence and submit at least two affidavits from people with direct, personal knowledge of the circumstances. *Id.*

Here, the petitioner has not provided evidence that federal authorities seized its immigration files and that the files are unavailable. Assuming that federal authorities seized the files, it also has not demonstrated that it requested permission to obtain, view, or copy the files. *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (*citing Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190, 193 (Reg'l Comm'r 1972)) (assertions without supporting, documentary evidence do not meet the burden of proof in these proceedings).

The petitioner's audited financial statements reflect substantial annual net income and net current asset amounts for most years from 2003 through 2012. But, without information and evidence regarding the petitioner's other I-140 petitions, the financial statements do not establish the petitioner's continuing ability to pay the combined proffered wages of the beneficiary and the beneficiaries of other pending petitions.

For example, the petitioner's 2009 audited financial statements state an annual net income loss, with an annual net current asset amount of about \$250,000. Depending on how many petitions for other beneficiaries remained pending in 2009, the proffered wages of those beneficiaries, and the wages the petitioner paid to those beneficiaries, the petitioner's annual net current assets of \$250,000 may not be sufficient to pay the combined proffered wages of all the beneficiaries that year. Thus, the AAO concludes that the petitioner has not established its continuing ability to simultaneously pay the combined proffered wages of the beneficiary and the beneficiaries of its other petitions.

In summary, the AAO grants the petitioner's motion to reopen and reconsider. After review of the motion and careful reconsideration of the record as a whole, the AAO affirms its prior decision. The AAO finds that the petitioner, in light of the multiple petitions it has filed for other beneficiaries, has failed to establish its continuing ability to pay the beneficiary's proffered wage. The AAO also finds that the petitioner has failed to resolve inconsistencies in the record regarding the beneficiary's employment history and thus has not established that the beneficiary possessed the minimum

experience required for the offered position by the priority date. The beneficiary therefore does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

The AAO affirms the petition's denial for the reasons stated above, with each considered 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; *see also Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

ORDER: The motion is granted, the AAO's decision of June 25, 2013 is affirmed, and the petition remains denied.