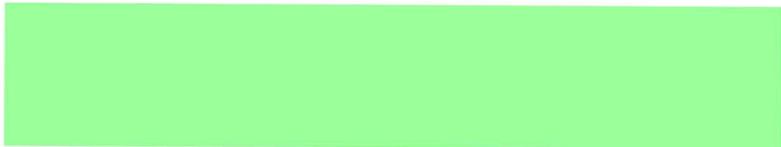


(b)(6)

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

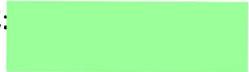


U.S. Citizenship
and Immigration
Services

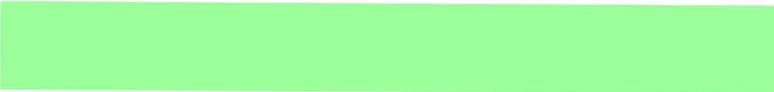


DATE: OCT 10 2013 OFFICE: TEXAS SERVICE CENTER

FILE:

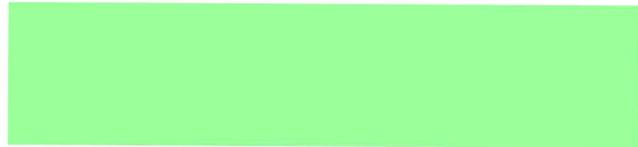


IN RE: Petitioner:
Beneficiary:



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 (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,

Rachel N. J. J. J.
hr

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The appeal will be dismissed.

The petitioner describes itself as a gasoline and service station. It seeks to permanently employ the beneficiary in the United States as an auto master mechanic. 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), approved by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date DOL accepted the labor certification for processing, is March 25, 2005. See 8 C.F.R. § 204.5(d).

In his decision, the director denied the petition with a finding of fraud after concluding that the offered employment did not exist and that the Form I-140, Immigrant Petition for Alien Worker, had been filed solely for the purpose of procuring an immigration benefit. The director further found the beneficiary to be subject to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having sought an immigration benefit through the willful misrepresentation of a material fact.

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.²

Employment History

The director based his conclusions regarding the fraudulent nature of the offer of employment on the testimony provided by the beneficiary in a February 9, 2011 interview with United States Citizenship

¹ Although the petitioner has checked Part 2.e. on the Form I-140 petition indicating that it is filing for classification of the beneficiary either as a professional or a skilled worker, the record indicates that the petitioner is seeking to employ the beneficiary as a skilled worker. 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.

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).

and Immigration Services (USCIS) officers. In that interview, the director noted, the beneficiary had stated that he had never been offered a position by the petitioner. The director also noted that the beneficiary had informed USCIS officers that he had owned and operated his own business, [REDACTED] since 2002, but had not indicated this employment on the labor certification. Instead, the director stated, the beneficiary had indicated on the Form ETA 750 that he had been employed as a marketing research analyst with [REDACTED] from January 2002 until January 2005. The director noted, however, that this January 2005 end date conflicted with information the beneficiary had provided in another labor certification, dated October 20, 2006, where he claimed current employment with [REDACTED]. The director found the beneficiary's Form G-325A, Biographic Information, submitted in support of the Form I-485, Application to Register Permanent Residence or Adjust Status, he filed on August 14, 2007 to offer further evidence that although the beneficiary claimed employment with [REDACTED] beginning in 2002, he had actually been working for [REDACTED]. The Form G-325A, he noted, reported that the beneficiary had lived in Virginia since 2002, the state of operation for [REDACTED] while the business address for [REDACTED] was in Texas.

The director also indicated in his decision that although the petitioner claimed to be employing the beneficiary, the wages paid to the beneficiary, as reported in the 2009 and 2011 Internal Revenue Service (IRS) Forms W-2 found in the record, did not reflect full-time employment. The director further noted that the petitioner had submitted no evidence to establish its employment of the beneficiary in 2010 or in 2008, subsequent to his departure from [REDACTED] employ.

Prior to reaching his decision, the director considered affidavits submitted by the petitioner and the beneficiary asserting the genuine nature of the offered employment, as well as a statement from the Director of [REDACTED] regarding the dates of the beneficiary's employment with his firm and the terms of his employment, which allowed him to work remotely. The director, however, found the submitted statements, in the absence of any documentary evidence to support them, did not overcome the findings he had reached regarding the evidence of record.

In response to a Notice of Intent to Dismiss (NOID) and Request for Evidence (RFE) issued by the AAO on June 21, 2013, the petitioner has now submitted documentary evidence to establish the beneficiary's employment history with regard to [REDACTED] and [REDACTED] including copies of the beneficiary's tax returns for the period 2002 through 2011; copies of IRS Form W-2 Wage and Statements (Forms W-2) issued to the beneficiary by [REDACTED] for the years 2002 through 2007; and copies of Social Security Administration records of all IRS Forms W-2 issued to the beneficiary from 2002 through 2011. Based on this evidence, the petitioner has established that the beneficiary was employed by [REDACTED] from 2002 through 2007 and that during this same time period, he also owned and operated [REDACTED] a kiosk business from which he also derived income.³

³ In a December 21, 2011 affidavit submitted in response to the director's November 22, 2011 NOID, the beneficiary states that he did not work for [REDACTED] but that it was an investment. The record indicates that the beneficiary reports annual income from [REDACTED] on Schedule C, Profit or Loss from Business, of the Form 1040, U.S. Individual Income Tax Return, which is used to report

Accordingly, the beneficiary's admission regarding his ownership of and employment with [REDACTED] does not establish that his claimed employment with [REDACTED] was the product of misrepresentation.

Offer of Employment

With regard to the director's notation that the beneficiary stated in his February 9, 2011 interview with USCIS officers that he had never been offered a position by the petitioner in the present case, the AAO has considered the petitioner's response to the director's NOID issued on November 22, 2011. Included in the petitioner's response is a statement from the beneficiary in which he asserts that his statements at the time of his February 9, 2011 interview have been misunderstood. The beneficiary states that he informed the USCIS officers who interviewed him that the offered position was available to him only if he moved to Maryland and that he, therefore, had agreed that he would accept the offered position only if approved for lawful permanent resident status.

The AAO's review of the record finds that at the time of his February 9, 2011 interview, the beneficiary stated that he had never worked for the petitioner on a regular basis and had not been given a full-time job by the petitioner, statements that are borne out by the IRS Forms W-2 issued to the beneficiary by the petitioner and the beneficiary's tax returns for 2008 and 2010. However, the AAO does not find the record to indicate that the beneficiary stated to USCIS officers that the permanent full-time position of motor mechanic was not offered to him by the petitioner. Moreover, the fact that the beneficiary has not worked and does not work for the petitioner on a full-time basis does not support the director's finding regarding the fraudulent nature of the job offer. The beneficiary's failure to list his self-employment with [REDACTED] on the Form ETA 750 and his claim of having resided in Maryland on the Form G-325 he submitted with the Form I-485 also do not demonstrate that the offer of employment in this case is fraudulent. Accordingly, the AAO will withdraw the director's finding of fraud with regard to the petitioner's filing of the petition, as well as his determination that the beneficiary is subject to section 212(a)(6)(C)(i) of the Act for having submitted a false statement supporting the claim of employment in the petition.

Nevertheless, the visa petition in this case may not be approved. Having reviewed the record, the AAO does not find it to establish that the beneficiary is qualified for classification as a skilled worker under section 203(b)(3)(A) of the Act.⁴

income or loss from a business that is operated by the tax payer or a profession practiced by the tax payer as a sole practitioner. The Schedule C forms found in the record for the years 2003 through 2011 reflect that the beneficiary has consistently checked Box G on page 1 of these forms, indicating that he materially participates in the operation of his business. Accordingly, the AAO finds the record to establish the beneficiary as the owner and operator of Gold Mart.

⁴ As previously indicated, the AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d at 145. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if all of the grounds for denial are not identified in the initial decision.

A 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, 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).

Beneficiary’s Experience

In the present case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: None required.
High School: None required.
College: None required.

TRAINING: None Required.

EXPERIENCE: Two (2) years in the job offered.

OTHER SPECIAL

REQUIREMENTS: None.

It also indicates that the beneficiary qualifies for the offered position based on his experience as a mechanic with [redacted] Pakistan, where he worked 48 hours a week from May 1989 to July 1993. No other relevant experience is listed. The beneficiary’s signature appears on 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.

In the NOID and RFE it issued on June 21, 2013, the AAO informed the petitioner that the record on appeal did not establish that the beneficiary possessed the two years of experience required by the labor certification. It noted that the experience statement provided by the petitioner, a July 15, 1993 statement from ██████████ Pakistan, did not satisfy the requirements of the above regulation as it failed to provide his title or position with the company and did not offer a description of the work performed by the beneficiary. Moreover, the AAO found that Mr. ██████████'s statement failed to indicate that the beneficiary had been employed by Khalid Autos on a full-time basis.

In response, the petitioner submits a new statement from Mr. Rasheed, dated July 2, 2013, in which he indicates that he is the owner and manager of Khalid Autos and that the beneficiary performed the following duties while in his employ: examined vehicles and tested components and systems, examined vehicles to determine damage and malfunction, performed routine and scheduled maintenance and tune-ups, performed wheel alignment and balancing, provided full brake service and interacted with customers to obtain descriptions of the mechanical problems. Mr. ██████████ also states that the beneficiary was employed on a part-time basis from May 1989 until July 1993, working five days a week, 7 a.m. until 1 p.m., i.e., 30 hours a week.

However, Mr. Rasheed's assertion that he employed the beneficiary on a part-time basis contradicts the 48-hour work week indicated in the labor certification. To explain this discrepancy, the petitioner submits a July 15, 2013 declaration from the beneficiary in which he states that the full-time employment reported in the labor certification is the result of an error on the part of his former counsel. The beneficiary indicates that, rather than being employed full-time by Mr. Rasheed, he worked 25 hours a week, from May 1989 through July 1993.⁵

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Here, the petitioner has submitted a declaration from the beneficiary to reconcile the inconsistency between the full-time employment reported on the labor certification and

⁵ The beneficiary also states that his date of birth and the end date of his employment with Zaid Enterprises, Inc. are misstated on the Form ETA 750 and that his prior counsel signed the labor certification on his behalf. On appeal, the petitioner resubmits Part B of the Form ETA 750, signed by the beneficiary and including the corrections indicated by the beneficiary.

the part-time employment indicated by Mr. [REDACTED] in his July 2, 2013 statement. The statement from the beneficiary does not, however, constitute independent, objective evidence of his work experience. 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)). Moreover, the AAO finds the beneficiary's claim of having worked 25 hours a week, rather than the 30 hours indicated in Mr. [REDACTED]'s statement, to raise further questions about the reliability of the employment experience he claims. 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. See *Matter of Ho* at 591.

The record contains no documentary evidence that would establish the nature of the beneficiary's employment with [REDACTED]. Although Mr. [REDACTED] indicates in his statement that he no longer has any documentation relating to the beneficiary's employment, the petitioner does not claim and the record does not demonstrate that documentation of the beneficiary's employment with [REDACTED] is unavailable from other sources, e.g., Pakistani tax documents or social security payments. Without such competent, objective evidence of the beneficiary's employment with [REDACTED] the inconsistent accounts of the beneficiary's employment experience cannot be resolved and the petitioner cannot demonstrate that the beneficiary possessed the minimum two years of experience required by the Form ETA 750 as of the priority date.

As the record does not establish that the beneficiary has the two years of work experience required by the labor certification, the AAO finds that he is not qualified for classification as a skilled worker under section 203(b)(3)(A) of the Act.

In that the record does not demonstrate that falsified documentation was submitted in support of the instant visa petition or that the beneficiary sought an immigration benefit through the willful misrepresentation of a material fact, the director's decision will be withdrawn. However, as the record fails to demonstrate that the beneficiary possessed the minimum experience required by the offered position as of the priority date, the petition may not be approved. Accordingly, the appeal will be dismissed.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The director's decision is withdrawn. The appeal is dismissed. The petition remains denied.