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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: SEP 1 3 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

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, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner[1] is a supermarket . It seeks to permanently employ the beneficiary in the United States as a '[redacted].'' The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).[2]

The petition is accompanied by an ETA Form 9089, Application for Permanent 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 July 1, 2011. *See* 8 C.F.R. § 204.5(d).

The director's decision denying 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.

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.[3]

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)(l), (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

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[1] The petitioner's corporation appears to be '[redacted].'' as listed on the labor certification and the taxes provided.

[2] 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.

[3] 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).

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:

H.4. Education: None required.
H.5. Training: None required.
H.6. Experience in the job offered: 24 months.
H.10. Experience in an alternate occupation: 24 months of experience as a "chief cashier; lead cashier."
H.14. Specific skills or other requirements: None.

The labor certification also states that the beneficiary qualifies for the offered position based on the following experience: (1) as a [redacted] with the [redacted] in Seoul, Korea, from January 8, 1983 until July 17, 2008; and (2) as a "[redacted] for [redacted] in Richmond, Virginia, from September 1, 2009 until July 1, 2011. 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 "Certification of Career" from the General Manager of the , dated March 14, 2012, stating that the company employed the beneficiary in the following positions:

- As a " " from January 8, 1983 until August 12, 1995.
- As an " " from August 2, 1996 until July 31, 2000.
- As a " from August 2, 2001 until January 21, 2008.
- As a " from January 22, 2008 until July 17, 2008.

In response to the director's September 10, 2012, Notice of Intent to Deny (NOID), the petitioner provided a second " " dated September 25, 2012, which states that the beneficiary was employed in the following positions:

- As a " from January 8, 1983 until January 31, 1990.
- As a " from February 1, 1990 until August 12, 1996.
- As an " " from August 13, 1996 until July 31, 2000.
- As a " from August 2, 2000 until January 21, 2008.
- As a " from January 22, 2008 until July 17, 2008.

On June 24, 2013, the AAO issued the petitioner a Notice of Intent to Dismiss (NOID), including a notice of derogatory information and request for evidence, which stated that the two "Certification of Career" documents, dated March 14, 2012 and September 25, 2012, did not contain a certified translation of these documents. The regulation at 8 C.F.R. § 103.2(b)(3) states the following:

> *Translations.* Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The translations of the "Certification of Career" documents appear on the letterhead for the signed by the General Manager of the Human Resources Department. However, the translation of the September 25, 2012, "Certification of Career," provided in response to the AAO's NOID is signed by the petitioner's owner and dated July 22, 2013. The regulation at 8 C.F.R. § 103.2(b)(3) requires a "full English language translation which the translator has certified as complete and accurate." (Emphasis added). Given that this translation certification is not made by the translator, contemporaneously with the translation, as the regulation requires, and the fact that it is made by the petitioner's owner, and not an independent, objective party, the AAO will not accept it as being accurate.

Even if this translation were acceptable, several of the dates in the September 25, 2012 "Certification of Career" vary significantly from the dates of the March 14, 2012 "Certification of Career," casting doubt on the length of time the beneficiary was employed in each position. The earlier document combines the position of " and " and states that this lasted until August 12,

1995. The later document lists these positions separately and states that the beneficiary was employed as a ' ' until August 13, 1996, one year later. The earlier document states the beneficiary was employed as an ' ' as of August 2, 1996, and the later document states that this began on August 13, 1996. The earlier document states that the beneficiary was employed as a ' ' as of August 2, 2001, and the later document states that this began on August 2, 2000, one year earlier. The petitioner has not provided an explanation from the General Manager of the explaining the reasons for these discrepancies.

Additionally, it is unclear why the labor certification only lists the beneficiary's job title at the as being a ' ' for the entire period from January 8, 1983 to July 17, 2008. The job title of the instant labor certification is that of a " or, in the alternative, a ' ' or " " 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 labor certification, lessens the credibility of the evidence and facts asserted. In this case, the labor certification did not state that the beneficiary worked as a ' ' a " ' an ' ' or a " " The September 25, 2012 " " if otherwise properly translated and certified, is inconsistent with the beneficiary's claimed experience on the labor certification. Further, the job description of the beneficiary's position with the on the labor certification, which included researching and reviewing loan qualifications, foreign exchange rates, and credit checks, does not appear to be similar to the position offered, which required supervising and coordinating activities of store cashiers, preparing employee work schedules, and keeping financial records. Therefore, the petitioner has not established that the beneficiary's experience with the meets the qualifications of the labor certification. This casts doubt on the beneficiary's claimed experience with the . Doubt cast on any aspect of the petitioner's evidence 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, 591-592 (BIA 1988). It is incumbent upon 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. *Id.*

The record also contains a letter from dated May 22, 2012, which states that the beneficiary worked there full-time, 40 hours per week, as a manager beginning November 5, 2009. This date conflicts with the dates of employment provided on the labor certification. Further, the record does not contain a Form W-2 for the beneficiary from for 2009 to confirm the beneficiary's employment during that year. The beneficiary's Form W-2 for 2010 from states income of $12,000.00 and his Forms W-2 for 2011 and 2012 state income of $20,800.00 for each year. This suggests that, at least in 2010, the beneficiary appears to have worked part-time for , which contradicts the information in this experience letter and provided on the labor certification. Doubt cast on any aspect of the petitioner's evidence 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, 591-592 (BIA 1988). It is incumbent upon 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. *Id.* The AAO's NOID also informed the petitioner that the Virginia State Corporation Commission (SCC) indicates that [redacted] was "canceled" on December 31, 2010. In response to the AAO's NOID, the petitioner submitted a document from the SCC showing that [redacted] is active, effective July 18, 2013. However, the petitioner has not demonstrated that [redacted] was actively in business from January 1, 2011 until July 18, 2013.[4] Counsel for the petitioner states that [redacted] was reinstated retroactively, but the evidence in the record does not sufficiently demonstrate this. Therefore, the petitioner has not established that the beneficiary's employment with [redacted] meets the experience requirements of the labor certification.

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.

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[5] If the petitioner's net income or net current assets is

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[4] The AAO notes that the owner of [redacted] appears to be the beneficiary's wife. The letter from [redacted] is from the owner of that entity, who has the same name as the beneficiary's wife as indicated on Form I-140. The AAO also notes that USCIS records indicate the beneficiary's wife is an E-2 investor. The record indicates that the beneficiary has been working only in this investment enterprise, not for the petitioner. This casts doubt on whether there is a *bona fide* job offer with the petitioner and whether the beneficiary intends to be employed by the petitioner as a cashier when he is currently employed by his wife's investment enterprise as a manager. Doubt cast on any aspect of the petitioner's evidence 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, 591-592 (BIA 1988). It is incumbent upon 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. *Id.* In any future filings, the petitioner must resolve these discrepancies.

[5] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F.

not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the record demonstrates that the petitioner has not employed the beneficiary. The petitioner's 2010 tax return states net income of $10,425.00, which is insufficient to pay the beneficiary's proffered wage of $50,024.00. Although the petitioner appears to have had sufficient net current assets to pay the beneficiary's proffered wage in 2010, the tax returns in the record contain conflicting information, which casts doubt on the petitioner's actual net current assets. The petitioner's 2010 tax return states the petitioner had $550,000.00 in inventory at the end of the 2010 tax year. However, the petitioner's 2011 tax return states that it had $525,000.00 at the beginning of the 2011 tax year, which casts doubt on the information contained in the petitioner's 2010 and 2011 tax returns. Additionally, it is unclear why the Form I-140, which was signed by the petitioner's owner on March 6, 2012, states that it employs only three workers and the petitioner's IRS Form 941, Quarterly Federal Tax Return, states that it employs 29 workers. Doubt cast on any aspect of the petitioner's evidence 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, 591-592 (BIA 1988). It is incumbent upon 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. *Id.* Even though the petitioner submitted evidence that the petitioner filed an extension to file its 2012 tax returns, it could have provided other regulatory required evidence of its ability to pay the proffered wage, such as its annual report or audited financial statements for 2012. *See* 8 C.F.R. § 204.5(g)(2).

The AAO also notes that USCIS records demonstrate that the petitioner has filed an I-140 petition on behalf of at least one other beneficiary. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The evidence in the record does not document the priority date, the proffered wage or wages paid to each beneficiary, whether the other petition has been withdrawn, revoked, or denied, or whether the other beneficiary has obtained lawful permanent residence. Therefore, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary from the priority date onward.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Supp. 2d 873 (E.D. Mich. 2010), aff'd, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.