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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: **JUL 03 2014** OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and the petitioner appealed the matter to the Administrative Appeals Office (AAO). The AAO dismissed the appeal and the petitioner filed several motions to reopen and reconsider. The AAO reopened and reconsidered these motions and affirmed the previous decisions. The petitioner has filed another motion to reopen and reconsider. The matter will be reopened. The AAO's decision dated March 18, 2014, will be affirmed and the petition will remain denied.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a "Field Supervisor, Taping Foreman." As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director's decision denying the petition concludes: (1) that the labor certification did not require at least two years of experience for classification under the "skilled worker" category and (2) that the petitioner had not established that the beneficiary possessed the minimum experience required to perform the offered position by the priority date.

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 and motion.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.

First, the labor certificate submitted with the Form I-140 appeared to have been altered to indicate that the position offered required four years of experience in the job offered. The labor certification did not indicate that the DOL had approved any changes. Therefore, USCIS requested a certified copy of the labor certification from the DOL. Upon receipt of the certified copy of the labor certification, the director verified that the original labor certification required only one year of experience in the job offered. Because the validity of the labor certification submitted by the petitioner is in question due to the variations between it and the certified copy provided by the DOL, we will base our decision on the DOL's certified copy of the labor certification.

The certified copy of the labor certification states that only one year of experience in the job offered is required. The record contains a letter from the petitioner's president, dated September 11, 2007,

¹ 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).

which states that the position requires a “minimum of one year supervised on the job training.” The record contains another letter from the petitioner’s president, dated March 5, 2008, in which he states that his previous letter was incorrect and that the position offered required four years of experience. We find that this one letter does not overcome two earlier pieces of evidence in the record: the certified copy of the labor certification and the first letter from the petitioner’s president, which both demonstrate that the position requires one year of experience. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Counsel asserts that the change from requiring one year of experience to four years was made after the Form ETA 750 was submitted and suggests that the DOL certified copy was from the original submission and does not reflect any subsequent changes. However, the petitioner has not submitted any correspondence to or from the DOL which would demonstrate that subsequent changes were requested by the petitioner and authorized by the DOL.

Counsel also submits copies of advertisements and postings purportedly completed as recruitment for the proffered position. The record reflects several discrepancies regarding the evidence of recruitment in the record. The advertisement with [REDACTED] states that the position offered as a “Drywall Hanger/Taper” requires an associate’s degree and 4.5 years of experience. This conflicts with the labor certification which lists the position offered as a “Field Supervisor/Taping Foreman,” requiring no education and one year of experience in the job offered. Further, this job listing was posted from April 23, 2001 until May 20, 2001, which overlaps the time that the Form ETA 750 was filed, on April 30, 2001. The internal posting notice has not been signed or dated. The newspaper advertisements do not state an employer’s name and list a requirement of three years of experience. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Counsel’s assertions that the petitioner requested changes to be made to the labor certification and that the DOL approved the changes are unpersuasive, and the evidence stated above casts further doubt on this assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Therefore, the position offered requires one year of experience in the job offered and does not qualify as a position for “skilled worker” classification under section 203(b)(3)(A)(i) of the Act.

Second, 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 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 will not look beyond the plain language of the labor certification to determine the employer’s claimed intent.

As noted above, the DOL certified copy of the labor certification states that the offered position requires one year of experience in the job offered. The copy of the labor certification does not provide any work experience that the beneficiary may have had for the position offered. The original labor certification submitted with the Form I-140, which appears to have been altered as discussed above, states that the beneficiary qualifies for the offered position based on experience as a “Field Supervisor, Taping Foreman” for the petitioner beginning in February 1989. This labor certification also states that the beneficiary worked as a construction worker but does not state the employer’s name or dates of employment. However, as stated above, this original labor certification has been called into question.

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 experience letter from the petitioner’s president, dated September 11, 2007, states that the beneficiary is employed as a drywall finisher, which includes “recruiting tapers, supervising the crew of tapers and assigning each crew on a specific site,” and that he has been employed “in the same capacity since February 1989.” The letter from the petitioner’s president, dated March 5, 2008, states that the beneficiary worked as a drywall finisher from 1989 to 1994 and that he was promoted to drywall supervisor in 1995. As noted in our March 18, 2014 decision, the record reflects that the beneficiary was paid a lower salary in 1995 than he was paid in 1993, which we noted casts doubt on the assertion that the beneficiary became a supervisor in 1995. Counsel asserts

that the beneficiary's salary was based on the amount of work available and not the role that the beneficiary filled. While this may explain the reason for the beneficiary's decreased wages in 1995, the petitioner has not provided any independent, objective evidence to corroborate when the beneficiary was promoted to the supervisory position. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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. *Matter of Ho*, 19 I&N Dec. at 591-592. The petitioner has not resolved this discrepancy. Therefore, the petitioner has not demonstrated that the beneficiary possessed one year of experience as a "Field Supervisor, Taping Foreman" prior to the priority date in 2001.

Beyond the decision of the director,² 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.³ If the petitioner's net income or net current assets is 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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In our March 18, 2014 decision, we held that the petitioner had not established the ability to pay the difference between the proffered wage and the wages paid to the beneficiary in 2004. The record reflects that the petitioner paid the beneficiary \$29,339.50 in 2004, which is \$12,130.50 less than the proffered wage. The petitioner's tax returns state net income of negative \$354,106.00 and net current assets of negative \$8,892.00. The petitioner failed to establish that factors similar to *Sonogawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the

² 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).

³ 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. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

proffered wage in 2004 despite its shortfalls in wages paid to the beneficiary, net income and net current assets. We also noted in our March 18, 2014 decision that the petitioner had not provided evidence of any uncharacteristic business expenses for 2004. Counsel states in the Attachment to Form I-290B, Part B, which we received on April 21, 2014, that the petitioner will submit audited financial statements for 2004 within two weeks. We have not received any additional evidence. Further, the elements of a motion must be established at the time of filing. *See* 8 C.F.R. § 103.5(a)(2) (stating that a motion to reopen must provide new facts and be supported by affidavits or other documentary evidence).

On motion, counsel asserts that “2004 was an aberration.” However, no explanation of any uncharacteristic business expenses or losses in 2004 is provided. Further, no evidence to support this conclusion has been submitted. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Simply noting that 2004 was an “aberration” in comparison to other years is insufficient.

Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

We affirm the director’s decision that the position offered does not qualify for classification as a skilled worker position and 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. We also affirm our previous decision that the petitioner has not demonstrated that it had the ability to pay the beneficiary’s proffered wage from the priority date onward.

Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act.

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 motion is granted. The previous decision of the AAO, dated March 18, 2014, is affirmed. The appeal is dismissed.