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

[redacted]

DATE: SEP 17 2014 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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,

Josh B
for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (Director), revoked the approval of the immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal and its prior motion to reopen and reconsider. The matter is now before us on another motion to reopen and reconsider by the petitioner. The motion will be granted, our dismissals of the appeal and prior motion will be affirmed, and the petition's approval will remain revoked.

The petitioner is a construction company.[1] It seeks to permanently employ the beneficiary in the United States as a carpenter. The petitioner requests classification of the beneficiary as a professional or skilled worker under section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[2]

U.S. Citizenship and Immigration Services (USCIS) may revoke a visa petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C § 1155. A director's realization that a petition was erroneously approved may constitute good and sufficient cause for revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

In the instant case, the Director revoked the petition's approval on March 13, 2013.[3] The Director concluded that the petitioner did not establish the beneficiary's possession of the minimum experience required for the offered position by the petition's priority date. On July 8, 2013, we dismissed the petitioner's appeal on the same ground.

The petitioner moved this office to reopen and reconsider its decision, asserting that we did not consider evidence and a brief submitted in support of its appeal. On November 27, 2013, we dismissed the petitioner's first motion as untimely.

Motion to Reopen and Reconsider

In its current motion, the petitioner asserts that the submission of its prior motion was timely. It contends that USCIS failed to adjudicate the fee waiver request that accompanied the first motion, resulting in the motion's initial rejection and its ultimate, untimely filing.

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[1] The petitioner's Articles of Incorporation and 2005 tax returns identify its legal name as The record does not indicate whether the petitioner changed its name or identified itself by a trade name in the petition and on the accompanying labor certification. In any future filings regarding this petition, the petitioner should clarify its name.

[2] Section 203(b)(3)(A)(i) of the Act provides 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 provides preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

[3] As we will discuss further, the Director previously revoked the petition's approval on January 28, 2013. However, on the petitioner's motion, the Director reopened and reconsidered his decision before again revoking the petition's approval.

The record shows that the petitioner's current motion is timely and properly filed. The motion will be granted because it states new facts supported by documentary evidence and argues that the AAO misapplied law or policy. *See* 8 C.F.R. §§ 103.5(a)(2), (3).

This office conducts appellate review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted on motion or appeal.[4]

A petitioner must generally file a motion to reopen and/or reconsider within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1). All benefit requests must be executed and filed pursuant to form instructions. 8 C.F.R. § 103.2(a)(1). USCIS will consider a benefit request received as of the actual date of receipt at the location designated for filing. 8 C.F.R. § 103.2(a)(7).

Filing fees are non-refundable and must generally be paid when a benefit is filed. 8 C.F.R. § 103.2(a)(1); *see also* 8 C.F.R. § 103.5(a)(1)(iii)(B) (stating that a motion must be accompanied by a non-refundable fee). However, USCIS, in its discretion, may waive the filing fee requirement if the party is unable to pay the prescribed fee, or if a fee waiver is consistent with the status or benefit sought. 8 C.F.R. § 103.7(c)(1).

A fee waiver request must be in writing, stating the party's belief that it is entitled to the benefit sought and the reasons for its inability to pay the fee. 8 C.F.R. § 103.7(c)(3). A party must also support its reasons with evidence. *Id.* In addition, the USCIS Director may waive fees for a case or class of cases upon determination that a waiver would be in the public interest and is consistent with other applicable law. 8 C.F.R. § 103.7(d).

The petitioner submits evidence that USCIS received its prior motion on July 24, 2013, within 30 days of our appellate decision of July 8, 2013. The prior motion includes a written request for "a fee waiver based on USCIS error," but does not include a filing fee.

Although USCIS received the petitioner's prior motion within 30 days of the appellate decision, the record indicates that USCIS issued a July 29, 2013 letter and a July 30, 2013 rejection notice. Despite the petitioner's request for a fee waiver, USCIS found that the petitioner's submission did not include a filing fee and asked the petitioner to resubmit the materials with the required fee. The petitioner filed the motion with a fee on October 2, 2013, more than 30 days after the appellate decision of July 8, 2013.

The petitioner contends that USCIS erred in failing to consider its fee waiver request. However, USCIS error does not warrant a fee waiver. *See* 8 C.F.R. § 103.7(c)(1) (stating that reasons meriting

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

discretionary fee waivers "are limited" to a party's inability to pay the fee, or where the status or benefit sought is consistent with a fee waiver). Also, the filing fee for a Form I-290B may only be waived if the underlying application or petition did not require a fee or its fee could have been waived. 8 C.F.R. § 103.7(c)(3)(vi). In the instant case, the underlying petition required a filing fee, which the petitioner has not demonstrated could have been waived. Also, USCIS's July 29, 2013 letter invited the petitioner to request an expedited review of its case to correct any administrative errors. The record does not indicate that the petitioner asked USCIS for an expedited review. In addition, the petitioner has not presented evidence that the USCIS Director, pursuant to 8 C.F.R. § 103.7(d), otherwise authorized fee waivers in cases of USCIS error.[5]

Moreover, even if the petitioner's prior motion had been timely filed, the motion does not establish that USCIS erred in failing to consider the petitioner's appellate brief and its accompanying documentation. The petitioner provided courier airbills and online tracking information, claiming to demonstrate USCIS's receipt of the materials within 30 days of the appeal's filing. The petitioner asserted that the brief and its accompanying evidence demonstrate the beneficiary's possession of the experience required for the offered position by the petition's priority date.

Although the appellate brief and its accompanying documentation were submitted to a USCIS office, the petitioner's evidence indicates that it sent the materials to the wrong location. Part 2.B. of the petitioner's appellate Form I-290B specifies that separate briefs and/or additional evidence must be submitted within 30 days "to the AAO." The form's instructions also contain this information. *See* 8 C.F.R. § 103.2(a)(1) (stating that every benefit request or document submitted to USCIS must be executed and filed pursuant to the form instructions, which are incorporated into the regulations). The petitioner's evidence indicates that it sent its appellate brief and accompanying materials to a USCIS office in Dallas, Texas. Thus, because the petitioner submitted its appellate brief and accompanying documentation to the wrong location, the record does not establish USCIS error.

For the foregoing reasons, we will grant the instant motion and affirm our dismissals of the petitioner's appeal and prior motion.

Validity of Revocation Procedure

We note that the Director properly issued a notice of intent to revoke in this matter. Revocation of a visa petition cannot be sustained where the notice of intent to revoke was improperly issued, even if the petitioner did not respond to the notice. *Matter of Estime*, 19 I&N Dec. 450, 452 (BIA 1987).

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[5] At a September 30, 2009 question-and-answer session with the USCIS Ombudsman, USCIS officials indicated that fee waivers could not be based on claims of administrative error. However, they stated that USCIS was developing a policy that would allow fee refunds in cases involving administrative errors. *See* "CIS Ombudsman Teleconference: Fee Waivers: How are they working for you? September 30, 2009," USCIS, *available at*, http://www.uscis.gov/ tools/ ombudsman-liaison/ombudsman-teleconference-qas/cis-ombudsman-teleconfrence-fee-waivers-how-are-they-working-for-you-september-30-2009; *cf.* USCIS Adjudicator's Field Manual, § 10.10, *available at* http://www.uscis.gov/iframe/ ilink/docView/AFM/HTML/AFM/0-0-0-1.html (accessed August 26, 2014) (stating that USCIS generally does not refund fees, except when an incorrect fee was collected or an application was inappropriately filed because of USCIS error).

USCIS must advise a petitioner in revocation proceedings of derogatory information of which it is unaware and afford it an opportunity to rebut the information and to submit evidence on its own behalf. *Matter of Estime, supra*, at 451; *see also* 8 C.F.R. § 103.2(b)(16)(i). USCIS properly issues a notice of intent to revoke a visa petition for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based on the petitioner's failure to meet its burden of proof. *Id.* A notice of intent to revoke must include a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence. *Id.* at 452.

In the instant case, the record indicates that the Director mailed a Notice of Intent to Revoke (NOIR) to the petitioner on December 6, 2012. After the petitioner did not timely respond to the NOIR, the Director issued a Notice of Revocation (NOR) to the petitioner at the same address on January 28, 2013. The petitioner timely moved to reopen and reconsider the proceedings, stating that it did not receive the NOIR. On March 13, 2013, the Director granted the petitioner's motion and again revoked the petition's approval.

Although the Director found that the petitioner did not receive the NOIR, the petitioner acknowledged that it received the first NOR and submitted additional evidence with its motion in an attempt to overcome the revocation grounds stated in that NOR. The first NOR restated the information in the NOIR, explaining that the petitioner did not establish the beneficiary's possession of a high school diploma and at least 24 months of experience in the job offered as specified in the accompanying labor certification.

Because the first NOR restated the information contained in the NOIR and the Director considered the petitioner's additional evidence on motion, the record clearly establishes that USCIS advised the petitioner of the specific facts and supporting evidence underlying the proposed revocation and afforded it an opportunity to respond. Also, the information in the NOIR, as restated in the NOR, would have warranted denial of the visa petition based on the evidence of record at the time of its issuance. Therefore, the Director properly initiated and conducted the revocation proceedings in this matter pursuant to 8 C.F.R. § 205.2.

The Beneficiary's Experience

The record also establishes that the Director properly revoked the petition's approval. A petitioner must establish that a beneficiary met all of the requirements of the offered position specified on the approved ETA Form 9089, Application for Permanent Employment Certification (labor certification), by the petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); *see also 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 the instant case, the petition's priority date is October 25, 2006, the date the United States Department of Labor (DOL) received the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

USCIS must examine the job offer portion of an accompanying labor certification to determine the minimum requirements for the offered position. *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *Id.*; *see also K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

The only rational manner by which USCIS can be expected to interpret job requirements on a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale & Linden Park Co. v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job requirements 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.

In the instant case, the labor certification states that the offered position of carpenter requires a high school diploma or a foreign equivalent, and 24 months of experience in the offered position. The labor certification states that the petitioner will not accept experience in an alternate occupation or an alternate combination of education and experience.

On the labor certification, the beneficiary stated that he completed high school in South Korea in 1971. He stated that he worked full-time as a carpenter for [redacted] in South Korea from November 10, 1999 to August 20, 2003. The labor certification, which the beneficiary signed and declared to be true and correct under penalty of perjury, did not state any other relevant employment experience of the beneficiary.

A petitioner seeking to permanently employ a skilled worker or professional 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. 8 C.F.R. § 204.5(l)(3)(ii)(A).

The instant record contains a December 23, 2004 "certificate of experience," with English translation, signed by the president of Sungho. The certificate indicates that the beneficiary's job title with [redacted] from November 10, 1999 to August 20, 2003 was carpenter. However, the certificate also identifies the beneficiary's "position" as "office man."

As the Director stated in his NOIR and January 28, 2013 NOR, the December 23, 2004 certificate does not contain a description of the beneficiary's experience at [redacted] pursuant to the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A). The certificate therefore does not establish the beneficiary's qualifying experience at [redacted]

The certificate also does not establish whether the beneficiary worked for [redacted] as a carpenter or as an "office man." In addition, the certificate's English translation states that the certificate was issued on December 23, 2004. However, the accompanying certificate of translation indicates that the certificate was translated into English on November 29, 2004, before the certificate had purportedly been issued.

The inconsistencies regarding the beneficiary's position with and the dates of the certificate's issuance and translation cast doubt on the reliability of the experience certificate. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (a petitioner must resolve inconsistencies in the record by independent, objective evidence). Further, the certificate does not state the employer's address pursuant to the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A).

With its motion to reopen and reconsider to the Director, the petitioner submitted a February 6, 2013 letter, with English translation, from the same president of that signed the prior certificate of experience. The letter states that the beneficiary served as a carpenter with from November 10, 1999 to August 20, 2003 and includes a description of the beneficiary's experience.

In his March 13, 2013 decision, the Director noted that the description of the beneficiary's experience in the February 6, 2013 letter is virtually a word-for-word recitation of the job duties stated on the labor certification. The close similarities between the letter's description of the beneficiary's experience and the job duties stated on the labor certification cast doubt on whether the letter represents an independent, objective verification of the beneficiary's prior employment. The letter also does not explain why the prior certificate indicated that the beneficiary served as an "office man" or how the prior certificate could be translated into English almost one month before it was purportedly issued in the Korean language. *See Matter of Ho, supra*, at 591-92 (a petitioner must resolve inconsistencies in the record by independent, objective evidence). The February 6, 2013 letter therefore does not establish the beneficiary's qualifying experience for the offered position.

On appeal, the petitioner submitted an April 8, 2013 affidavit from the president of The affidavit states that the beneficiary worked for from November 10, 1999 to August 20, 2003 as a carpenter. The affidavit describes the beneficiary's experience and identifies various projects on which he worked.

The affidavit also states that the president of served in that position from April 1997 to December 2009. Thus, the February 6, 2013 letter identified him as president of the company even though he purportedly was no longer serving in that capacity. The discrepancy between the president's positions as stated in the 2013 affidavit and the 2013 letter cast doubt on the reliability of the documents. *See Matter of Ho*, *supra*, at 591 (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in the record).

In addition, the 2013 affidavit is in English, as is an accompanying April 4, 2013 letter signed by the president. The 2004 certificate and February 6, 2013 letter signed by the president were in the Korean language, with English translations, suggesting that the president does not write in the English language. The record lacks evidence that a translator prepared or read the contents of the 2013 English-language affidavit and letter to the president in Korean, or that he otherwise understood the contents of those documents and prepared them himself. The different languages of the president's correspondence casts doubt on the reliability of the documents. *See Matter of Ho*, *supra*, at 591 (a petitioner must resolve inconsistencies in the record by independent, reliable evidence).

For the foregoing reasons, the record does not establish that the beneficiary possessed the qualifying experience for the offered position by the petition's priority date. The Director therefore properly revoked the petition's approval on this basis.

The record also indicates that the petition was otherwise unapprovable at the time the NOIR was issued based on other grounds, including the petitioner's ability to pay the proffered wage, and the *bona fides* of the job offer.

Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay the proffered wage from the petition's priority date until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

In the instant case, the record lacks copies of annual reports, federal tax returns, or audited financial statements from the petition's priority date of October 25, 2006 onward. The record contains a copy of the petitioner's 2005 federal income tax return. However, this return reflects the petitioner's financial condition before the petition's priority date and therefore does not meet the requirements of 8 C.F.R. § 204.5(g)(2). The record also contains copies of a profit and loss statement and balance sheet for 2006. However, the record does not establish that these financial statements have been audited as required by 8 C.F.R. § 204.5(g)(2).

The absence of complete annual reports, federal tax returns, or audited financial statements of the petitioner for each year from the petition's priority date is sufficient cause to deny the petition. Other materials may not substitute for evidence required by regulation.

Also, USCIS records indicate that the petitioner, after the priority date of the instant petition, filed an immigrant visa petition on behalf of at least one other beneficiary. Because the petitioner must demonstrate its ability to pay the proffered wages of all of its immigrant visa beneficiaries, the petitioner must establish its continuing ability to pay the combined proffered wages of both beneficiaries from the priority date of the instant petition until the other beneficiary obtained lawful permanent residence, or until his petition was withdrawn, revoked, or denied without appeal. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-45 (Acting Reg'l Comm'r 1977).

The evidence of record does not establish the priority date or proffered wage of the other petition, or any wages that the petitioner may have paid to the other beneficiary. The record also does not indicate whether the other petition has been withdrawn, revoked, or denied, or whether the other beneficiary obtained lawful permanent residence. Thus, the petitioner would not have established its continuing ability to pay the combined proffered wages of the instant beneficiary and its other beneficiary from the instant petition's priority date onward based on the record before the Director when the NOIR was issued.

The *Bona Fides* of the Job Offer

A petitioner must also establish that it intends to employ a beneficiary pursuant to the terms of the accompanying labor certification. *Matter of Izdebska*, 12 I&N Dec. 54, 54 (Reg'l Comm'r 1966) (upholding a petition's denial where evidence indicated that the petitioner did not intend to employ the beneficiary as a live-in housekeeper as specified in the accompanying labor certification).

In the instant case, the accompanying labor certification states that the petitioner intends to employ the beneficiary as a carpenter in Georgia. However, evidence of record casts doubt on the petitioner's intention to employ the beneficiary at the stated location. *See* 20 C.F.R. § 656.3 (defining the term "job opportunity" to mean "a job opening for employment at a place in the United States to which U.S. workers can be referred").

The petitioner has not indicated any change of address since it filed the labor certification on October 25, 2006. However, the record indicates the return of decisions and notices mailed by USCIS to the petitioner as undeliverable, including: our November 27, 2013 decision regarding the petitioner's motion to reopen and reconsider; and notices returned to a USCIS office in Phoenix, Arizona in August and September of 2013. Also, copies of the petitioner's 2005 federal income tax returns, its February 7, 2013 "letter of assertion" regarding its non-receipt of the NOIR, and its April 23, 2013 letter in support of its appeal state different addresses for the petitioner. The return of USCIS's mailings as undeliverable and the petitioner's statements of multiple addresses cast doubt on its intention to permanently employ the beneficiary in Georgia as specified by the labor certification. *See* 20 C.F.R. § 656.30(c) (limiting the validity of a labor certification to the particular job opportunity stated on it). The undeliverable mailings and multiple addresses also cast doubt on whether the petitioner's job opportunity had a location to which U.S. workers could be referred pursuant to 20 C.F.R. § 656.3.

In addition, in a July 15, 2011 letter in support of the beneficiary's application for adjustment of status, the petitioner's owner and chief executive officer stated that the beneficiary would be specializing in "oriental carpentry." The job duties and requirements stated on the accompanying labor certification do not mention oriental carpentry in connection with the offered position. *See* 20 C.F.R. §§ 656.11(b), 656.30(c) (barring modifications to labor certification applications and limiting a certification's validity to the particular job opportunity stated on it); *Madany v. Smith*, *supra*, at 1015 (stating that USCIS may not ignore a term of the labor certification, nor impose additional requirements). Further, in its February 21, 2007 letter in support of the petition, the petitioner stated that it was offering the beneficiary the permanent position of "Diamond Cutter." The inconsistencies in the petitioner's description of the offered position also cast doubt on its intention to employ the beneficiary pursuant to the terms of the accompanying labor certification. For the foregoing reasons, the record does not establish the *bona fides* of the petitioner's job offer to the beneficiary.

In summary, we will grant the petitioner's motion to reopen and reconsider. However, as the record does not establish that the petitioner's prior motion or appeal were improperly dismissed, we affirm our prior dismissals.

In visa petition revocation proceedings, the petitioner bears the burden of establish eligibility for the immigration benefit sought. *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion to reopen and reconsider is granted. Our dismissals of the petitioner's appeal and prior motion are affirmed. The petition's approval remains revoked.