



U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE:

**JUL 09 2015**

FILE #:



RECEIPT #:

IN RE: Applicant:

Beneficiary:



APPLICATION:

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

ON BEHALF OF APPLICANT:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page ([www.uscis.gov/i-290b](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

  
Ron Rosenberg

Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, initially approved the immigrant visa petition. The petition's approval was revoked on March 27, 2010. The director granted a subsequent motion to reopen and reconsider and affirmed the revocation on March 10, 2015. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook. 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).<sup>1</sup>

The petition is accompanied by a Form ETA 750, Application for Alien 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 June 7, 2002. See 8 C.F.R. § 204.5(d).

The labor certification states that the proffered job requires the following: two years experience in the proffered job, including “[c]ook meat, poultry and fish according to menu, cook all kinds of food according to customer’s taste.” The beneficiary claimed to have two years experience in the proffered job and provided a letter from [REDACTED] claiming the beneficiary had worked in his restaurant from April 2002 through August 2006. The director initially approved the petition.

In an April 10, 2012, Notice of Intent to Revoke (NOIR), the director notified the petitioner that during a consular investigation of this case, Mr. [REDACTED] was interviewed and disclosed that the beneficiary had in fact been employed as a maid, not a cook. Furthermore, when the beneficiary was interviewed she did not possess knowledge of Persian cooking. The director found that the record did not establish that the beneficiary had the minimum experience required by the terms of the labor certification and revoked the petition accordingly.

The petitioner filed a motion to reopen and reconsider the director’s decision. The petitioner cited to a letter from Mr. [REDACTED] that contradicted the consular investigation. The petitioner also disagreed with the results of the beneficiary’s interview.

The director evaluated the motion, found it met the standard for reopening and reconsideration, but ultimately determined that the petitioner had not met its burden of proof as to the merits. This appeal followed.

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<sup>1</sup> 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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.

We conduct 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.<sup>2</sup>

We note that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued 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 upon the petitioner’s failure to meet his burden of proof. The director’s NOIR sufficiently detailed the evidence of the record, pointing out that a consular investigation established the beneficiary’s claimed experience for the proffered job was inaccurate, and thus was properly issued for good and sufficient cause.

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.

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<sup>2</sup> 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).

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

EDUCATION

Grade School: Literate

TRAINING: None Required.

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

OTHER SPECIAL REQUIREMENTS: Non smoking work area; excellent references; lifting of kitchen equipment between 40 & 60 lbs.

The labor certification states that the beneficiary qualifies for the offered position based on experience as an assistant to chef with Mr. [REDACTED] Dominican Republic, from April 2002 until August 2006. 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.

As discussed above, the record contains inconsistent evidence regarding the beneficiary's experience. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In its brief, the petitioner argues that it has sustained its burden through "credible and probative evidence." We first note that the petitioner misstates the legal standard for overcoming inconsistencies in the record. As explained in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), "the petitioner must resolve any inconsistencies in the record by independent, objective evidence."

Next, we note that the evidence the petitioner relies on is not independent or objective. First, while Mr. [REDACTED] provided an affidavit on the beneficiary's behalf, this is not the type of evidence that comes from a source with no interest in the proceeding. There are no tax documents, or other documents from a reliable uninterested source verifying not only the employment relationship but also the beneficiary's claimed experience and skills. Furthermore, the letter from the couple who had their 2007 wedding catered is not illustrative of the beneficiary's experience as of the priority date-the critical question in these proceedings. Moreover, photos of the purported wedding rehearsal dinner show only two males cooking, rather than the beneficiary.

Here the petitioner has not provided independent or objective evidence (e.g. evidence from sources beyond question or reproach, who are uninterested in the outcome of proceedings, and cannot be swayed). Consequently, the petitioner has not met its evidentiary burden in these proceedings. Thus, the director's decision on revocation will not be disturbed.

We affirm the director's decision that the petitioner did not 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 continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2).

The priority date for the instant petition is June 7, 2002. To meet its burden the petitioner must establish it has the ability to pay the proffered wage from 2002 onward. The proffered wage is \$475 per week, or \$24,700 per year. USCIS will look to the petitioner's net income or net current assets when evaluating the petitioner's ability to pay. The record contains the petitioner's IRS Forms 1120 for the year containing the priority date and the three years that follow. In those years, the petitioner had the following:

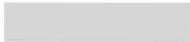
	Net Income	Net Current Assets
2002	\$24,194	\$49,611
2003	\$30,869	\$40,676
2004	\$31,725	\$43,659
2005	\$56,591	\$34,459

While the petitioner's tax returns reflect net income and net current assets above the proffered wage, further inquiry shows the petitioner did not carry its burden.

According to USCIS records, the petitioner has filed sixty-eight (68) I-140 petitions on behalf of other beneficiaries. According to the filing dates, these petitions would have substantially overlapped with the pendency of the current petition. 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 or proffered wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

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*NON-PRECEDENT DECISION*

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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. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.