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

(b)(6)

DATE: APR 0 3 2015 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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 describes itself as a Brazilian steakhouse. It seeks to permanently employ the beneficiary in the United States as a business development and marketing director. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1]

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, 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 August 29, 2012. *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 of 24 months in the alternate occupation of marketing management as required to perform in the offered position by the priority date. The director ultimately found that the petitioner and the beneficiary had willfully misrepresented the beneficiary's work experience and denied the petition accordingly. The director also invalidated the approved labor certification filed by the petitioner.

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). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

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 may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983);

[1] Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees, whose services are sought by an employer 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).

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.

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

H.4. Education: Master's degree in Business Administration or Marketing.
H.5. Training: None required.
H.6. Experience in the job offered: None required.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Not Accepted.
H.10. Experience in an alternate occupation: 24 months in marketing management.
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 listed in the labor certification:[3]

- Director of sales and marketing with the petitioner in Florida from October 18, 2011 until October 17, 2014.
- Corporate/marketing manager with [redacted] in Pennsylvania from April 18, 2011 until October 17, 2011.
- Corporate/marketing manager trainee with [redacted] in Pennsylvania from June 28, 2010 until December 13, 2010 (part-time).
- General Manager with [redacted] in Pennsylvania from January 21, 2008 until August 23, 2008.
- General Manager with [redacted] in Virginia from November 1, 2006 until December 21, 2007.

[3] The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

- Operations manager/ Gaucho with [redacted] in Florida from September 19, 2003 until October 31, 2006

No other experience is listed.

The regulation at 8 C.F.R. § 204.5(g)(1) states:

> *General.* Specific requirements for initial supporting documents for the various employment-based immigrant classifications are set forth in this section. In general, ordinary legible photocopies of such documents (except for labor certifications from the Department of Labor) will be acceptable for initial filing and approval. However, at the discretion of the director, original documents may be required in individual cases. Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains the following experience letters:

- [redacted] Managing Member on [redacted] letterhead dated December 20, 2012, stating that the company employed the beneficiary as a director of sales and marketing in Florida from October 18, 2011; as a corporate/marketing manager in Pennsylvania from April 18, 2011 until October 17, 2011, and; as corporate/marketing management trainee from June 28, 2010 until December 13, 2010 (part-time).
- [redacted] Managing Member on [redacted] letterhead dated December 20, 2012, stating that [redacted] employed the beneficiary as General Manager from January 2008 until August 2008, in Virginia, and; as an operations manager/ gaucho from September 2003 until October 2006, in Florida.

In a Notice of Intent to Deny dated May 7, 2014, the director informed the petitioner of several inconsistencies concerning the beneficiary's claimed work experience. Specifically, the director noted that the beneficiary was previously sponsored for non-immigrant status by [redacted] and [redacted] and for an immigrant petition by [redacted] and that all three entities are related to the instant petitioner.[4] The director referenced the supporting documents for these petitions and pointed out the following inconsistencies:

- The 2003 L-1B non-immigrant petition of [redacted] described the beneficiary's proposed job duties as a Meat Waiter under supervision, to assist in preparation of the all different types of meat and serving to the client; to assist in maintaining food service

[4] The record demonstrates that [redacted] is a managing member of the instant petitioner and of [redacted] The record further demonstrates that [redacted] was an original partner of [redacted]

facilities, equipment (fireplace), and utensils in a clean and sanitary condition and do related work as required.

- The 2007 immigrant petition of described the beneficiary's prior employment with as being employed in a fulltime position of, "Cook, Brazillian-Style Cuisine" from October 21, 2003 to the present (from letter dated May 3, 2007).
- The 2009 H-1B non-immigrant petition of described the beneficiary's experience with beginning in August 2002 in Brazil as a manager; then came to work for in FL as a gaucho (Meat Waiter); then served as a manager at the Florida location; as Operations Manager of VA location in 2006 through December 2007, and; supervised the PA location until August 2009.

The director further referenced the beneficiary's resume and a Form G-325A Biographic Information submitted with the beneficiary's Form I-485, Application to Adjust Status, noting the following inconsistencies in the beneficiary's claimed work history:

Resume

- Restaurant Manager, FL from October 2003 to December 2006.

Form G-325A

- Gaucho/Ops Manager, FL from September 2003 to October 2006

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988), states:

> 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.

In response to the director's Notice, the petitioner submitted the beneficiary's Forms W-2, Wage and Tax Statements, issued by in 2003 to 2005, and by in 2006.[5] The Forms W-2 indicate that the beneficiary claimed tips as part of his wages for 2003 through 2006. The position of cook, Brazilian-style cuisine (Gaucho) is a tip based occupation similar to a server in a U.S. restaurant. Therefore, this evidence demonstrates that the beneficiary was primarily employed as a Gaucho and not as an operations manager with from 2003 through 2006.

[5] The petitioner provided evidence that currently known as is an HR/payroll administration company that provides payroll administration for the petitioner (since 2008) and (since 2009). Nothing in the record demonstrates that provided payroll administration for in 2006, when this Form W-2 was issued and when the beneficiary claimed to have been employed with

The petitioner asserts that the beneficiary's documented work experience after 2006 is sufficient to demonstrate that he possessed the required 24 months of experience in marketing management before the August 29, 2012 priority date.

The work experience letters from and cannot be accepted, as these letters did not provide a description of the beneficiary's specific job duties. Further, these experience letters establish 17.5 months of experience in the alternate occupation of marketing manager, which is less than the total 24 months required by the terms of the labor certification.

The experience letter from documents the beneficiary's experience in marketing management from April 18, 2011 to August 29, 2012 (the instant priority date), demonstrating approximately 18 months of experience. The letter does not demonstrate that the beneficiary's experience as a "corporate/marketing management trainee" was in the accepted occupation of marketing manager. No job duties for the trainee position were included and it cannot be determined that the beneficiary's training in marketing management can be considered work experience.[6]

Although the experience letter from Mr. describes the beneficiary's experience in marketing management with the inconsistencies described by the director have not been resolved with independent, objective evidence. It is incumbent on 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. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The record includes no additional evidence in support of the beneficiary's actual employment with after 2006. As noted above, the beneficiary's 2006 Form W-2 was not issued by Therefore, it cannot be determined that the beneficiary gained any of the required work experience with

In his denial, the director determined that the petitioner and the beneficiary willfully misrepresented the beneficiary's work experience in order to gain an immigration benefit and an approved labor certification. *See* section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

[6] The petitioner asserts that the beneficiary's part-time experience as a trainee amounts to 2 months, 23 days experience. The petitioner fails to consider that part-time experience is not counted the same as full-time experience in the overall time period. Even if this experience were considered to be in the accepted occupation of marketing manager, the total experience would be approximately 1.5 months.

A willful misrepresentation of a material fact occurs is one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961).

The director noted that the approved and signed labor certification indicates at Part K.e. and f. that the beneficiary worked as an operations manager/ Gaucho with [redacted] in Florida from September 19, 2003 until October 31, 2006, which contradicts other evidence in the record.

We further note that the labor certification lists additional employment with [redacted] from November 1, 2006 to December 21, 2007, which is contradicted by the 2006 Form W-2 issued to the beneficiary by another entity.

By signing and submitting evidence in support of a misrepresentation, we also find that the petitioner and the beneficiary acted in a willful manner to obtain an immigration benefit and an approved labor certification.

On appeal, the petitioner states that USCIS has not articulated any specific facts to establish a willful or material misrepresentation. We have reviewed the complete record at hand, taking into consideration all material submitted in connection with the filing of the instant petition and in response to the director's Notice of Intent to Deny. The petitioner has not overcome the director's decision.

We affirm 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 an advanced degree professional under section 203(b)(2) 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 appeal is dismissed.