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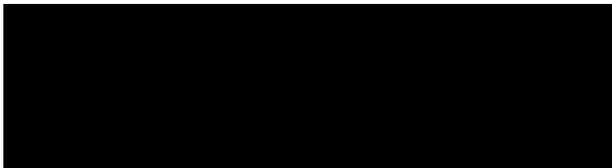
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **DEC 16 2005**
SRC-03-208-50403

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Texas Service Center denied the preference visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a freight forwarder and consolidator. It seeks to employ the beneficiary permanently in the United States as a Traffic Agent. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary was qualified for the proffered position and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, 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.

The issue to be discussed in this case is whether or not the petitioner established the beneficiary's qualifications for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is April 4, 2001. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of traffic agent. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|-------------------------|-----|
| 14. | Education | |
| | Grade School | 6 |
| | High School | 4 |
| | College | 2 |
| | College Degree Required | N/A |
| | Major Field of Study | N/A |

The applicant must also have three years of experience in the job offered in order to perform the job duties listed in Item 13 of the Form ETA 750 A, which will not be restated in this decision since it is incorporated into the record of proceeding. The proffered position also requires Spanish fluency.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information about the beneficiary's educational history, he represented that he received a diploma from Corporacion Educativa del litoral, a university, after attending from January 1980 through December 1985. Prior to that, the beneficiary represented that he received a high school diploma from Colegio de la Costa, a high school that he attended from January 1974 through December 1979. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked for Concept Cargo, Inc. in Miami, Florida, from May 1991 through February 1994 as a traffic agent.

With the initial petition, the petitioner submitted no evidence of the beneficiary's qualifications for the proffered position.

Because the evidence was insufficient, the director requested additional evidence concerning the evidence of the beneficiary's qualifications on November 3, 2003.

In response to the director's request for evidence, the petitioner submitted a letter on Concept Cargo, Inc. letterhead, dated February 22, 1994, and signed by [REDACTED] the president of the company. The Concept Cargo, Inc. letter is a recommendation letter and stated that the beneficiary acquired skills in the international transportation trade using his "knowledge of the documentation and requirements for exports in both [f]reight forwarding and consolidation of cargo to most Central American ports in both the [a]ir [f]reight and [o]cean [f]reight areas." The letter confirms the beneficiary's employment from May 15, 1991 to the date of the letter.

The director denied the petition on December 5, 2003, stating that the letter failed to "indicate that the beneficiary has the required three years experience," and that the petitioner failed to submit evidence reflecting the beneficiary's educational background that would show that the beneficiary is qualified for the proffered position.

On appeal, counsel states that the "skilled worker" category does not require a minimum education level and that the Department of Labor (DOL) has assigned a "specific vocational preparation" (SVP) level of 7 "which provides that candidates must have training or experience in the relevant field over two years and up to and including four years." Counsel states that the beneficiary has two years and nine months of qualifying employment experience, and although he has "obtained two years [of] college experience and is a high school graduate, . . . he has not obtained a four-year college degree." Counsel argues that DOL already determined that the beneficiary is qualified to perform the duties of the proffered position and it is "unfair" for CIS to deny the petition on the grounds of the beneficiary's qualifications. Counsel submits copies from DOL about SVP for a traffic agent position, and a copy of the beneficiary's high school diploma.

At the outset, the AAO notes that DOL's certification of the Form ETA 750 does not supercede CIS' review and evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable, and that includes a review of the whether or not the beneficiary is qualified for the proffered position, which in this case, is governed by 203(b)(3)(A)(i) of the Act and 8 C.F.R. § 204.5(l)(3).

Additionally, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

However, despite the petitioner's ultimate burden of proof, the AAO notes that the director failed to detail the specific evidence she sought. Because the record of proceeding does not contain any derogatory information and representations made on other immigration forms are consistent with the details contained in the new evidentiary submissions on appeal, the AAO will exercise favorable discretion and accept the evidence on appeal.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

If the petition is for a skilled worker, **the petition must be accompanied by evidence that the alien meets the educational, training or experience**, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

(Emphasis added). Thus, for petitioners seeking to qualify a beneficiary for the third preference "skilled worker" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification" as clearly directed by the plain meaning of the regulatory provision regardless of DOL's SVP classification for that occupation.

Additionally, the regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation—*

(A) *General.* 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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information

Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

At the outset, counsel concedes on appeal that the beneficiary has two years and nine months of qualifying employment experience. Although the skilled worker category requires that the proffered position require at least two years of employment experience¹, the petitioner clearly indicated that it required candidates to have three years of employment experience to qualify for the proffered position. Both the beneficiary's Form ETA 750 B employment experience representations and the experience letter submitted by the petitioner in response to the director's request for evidence reflect that the beneficiary has a total of two years and nine months of employment experience. Although the AAO does not concur with the director's determination that the letter does not conform to the regulatory requirements², the AAO concurs that the record of proceeding does not reflect that the beneficiary has three years of qualifying employment experience which is clearly required by the Form ETA 750 A's delineated requirements for the proffered position.

Additionally, on appeal, the petitioner's evidentiary submission reflects that the beneficiary graduated from high school, which is an educational requirement for the proffered position as delineated on the Form ETA 750 A, Item 14. Thus, the petitioner has overcome that particular portion of the director's adverse determination. However, the petitioner has still not provided any evidence of the beneficiary's attendance at college for two years, which is also an educational requirement for the proffered position as delineated on the Form ETA 750 A, Item 14. Only counsel asserted that the beneficiary attended college for two years, but he failed to submit corroborating evidence. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Thus, the beneficiary is not qualified for the proffered position because the petitioner failed to provide evidence of the beneficiary's three years of qualifying employment experience and two years of a college education which is required by the proffered position on the Form ETA 750A.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

¹ If a proffered position requires less than two years of employment experience, then it might be eligible under the unskilled worker category. However, if additional requirements are set forth on the Form ETA 750 A, the petitioner must still show that the beneficiary meets those additional requirements as well. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. at 406.

² The letter from Concept Cargo, Inc. conforms to the regulatory requirements at 8 C.F.R. § 204.5(1)(3) as it was written by the beneficiary's employer, on company letterhead, provided the name, address, and title of the employer, and described the training the beneficiary obtained at that business, which matches the description of the proffered position overall.