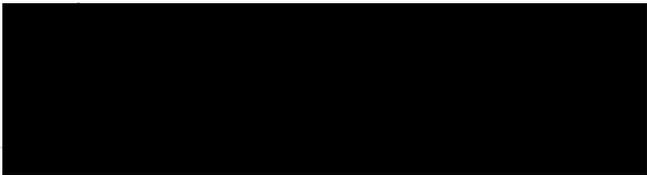




U.S. Citizenship
and Immigration
Services

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prevent clearly unwarranted
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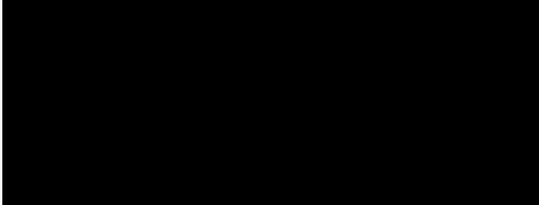
Office: VERMONT SERVICE CENTER

Date: NOV 21 2005

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 Vermont Service Center denied the preference visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is an architectural mason. It seeks to employ the beneficiary permanently in the United States as a stone mason. 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 30, 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 stone mason. In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education
 - Grade School Blank
 - High School Blank
 - College Blank
 - College Degree Required Blank
 - Major Field of Study Blank

The applicant must also have two years of experience and two years of training in the job offered or in the related occupation of stone masonry 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 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 15, eliciting information of the beneficiary's work experience, he represented that he worked for C & N Mason Company, located at 34 Bodwell Street in Hartford, CT, from 1997 to 1998 as a mason laying bricks and blocks.

With the initial petition, the petitioner submitted a letter from C & N Mason Company on letterhead and signed by Nicola Niro, Owner, who stated that the beneficiary worked for his company from May 1997 to December 1998 working as a stone, block and brick mason.

Because the evidence was insufficient, the director requested additional evidence concerning the evidence of the beneficiary's qualifications on December 4, 2003. The director noted that the beneficiary only listed one prior employment experience and C & N only verified less than two years of experience, which did not demonstrate the beneficiary's two years of qualifying employment experience and training to demonstrate his qualifications for the proffered position. The director requested additional evidence to demonstrate the beneficiary's qualifying prior employment experience.

In response to the director's request for evidence, counsel's letter stated that the beneficiary "omitted from the application reference to other work that he had done that was of a more temporary and sporadic nature in the mistaken belief that this experience was not necessary to establish his qualifications for the job [with the petitioner]." The petitioner submitted a letter on Platinum letterhead stating that the beneficiary worked for their company as a stone mason during April and July of 1999 and September through December 2000.

The director denied the petition on May 3, 2004, stating that the evidence in the record of proceeding was insufficient to establish that the beneficiary was qualified to perform the duties of the proffered position because there was no evidence that the beneficiary had two years of qualifying training.

On appeal, counsel states that he misread the director's request for evidence and thus failed to submit evidence of the beneficiary's training but asks CIS to accept the evidence on appeal. The petitioner submits a letter from F. Monarca Masonry Enterprises, Inc. in Middlefield, CT verifying the beneficiary's employment with their company from March 1994 to November 1997 receiving training as a stone, block and brick mason.

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 Obaighena*, 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, the AAO notes that counsel explained that it was his oversight for failing to submit the critical piece of evidence. Because the record of proceeding does not contain any derogatory information and representations made on other immigration forms, as well as the beneficiary's date of entry, are consistent with the details contained in the new evidentiary submissions and factual assertions on appeal, the AAO will exercise favorable discretion and accept the evidence on appeal.

The director conceded that the petitioner established that the beneficiary has two years of qualifying employment experience and all that remains in dispute is whether or not the beneficiary has two years of qualifying training. The regulation at 8 C.F.R. § 204.5(l)(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.

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.

Additionally, the regulation at 8 C.F.R. § 204.5(l)(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.

The AAO finds that the petitioner overcame the director's decision through evidentiary submissions on appeal. The letter from F. Monarca Masonry Enterprises, Inc. conforms to the regulatory requirements at 8 C.F.R. § 204.5(l)(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. Thus, the beneficiary is qualified for

the proffered position as he has provided evidence of two years of training as delineated as a requirement on the 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.