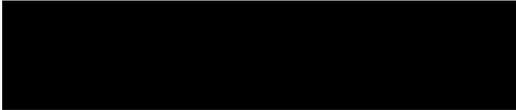


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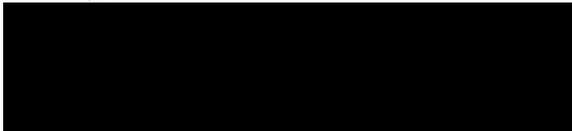
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FILE: EAC 03 190 50426 Office: VERMONT SERVICE CENTER Date: JUN 07 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center denied the preference visa petition and a subsequent motion to reopen. The matter is now before the Administrative Appeals Office (AAO) on appeal. The case will be dismissed.

The petitioner is an individual. It seeks to employ the beneficiary permanently in the United States as a barn manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). On August 27, 2004, the director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with four years of qualifying employment experience. The director denied the petition accordingly. The director affirmed its decision on November 19, 2004 for the same reason.

The record shows that the appeal is properly filed and timely 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.

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 petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 19, 2001.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, counsel submits a brief, a copy of the Form ETA 750, a copy of an experience letter from Heritage Farm dated April 11, 2003 previously submitted and a copy of the Form I-140. Other relevant evidence in the record includes an experience letter from Stonewall Farm dated September 15, 2004. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the beneficiary had the required four years of experience. Counsel states that the minimum number of hours required to satisfy four years of full time experience would be 7,280 hours based on a 35 hour work week. Counsel asserts that the beneficiary had 690 hours of experience in excess of the required 7,280 hours.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and 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

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 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).

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 barn manager. 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 have four years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A, or four years of experience as a show groom. Since this is a public record, the duties listed at Item 13 will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

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 as a barn boss and showed horses at Heritage Farm in New York from September 1999 to March 24, 2001, the date he signed the Form ETA 750B. He stated that he worked as a show groom at October Farm in Connecticut from September 1996 to August 1999. He further stated that he worked as a show groom at Stonewall Farm in New York from April 1994 to April 1995. He did not provide any additional information concerning his employment background on that form.

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.

In a letter dated April 11, 2003 from Heritage Farm in Katonah, New York, the owner of Heritage Farm certified that the beneficiary worked as a barn manager from June 1998 to September 2001.² The letter does not indicate the number of hours per week worked by the beneficiary. Pursuant to a letter dated September 15, 2004 from Stonewall Farm in Granite Springs, New York, the manager of Stonewall Farm certified that the beneficiary worked as a show groom from April 1994 to April 1995. The letter does not indicate the number of hours per week worked by the beneficiary. The experience letters submitted by the petitioner do not indicate whether the beneficiary was employed on a full-time or part-time basis at Heritage Farm and Stonewall Farm. The petitioner submitted no other experience letters in support of her petition. As previously stated, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750. As of the priority date, April 19, 2001, the evidence demonstrates that the beneficiary had 3 years and 10 months of the experience required for the position.

Counsel's assertions that the beneficiary exceeded the minimum experience requirements for the position based on his hours of employment experience at Heritage Farm are unsupported by the 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). While the beneficiary claimed to have worked 40 hours per week at Heritage Farm on Form ETA 750B, the beneficiary also claimed to have started working at Heritage Farm in September 1999. This assertion is inconsistent with the experience letter submitted by Heritage Farm, which claims the beneficiary began work in June 1998. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner has failed to resolve the inconsistencies in the record.

Further, the experience requirement detailed at item 14 of Form ETA 750A is listed in terms of years, not hours. If the petitioner required 7,280 hours of previous experience in the position offered or in the position of show groom, the petitioner should have qualified the requirements on Form ETA 750A accordingly. The Form ETA 750A in this case clearly requires four years of experience in the position offered or in the position of show groom, and this office may not alter the experience requirements or impose additional requirements after the application has been certified by the DOL.³ In the present matter, counsel is urging the AAO to find that a period of less than four years is equivalent to the four year period required by the Form ETA 750.

The evidence fails to demonstrate that the beneficiary acquired the required four years of experience as of the priority date. Therefore, the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of the proffered position.

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

² This office notes that on Form ETA 750B, the beneficiary claimed to have started working at Heritage Farms in September 1999.

³ 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 *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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ORDER: The appeal is dismissed.