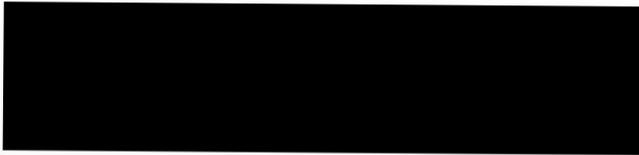




U.S. Citizenship
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FILE: [REDACTED]
EAC-03-166-50028

Office: VERMONT SERVICE CENTER

Date: **JUL 25 2006**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: 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 preference visa petition was denied by the Acting Center Director (Director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an auto body, painting and collision repair shop. It seeks to employ the beneficiary permanently in the United States as an automobile body repairer. 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 had the requisite experience as stated on the labor certification application at the time the request for certification was filed and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.¹

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 or seasonal nature, for which qualified workers are not available in the United States.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is March 26, 2001.

Citizenship and Immigration Services (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).

The certified Form ETA 750 in the instant case states that the position of automobile body repairer requires two (2) years of experience in the job offered. On the Form ETA 750B, signed by the beneficiary on February 28, 2001, the beneficiary set forth his work experience. He listed his experience as an "Automobile Body Repairer" at the petitioning entity from October 2000 to present (i.e. the date of the amendment of the Form ETA 750B which was dated January 19, 2002); as an "Automobile Body Repairer" with "Various Employer within New York & New Jersey area" from June 1996 to October 2000; and as an "Automobile Auto Repairer" at "[REDACTED]" from May 1980 to April 1994.

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). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

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

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of 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 instant I-140 petition was submitted on May 2, 2003 without a letter from a former employer concerning the beneficiary's qualification as required by the above regulation. The director issued a request for additional evidence (RFE) on June 10, 2003. In the RFE the director specifically requested the petitioner "[s]ubmit evidence to establish that the beneficiary possessed the required two years of job related experience as of March 26, 2001, the date of filing" as well as an original completed Labor Department Form ETA 750, Parts A and B. In response to the RFE dated June 10, 2003 the petitioner claimed that it "never received the original completed Form ETA 750 Parts A and B from the Department of Labor, which contained the beneficiary's original letter of experience from his previous employer evidencing that the beneficiary possessed the required two years of related experience as of the priority date." However, the petitioner did not provide any letter of experience from a previous employer as required by the regulation at 8 C.F.R. § 204.5(g)(1) and specifically requested in the director's RFE dated June 10, 2003. On November 22, 2004, the director determined that without evidence that can substantiate the beneficiary's prior two (2) years of experience, the petitioner failed to establish the beneficiary's qualifications for the proffered position, and denied the petition accordingly.

On appeal, counsel asserts that the director did not request a duplicate of the certified Labor Certification from the Department of Labor and denied the petition without verifying the beneficiary's requisite experience.

Contrary to counsel's assertion, the record of proceeding contains the duplicate certification issued on April 21, 2004 by the Department of Labor (DOL) consisting of the final determination and certification by DOL of the Form ETA 750 Parts A and B. The director denied the petition on November 22, 2004, seven months after the Department of Labor issued the duplicate. In her decision, the director reasoned her denial as follows:

Based on the labor certification submitted the proffered position requires two years of experience. Therefore, on June 10, 2003, [CIS] requested among other things additional evidence to establish that the beneficiary possessed the required experience as of the date of filing.

[CIS] received the petitioner's response on July 16, 2003. The petitioner did not submit evidence establish that the beneficiary qualified for the proffered position.

Therefore, counsel's assertion that the director failed to request the duplicate labor certification and based on that denied the petition is misplaced.

On appeal the petitioner also argues that the petitioner established that the beneficiary possessed the requisite two years experience prior to the priority date and submits a copy of experience letter from a claimed previous employer. The record of proceeding shows that the initial petition was filed without any experience letter from previous employer(s) to establish the beneficiary's qualification for the proffered position. Therefore, the director specifically requested in her RFE dated June 10, 2003 the

petitioner “[s]ubmit evidence to establish that the beneficiary possessed the required two years of job related experience as of march 26, 2001, the date of filing.” The director also gave detailed instructions on the requirements of the letter citing the regulation at 8 C.F.R. § 204.5(g)(1). However, in the response to the RFE received by the director on July 16, 2003, the petitioner through its counsel did not submit such a letter but contended that they “never received the original completed Form ETA 750 Parts A and B from the Department of Labor, which contained the beneficiary’s original letter of experience from his previous employer evidencing that the beneficiary possessed the required two years of related experience as of the priority date.”

First, 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 U.S. Department of Labor. *Matter of Wing’s Tea House*, 16 I&N Dec. at 159. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. In the instant case, it is the petitioner’s responsibility to submit regulatory-prescribed evidence with CIS to establish that the beneficiary possessed at least two (2) years experience in the occupation of automobile body repairer as of March 26, 2001 when it filed the instant employment-based immigrant petition. The petitioner failed to meet its burden relying on an attorney assertion that the labor certification submitted with DOL contained the original experience letter. The petitioner did not even submit a copy of that letter. 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)). The original completed Form ETA 750 Parts A and B do not contain any experience letter(s) from previous employer(s). In fact, the duplicate labor certification from the Department of Labor in the record of proceeding in the instant case does not contain any letter from a previous employer for the beneficiary as claimed by the petitioner and its counsel. The petitioner and its counsel’s reliance on the duplicate labor certification to establish the beneficiary’s qualification for the proffered position is misplaced.

Secondly, on appeal the petitioner submits a copy of an experience letter from [REDACTED] to establish the beneficiary’s qualification for the proffered position of automobile body repairer. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Therefore, in the instant case the director issued a RFE on June 10, 2003 specifically requesting for evidence of the beneficiary’s requested two years prior experience as of March 26, 2001. Although specifically and clearly requested by the director, the petitioner declined to provide a copy of the experience letter of the requisite two years for the beneficiary from his previous employer. The experience letter would have demonstrated the beneficiary’s qualification for the proffered position. 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.* Neither counsel nor the petitioner explained why a copy of the experience letter was not submitted in response to the RFE. Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

Furthermore, the experience letter from [REDACTED] would not meet the requirements under 8 C.F.R. § 204.5(g)(1) anyway. The letter was signed by someone from [REDACTED], but the name of the author was not printed. The letter did not include the title and contact information of the author, nor was the letter dated. It cannot be verified from who, when and where the original letter comes. Without solid supporting documents it is impossible to verify the origin and contents of the letter. *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."

Counsel asserts in the brief accompanying the appeal that DOL's certification is evidence that the beneficiary is qualified for the proffered position. DOL's certification of the Form ETA 750 does not supersede 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(1)(3).

The record of proceeding contains a letter from the petitioner regarding the beneficiary's work experience. The letter is written and signed by [REDACTED] General Manager, on the letterhead of the petitioner with address, telephone number and all contact information. This letter also verifies the full time status of the beneficiary's employment and contains a detailed job description. The petitioner confirms here that the beneficiary has been working as an automobile body repairer since October 2000. However, as previously noted the priority date in the instant case is March 26, 2001. Therefore, the petitioner does establish with this letter that the beneficiary possessed five months of experience in the job offered with the petitioner from October 2000 to March 2001. However, the petitioner failed to establish that the beneficiary possessed two years of requisite experience prior to the priority date, and further failed to demonstrate the beneficiary's qualifications for the proffered position.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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.