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U.S. Citizenship
and Immigration
Services

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FILE:

WAC 04 158 51400

Office: CALIFORNIA SERVICE CENTER

Date: NOV 29 2006

IN RE:

Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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 Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a real estate company. It seeks to employ the beneficiary permanently in the United States as a first line supervisor of landscape workers. 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 met the experience requirements of the labor certification as of the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 28, 2005 denial, the only issue in this case is whether or not the beneficiary met the experience requirements of the proffered job as specified by the Form ETA 750.

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.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

(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 occupational designation. The minimum requirements for this classification are at least two years of training or experience.

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. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 6, 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 appeal¹. Relevant evidence submitted on

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*

appeal includes counsel's brief and three letters from [REDACTED] dated November 15, 2000, January 26, 2004, and May 16, 2005, attesting to her employment of the beneficiary from January of 1992 until December 1998. The record does not contain any other evidence relevant to the beneficiary's experience.

The regulations for the skilled worker classification contain a minimum requirement that the position of two years training or experience. 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 approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 requires that the beneficiary must possess two years of experience in the job offered. Block 15 does not require any additional education or experience.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of first line supervisor of landscape workers must have two years of experience in the job offered.

In the instant case, in response to the director's request for evidence dated January 5, 2005, counsel submitted a letter, dated January 26, 2004, from [REDACTED]. The letter explained that [REDACTED] employed the beneficiary in a full-time (40 hours per week) position as a landscaper from January 1992 to December 1998. The letter states that the beneficiary was responsible for the gardening work for three high-end private home investment properties, and commercial properties, cleaning the yards, preparing the ground, terrain, lawn maintenance, and cultivation, including mowing as well as planting flowers, trees, bushes, and other plants as instructed. He was also responsible for the painting of fences and the homes and did other work as required.

The director denied the petition noting that the employment letter submitted from [REDACTED] contradicts what is stated in Part B of the ETA 750. Part B states that the beneficiary worked 20 hours a week, not 40. The director also stated that the job duties listed on the ETA 750 do not include painting, and it is unclear as to how much time the beneficiary spent painting and performing other non-landscaping work. Finally, the director stated that since there are no wage, tax, or pay records, and since the evidence in the record contains contradictory and vague statements, it is not possible to know if the beneficiary is qualified for the position as depicted by the ETA 750.

On appeal, counsel submits a new letter from [REDACTED] dated May 16, 2005, and an affidavit² from Susan M. Jeannette, agent of record, North County Legalization Services, Inc. Counsel claims that a

of Soriano, 19 I&N Dec. 764 (BIA 1988).

² It is noted that the affidavit provided by [REDACTED] although states she was duly sworn and placed under oath, does not contain a notary seal. The declaration that has been provided on appeal is not considered to be an affidavit as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. See *Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, does it contain the requisite statement, permitted by

typographical error was made when filling out the ETA 750, stating that [REDACTED] employed the beneficiary for 20 hours per week instead of the correct 40 hours per week.

The statement by [REDACTED] states that she, as the listed agent, North County Legalization Services, Inc., had one of her staff prepare the ETA 750 Parts A&B, who, in turn, made a scrivener's error in the hours box on the second page of the ETA 750 Part B. [REDACTED] asserts that under the listed prior work experience with [REDACTED] typographical error was made and that under the hours box, twenty hours per week was listed instead of the correct forty hours per week.

The new letter from [REDACTED] states that she employed the beneficiary from January 1992 to December 1998, 40 hours per week, in the capacity of landscape gardener. [REDACTED] explains that since the beneficiary was her only employee and since he did not have a Social Security Number, he was paid in cash on a weekly basis for his work. [REDACTED] also states that since the beneficiary did not have a Social Security Number, a payroll, tax, or formal wage payment system was not established for him. Finally, Ms. [REDACTED] clarifies her previous statement concerning the beneficiary's duties of painting fences and other minor outside non-landscape work as required. [REDACTED] states, "I feel that it must be explained that these other duties were very minimal in nature and were solely related to the fact that he was our only employee and was the only one we trusted to work as a Landscape Gardener on our investment properties. This is the reason that he would from time to time, do minor other work such as painting fences. However, this does not mean that he did not work for us full-time as a Landscape Gardener. All that was meant was that he was our sole and trusted employee, so when other minor work came up, he was the one to take care of it, in addition to his landscaping duties."

Counsel asserts on appeal that the number of hours marked on the ETA 750 Part B, page 2, was a typographical error and that the correct number of hours the beneficiary worked for [REDACTED] was available from other information in the record such as the employment letter from [REDACTED] and the statement from the preparer of the ETA 750 [REDACTED]. The AAO finds that the current record provides no basis to dispute counsel's assertion on appeal. Without further investigation from the director or other appropriate personnel, the director's speculation that such an error was intended to deceive is without basis and premature. Since [REDACTED] has insisted from the beginning that she employed the beneficiary in a full-time position (40 hours per week) and has consented to a meeting with CIS to provide verification of the beneficiary's employment, there is no reason to doubt that a clerical error was made. In addition, even if the AAO were to consider that [REDACTED] only employed the beneficiary for 20 hours per week, the amount of time employed (approximately six years) is more than sufficient to meet the two-year experience requirement of the ETA 750. This issue has been satisfactorily resolved.

Federal law, that the signer, in signing the statement, certifies the truth of the statement, under penalty of perjury. 28 U.S.C. § 1746. Such an unsworn statement made in support of an appeal is not evidence and thus, as is the case with the arguments of counsel, is not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

³ In his brief on appeal, counsel cites several decisions issued by the AAO concerning typographical errors, but does not provide their published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

After a review of the record, it is concluded that the petitioner has established that the beneficiary met the requirements of the ETA 750 as of the priority date, April 6, 2001.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The director's decision of April 28, 2005 is withdrawn. The petition is approved.