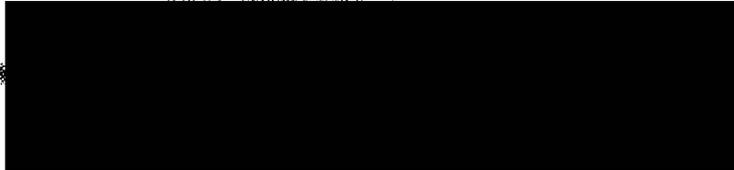




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FILE: WAC 03 256 52936 Office: CALIFORNIA SERVICE CENTER Date: **OCT 24 2006**

IN RE: Petitioner:  
Beneficiary:



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

The petitioner is a corporation that operates a recycling plant. It seeks to employ the beneficiary permanently in the United States as a recycling manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary has not met the minimum requirements of the Alien Employment Application at the time that the request for certification was filed. Therefore, the beneficiary was not eligible for the job offered by the petitioner. The director denied the petition approval accordingly.

On appeal, the counsel submits an explanatory letter 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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(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 regulation at 8 C.F.R. § 204.5(l)(2) states, in pertinent part:

“*Professional* means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.”

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

*Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.

If the petition is for a professional pursuant to 8 C.F.R. § 204.5(l), then, the petitioner must demonstrate that the beneficiary received a United States baccalaureate degree or an equivalent foreign degree prior to the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment

system of the Department of Labor. Here, the Form ETA 750 was accepted for processing on October 7 2002. The petitioner selected in Part 2, box "e" of the I-140 petition. That selection states, "A professional (at a minimum, possessing a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree) or a skilled worker (requiring at least two years of specialized training or experience)." Here, the labor certification required a Bachelor's Degree in Management or a related field. In the alternative, the petitioner stated in the labor certification that a related occupation would be "five years experience in purchasing, selling paper, plastic & mtl [sic] required."

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 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 October 26, 2001. The proffered wage as stated on the Form ETA 750 is \$81,000.00 per year. The Form ETA 750 states that the position requires five years of experience.

With the petition, counsel submitted the following documents: an explanatory letter from the petitioner; the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, income tax returns of petitioner, and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The I-140 petition was filed September 12, 2003. A request for evidence was issued July 16, 2004. Consistent with the requirements of 8 C.F.R. 204.5 § (1)(3)(i), the director requested, *inter alia*, evidence of the beneficiary's experience be in the form of a letter (s) from the beneficiary's previous employers giving the name, address, and title of the person verifying the information, and a description of the beneficiary's title, duties and dates of employment/experience and number of hours worked each week.

In response to the above, the petitioner provided an English language letter dated July 21, 2004, from [REDACTED] Taiwan, R.O.C. [REDACTED] the president of that company, stated that the beneficiary worked as a recycling manager since February 1, 1995. According to the letter, the beneficiary primarily analyzed the contents of scrap metal, and other recycling materials full time 40 hours each week.

The director denied the petition on December 13, 2004, finding that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition.

The issue to be discussed in this case is whether or not the petitioner had established that the beneficiary has the requisite experience as stated on the labor certification petition. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification. *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 13 and 14, set forth the job duties, minimum education, training, and experience that an applicant must have for the position of a recycling manager.

13. ...

“Negotiate with vendors, train in-house personnel, and oversee collection & processing operations.”

14. Education .....	
Grade School	8
High School	4
College	4
College Degree Required	Bachelors Degree
Major Field of Study	<u>Management or a related field</u>
Training	Blank
Experience .....	
Job Offered .....	
Years/Months	5/Blank
Related Occupation .....	
Years/Months	Blank
Related Occupation (specify)	<u>five years experience in purchasing, selling paper, plastic &amp; mtl [sic] required</u>

The certified ETA Form 750 Part B, Section 11 stated that the beneficiary is a graduate of Kansas Newman College, Wichita, Kansas earning a Bachelor of Arts degree<sup>1</sup> in Business Administration having attended from August 1989 through June 1993.

In the instant case, the Application for Alien Employment Certification, Form ETA-750B, item 15, set forth work experience that the beneficiary listed for the position of recycling manager:

15. WORK EXPERIENCE

a. NAME AND ADDRESS OF EMPLOYER

[REDACTED]

NAME OF JOB

[REDACTED]

DATE STARTED

[REDACTED]

DATE LEFT

Month -- Present [i.e. October 16, 2001]

KIND OF BUSINESS

Recycling Company

DESCRIBE IN DETAIL DUTIES...

<sup>1</sup> The diploma submitted specified that the beneficiary was awarded a Bachelor of Science degree.

Used computers to analyze the contents of scrap metal. Managed and ran day-to-day operation of plant.

NO. OF HOURS PER WEEK

40

The director requested an investigation be conducted of the beneficiary's job experience as stated with Essenco & Nimco Co., Ltd. From February 1995 to at least October 16, 2001 the date that the beneficiary signed the Form ETA 750 Part B. According to the investigation report, the president of the employer Essenco & Ecko is the father-in-law of the beneficiary and he told investigators that the business was divided into three companies. [REDACTED] and [REDACTED] and they all have the same address, telephone numbers and common family ownership.

The beneficiary is noted in local Taiwan official employment records that stated that the beneficiary was employed with [REDACTED] on June 3, 1996 and insured "under the basic level employee salary." According to the investigation, the company known as [REDACTED] only employed a full time cashier and part-time bookkeeper in attendance and that there was no direct employment verification from that company of the beneficiary's employment experience at that location. Also, according to arrival/departure records from Taiwan, R.O.C., the beneficiary had spent approximately three months each year in Taiwan (with the rest of time out of the country), in the years leading up to October 2001.

Upon appeal, counsel asserts that there is no direct evidence that the beneficiary "in fact does not meet the minimum qualifications of the job offered." Counsel asserts that the director's finding was based on incomplete, hearsay evidence and conjecture.

Counsel submits as additional evidence on appeal copies of the following documents: Taiwan, ROC, Corporation Registration certificate for [REDACTED] Taiwan; a company brochure for the Essenco & Nimco Group with a company history of operations; an organizational chart; an equipment/facility summary; a dismantling and processing summary; and, the beneficiary's labor insurance summary; and, "Various Income Withholding Certificate."

While counsel admits that the beneficiary was out of the country of Taiwan extensively before October 2001, he asserts that the beneficiary was on company business, and that the investigator and director's assumption was circumstantial on this point. This assertion begs the question of the beneficiary's duties as a recycling manager in Taiwan employed full time, 40 hours each week to perform duties that are described as "Negotiate with vendors, train in-house personnel, and oversee collection & processing operations" in the labor certificate, and described in ETA 750 Part B, section 15 as "Used computers to analyze the contents of scrap metal. Managed and ran day-to-day operation of plant." The AAO does not find it credible that the beneficiary **could be out of his home country** nine months each year prior to 2001 and also be employed full time by [REDACTED] in Kaohsiung, Taiwan performing the duties.

Counsel's explanation would identify another company job position requiring business travel not related to the managerial duties described and as outlined in the metals dismantling and processing summary mentioned above.

The problem that arises in this case is the multiple inconsistencies in information provided by the beneficiary, and, the lack of credible evidence of the occupation from the prior employer. *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." *Matter of Ho*, 19 I&N Dec. at 591-592 also states: "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.”

As mentioned above, the record of proceeding contains multiple inconsistencies. The job described in the labor certification does not relate to the traveling position that the beneficiary has undertaken during the period examined. There is no contradiction that the beneficiary actually spent three months out of each year in Taiwan, yet, the petitioner asserts that during the same time the beneficiary worked as a recycling manager in Taiwan 40 hours each week, while traveling abroad. There is a considerable and unexplained overlap in time for these endeavors. Further, the investigator reported that the beneficiary was insured based upon the “basic level salary,” That is not as a manager. The petitioner did not explain or provide additional information concerning this fact. The AAO concurs with the director’s determination that no probative evidence establishes that the beneficiary has two years of experience as a recycling specialist.

As found in the record of proceedings, the investigation conducted by the United States Embassy revealed that the statement of experience and sworn statements submitted with the I-140 and labor certification were inconsistent. Therefore, the statements of occupational experience in Form ETA 750B is inconsistent as they were done, in part concurrently, and while the beneficiary traveled out of his country. Further, what counsel asserts the beneficiary actually did for his company and the labor certification job description ETA 750 Parts A and B are at variance in a number of unexplained ways. Therefore the preponderance of the evidence does not show that the beneficiary does have the job experience stated in ETA 750 Part B.

Beyond the decision of the director, CIS electronic database records show that the petitioner filed I-140 petitions on behalf of one other beneficiary at about the same time as the instant petition was filed. Although the evidence in the instant case indicated financial resources of the petitioner greater than the beneficiary’s proffered wage, it would be necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. According to the CIS record number WAC 03 256 52964, the employment based petition filed for alien beneficiary [REDACTED] is currently pending. It was filed at approximately the same time as the subject petition and offers that alien a wage of \$32,573.00 per year. When a petitioner has filed petitions for multiple beneficiaries, it is the petitioner’s burden to establish its ability to pay the proffered wage to each of the potential beneficiaries. The two proffered wages total \$113,573.00.<sup>2</sup>

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The petitioner has not met that burden.

**ORDER:** The petition is dismissed.

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<sup>2</sup> The petitioner has submitted three U.S. federal tax returns (IRS Forms 1120 and 1120S) stating taxable income (Lines 28 or 21 respectively) of \$62,236.00, \$29,885.00 and \$75,819.00 for years 2001, 2002 and 2003. The record in the instant petition would fail to establish the ability of the petitioner to pay the proffered wages to the beneficiaries of the employment based visa petitions now pending. If this matter is pursued, this issue should be considered.