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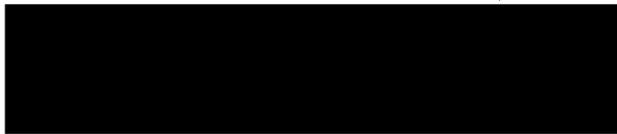


FILE: [REDACTED]
SRC-05-003-51245

Office: TEXAS SERVICE CENTER

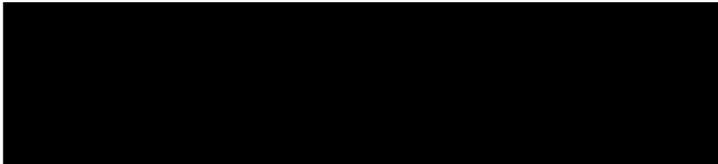
Date: APR 20 2007

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 was denied by the Acting Director (Director), Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an insulating contractor. It seeks to employ the beneficiary permanently in the United States as a first-line supervisor/manager of construction trades and extraction workers (insulation supervisor). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary had the requisite credentials as stated on the labor certification application. The director denied the petition accordingly.

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.

As set forth in the director's August 13, 2005 denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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 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 April 20, 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 in the record includes letters from the petitioner regarding the beneficiary's qualifications, a letter from Lift Truck Supply, Inc. and a copy of a skills certificate for the beneficiary. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the letters from the petitioner and evidence submitted establishes that the beneficiary possesses the required credentials.

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 labor certification to determine the required qualifications for the position. CIS may not ignore a term 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, 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 insulation supervisor. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Training	
	No. of Year	2 years
	Type of Training	video, field, certification
	Experience	
	Job Offered	Blank
	Related Occupation	Blank

The duties are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A states the followings as other special requirements:

- Must be a certified insulation installer by the National Association of Home Builders Research Center
- Must be a certified forklift driver
- Must be able to drive
- Must be able to operate communication system
- Must be drug free

The beneficiary set forth his credentials on Form ETA-750B and signed his name on April 13, 2001 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 13, the beneficiary listed "Certified Forklift Operator and Certified by the National Association of Home Builders Research Center as an Insulation Mechanic" as his licenses. On Part 15, eliciting information of his work experience, he represented that he has been working as a full time insulation installer for the petitioner since March 1995. He did not provide any additional information concerning his qualifications on that form.

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.

The instant I-140 petition was submitted on October 5, 2004 with a letter from Che Garner of the petitioner as evidence pertinent to the beneficiary's qualifications as required by the above regulation. This letter dated May 26, 2004 verified that the beneficiary had been employed as an insulation installer with the petitioner since November 17, 1995. However, the letter did not state any training the beneficiary received and did not include the writer's title or position with the company. The director issued a request for additional evidence (RFE) on May 21, 2005 requesting evidence to establish that the beneficiary possessed the requisite qualifications listed on the Form ETA 750 among others. In response to the director's RFE, the petitioner submitted another letter from the petitioner. The second letter was, dated July 11, 2005 from [REDACTED] Jr.

([redacted] July 11, 2005 letter). This letter stated the following concerning the beneficiary's work experience, in pertinent part:

[The petitioner] currently employs [the beneficiary] as an insulation installer. He has been employed here since November 17, 1995.

[redacted] has a training program for Insulators based on a progressive set of videos. [The petitioner] obtained these training videos from [redacted]. [redacted], Jr. President of [the petitioner] served as the trainer and used these videos, as required by the [redacted] program, to train his insulators.

The letter is from the president of a former and current employer of the beneficiary, who also served as a trainer. The letter verifies that the beneficiary obtained video training during his employment with that company as an insulation installer from November 1995 to the present time, i.e. July 11, 2005. Therefore, the AAO concurs with counsel's argument that Mr. [redacted]' July 11, 2005 letter should be accepted as primary regulatory-prescribed evidence to establish that the beneficiary obtained the requisite two years of training in the form of video as set forth in Item 14 of the Form ETA 750A.

However, the certified Form ETA 750 sets forth other special requirements in Item 15. These special requirements are: "Must be a certified insulation installer by the National Association of Home Builders Research Center; Must be a certified forklift driver; Must be able to drive; Must be able to operate communication system; and Must be drug free." The beneficiary indicated that he was certified by the National Association of Home Builders Research Center as an Insulation Mechanic in Item 13 of the form ETA 750B. Mr. [redacted] July 11, 2005 letter and his October 6, 2005 letter stated in pertinent part that: "[t]he National Association of Home Builders then came out after these training programs were completed and tested them and upon completion of that testing were awarded certificates." However, the record of proceeding does not contain any copy of such a certificate or other evidence to demonstrate that the beneficiary was certified by the National Association of Home Builders Research Center (or the National Association of Home Builders). The petitioner and counsel claim that the certificate cannot be located and produced by the petitioner due to the fact that the petitioner is currently in the process of changing locations. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). 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 record contains a copy of the beneficiary's certificate and a letter from [redacted] of Lift Truck Supply, Inc. to the petitioner. The letter stated in pertinent part that: "[w]e have conducted Forklift Safety Training at your location in Tyler, TX." The letter was not dated and did not indicate when Lift Truck Supply, Inc. conducted the training at the petitioner's location. The certificate was issued to the beneficiary for successful completion of the Toyota Safety Awareness for Forklift Equipment Lift Program. The date of completion on the certificate appears as Class I, IV & V and the certificate has no issuing date. It is not clear whether or not the certificate was issued to the beneficiary prior to the priority date of April 20, 2001, and thus it is not clear that the beneficiary met the special requirement of being a certified forklift driver prior to

the priority date. Therefore, the petitioner failed to demonstrate that the beneficiary was a certified forklift driver before filing the labor certification application as required by the Form ETA 750².

The record of proceeding does not contain a copy of the beneficiary's driver's license or any evidence that the beneficiary was able to drive. It is reasonably assumed that the beneficiary can drive, however, since the Form ETA 750 requires it as a part of special requirements, the petitioner must prove that the beneficiary was able to drive at the time of filing with solid evidence to establish the beneficiary's qualifications. The petitioner did not submit any evidence for the beneficiary's ability to operate a communication system. Nor did the petitioner submit drug test results or any other type of evidence showing that the beneficiary is drug free.

Therefore, the petitioner did not establish with regulatory-prescribed evidence that the beneficiary met all the special requirements set forth in Item 15 of the Form ETA 750, and further failed to establish that the beneficiary was qualified for the proffered position at the time of filing the labor certification application. Counsel's assertions on appeal fail to overcome the ground of denial in the director's decision.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 not been met.

ORDER: The appeal is dismissed.

² Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and discussed whether or not the petitioner has established that the beneficiary met the other special requirements set forth in Item 15 of the Form ETA 750. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).