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U.S. Citizenship
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Services

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[REDACTED]

FILE: [REDACTED]
SRC 05 121 51497

Office: TEXAS SERVICE CENTER Date:

JAN 03 2007

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:

[REDACTED]

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

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a manager. 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 is qualified to perform the duties of the proffered position with two years of qualifying employment experience. 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 of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 16, 2005 decision denying the petition, the single issue in this case is whether the evidence establishes that the beneficiary is qualified to perform the duties of the proffered position. The director noted inconsistencies in information pertaining to the beneficiary's employment experience and found it doubtful that the beneficiary could be employed at BNG Inc. d/b/a Quick Stop during the time period that it did not exist as a corporation.

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 April 30, 2001.¹

On the Form ETA 750B, signed by the beneficiary on February 25, 2005, the beneficiary did not claim to have worked for the petitioner. The ETA 750 was certified by the Department of Labor on February 17, 2004.

The I-140 petition was submitted on March 23, 2005. On the petition, the petitioner claimed to have been established in 1996, to currently have two employees, to have a gross annual income of \$371,741.00, and to have a net annual income of \$17,875.00. With the petition, the petitioner submitted supporting evidence.

On appeal, counsel submits a letter of clarification from the beneficiary's former employer.

¹ The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. From Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

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 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) or 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.

To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 Application for Alien Employment Certification, Form ETA-750A, blocks 14 and 15, sets forth the minimum education, training and experience that an applicant must have for the position of manager. On the ETA 750A submitted with the instant petition, blocks 14 and 15 describe the requirements of the offered position as follows:

14.	Education (number of years)	
	Grade School	Blank
	High School	Blank
	College	Blank
	College Degree Required	Blank
	Major Field of Study	Blank
	Training - yrs	Blank
	Experience	
	Job Offered	Yrs 2
	Related Occupation	Yrs Blank
	Related Occupation (specify)	Blank
15.	Other Special Requirements	Blank

The beneficiary states his or her qualifications on Form ETA 750B. On the ETA 750B submitted with the instant petition, in block 11, for information on the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), the beneficiary states the following:

Schools, Colleges and Universities, etc.	Field of Study	From	To	Degrees or Certificates Received
Blank	Blank	Blank	Blank	Blank

On the ETA 750A submitted with the instant petition, block 14 requires two years of experience in the offered position. No other requirements are stated in either block 14 or block 15.

The beneficiary states his or her qualifications on Form ETA 750B. On the ETA 750B submitted with the instant petition, in block 15, for information on the beneficiary's work experience the beneficiary states the following:

Name and Address of Employer	Name of Job	From	To	Kind of Business
Unemployed	Blank	Blank	Present	Blank

The record also contains the following documentation related to the beneficiary's qualifications:

- Letter, dated 03/12/2000, from the president of the Indian grocery store, [REDACTED] who states that the beneficiary worked as a store manager from 11/25/98 to 08/09/2000;
- Letter, dated 06/04/05, from the petitioner's president, verifying that the beneficiary was employed as a store manager at [REDACTED] in Swainsboro, GA, from January 2001 to December 2002;
- Letter, dated 07/01/05, from the petitioner's president, verifying that the beneficiary worked at his companies from January 2001 to December 2002, specifically at [REDACTED] White in Glenwood, GA, from January 2001 until she transferred to [REDACTED] upon its establishment in April 2001; and
- Form G-325A, Biographic Information, signed by the beneficiary on February 28, 2005, indicating that she had not been employed for the last five years.

The documentation related to the beneficiary's qualifications contains numerous inconsistencies. The letter from the beneficiary's foreign employer indicates that the beneficiary worked for less than two years from 11/25/98 to 08/09/2000. The Form G-325A, Biographic Information, signed by the beneficiary on 02/28/05, indicates that the beneficiary had been unemployed for the last five years, which would entail the time period from 02/28/2000 to 02/28/05. The petitioner's president states in his first letter that the beneficiary worked at [REDACTED] from January 2001 to December 2002, and then amended the details of the beneficiary's employment in his second letter after the director pointed out in her denial that the beneficiary could not have been employed at [REDACTED] prior to its existence as a corporation. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Further, 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 issue is whether the beneficiary met all of the requirements stated by the petitioner in block 14 of the labor certification as of the day it was filed with the Department of Labor. In view of the foregoing, the petitioner has not established that the beneficiary has two years of qualifying employment experience. Therefore, the petitioner has not overcome the objection of the director.

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.