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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 30 2007
WAC 05 015 51042

IN RE: Petitioner:
Beneficiary: [redacted]

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:

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

The petitioner operates a dental laboratory. It seeks to employ the beneficiary permanently in the United States as a dental ceramist. 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 is qualified to perform the duties of the proffered position with three 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 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.

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 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 appeal.

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. *See* 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). 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).

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 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).

Here, the Form ETA 750 was accepted on May 12, 1998.[1] The proffered wage as stated on the Form ETA 750 is $18.72 per hour. The Form ETA 750 states that the position requires three years experience.

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[1] It has been approximately eight years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the

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 dental ceramist.

In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	8
	High School	4
	College	N/A
	College Degree Required	Not required
	Major Field of Study	Blank
	Training	Blank
	Experience	3 years
	Related Occupation	
	Years	Blank
	Specify	Blank

The beneficiary set forth her work experience on Form ETA-750B, dated the form on October 15, 2004 and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury.

15. WORK EXPERIENCE

a. NAME AND ADDRESS OF EMPLOYER
Unemployed
NAME OF JOB
Student
DATE STARTED
Month – 04 [April] Year - 2003
DATE LEFT
Present [i.e. October 15, 2004]
KIND OF BUSINESS
Blank
DESCRIBE IN DETAIL DUTIES…
Engages in studying English language at Language Systems International from July 2003.
NO. OF HOURS PER WEEK
Blank

b. NAME AND ADDRESS OF EMPLOYER
141 E. 7th Avenue, Vancouver BC, Canada
NAME OF JOB
Dental Technician

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employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

DATE STARTED
Month – 12 [December] Year - 2000
DATE LEFT
Month – 03 [March] Year - 2003
KIND OF BUSINESS
Dental Laboratory
DESCRIBE IN DETAIL DUTIES…
Duties included waxing metal frame patterns for porcelain crowns and bridges ….
NO. OF HOURS PER WEEK
40

c. NAME AND ADDRESS OF EMPLOYER
[redacted] 10-25 Kouyou-Cho, Kochi City, Kochi, Japan
NAME OF JOB
Dental Technician
DATE STARTED
Month – 04 [April] Year - 1997
DATE LEFT
Month – 10 [October] Year - 2000
KIND OF BUSINESS
Dental Laboratory
DESCRIBE IN DETAIL DUTIES…
Duties included waxing metal frame patterns for composite resins and porcelain crowns and bridges ….
NO. OF HOURS PER WEEK
40

The applicant must also have three years of experience in the job offered, the duties of which 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 does not reflect any special requirements.

Along with Form ETA 750, Part A, set forth above, the employer also is required to submit Form ETA 750, Part B that is a "Statement of Qualifications of Alien." Part B identifies the alien, specifies his current and prospective address in the United States, the alien's education including trade and vocation training, and lists his work experience.

The Form ETA 750 Part B prepared by the beneficiary states the following education history:

Block 11
Names and Addresses of Schools, Colleges, and Universities Attended (including trade or vocational training facilities)

[redacted], Kochi, Japan

Field of Study	General
From …[mo./yr]	04 1987
To …[mo./yr.]	03 1990
Degrees or Certificates Received	Graduated

Faculty of Dentistry Hiroshima University, Hiroshima, Japan

Field of Study	Dental Technician Course
From ...[mo./yr]	04 1995
To ...[mo./yr.]	03 1997
Degrees or Certificates Received	Certificate

Language System International, Torrance, Ca

Field of Study	ESL
From ...[mo./yr]	07 2003
To ...[mo./yr.]	Present
Degrees or Certificates Received	Blank

With the petition filed on October 18, 2004, the petitioner submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor with an additional ETA 750 Part B for the beneficiary; verification of the beneficiary's employment by ; verification of the beneficiary's employment by Laboratory; the petitioner's personal joint U.S. Federal tax returns, Forms 1040, for years 1998 through 2003; the petitioner's offer of employment; and, copies of documentation concerning the beneficiary's personal information as well as other documentation.

A Request for Evidence was issued on May 5, 2005 by the director. Consistent with the requirements of 8 C.F.R. § 204.5(l)(3)(ii), the Director requested, *inter alia*, evidence of the beneficiary's prior employment experience on letterhead giving the dates of employment/experience giving the name, address, and title of the person providing the information with telephone numbers, and a description of the experience of the alien (the beneficiary's titles, duties, dates of employment/experience and numbers of hours worked per week).

In response to the above request, counsel submitted the following documents: an explanatory letter dated May 13, 2005; a statement of the beneficiary's employment by Dental Laboratory, of Kochi-city, Kochi, Japan, dated August 25, 2002, stating that the beneficiary was employed as a dental technician from April 1, 1997 to October 31, 2000; a statement of the beneficiary's employment by ., Vancouver, British Columbia, Canada, dated July 7, 2004, stating that the beneficiary was employed as a dental technician from December 1, 2000 to March 21, 2003

The director denied the petition on May 26, 2005, finding that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with three years of qualifying employment experience. Specifically, the director found that the work experience received by the beneficiary before the priority date was one year and one and one-half months and not the required three years expressed as a requirement in the labor certification. Further, the director stated that any work experience received after the priority date could not be considered. [2]

[2] Once the labor certification process is completed and the Alien Employment Application certified for the job as stated in Form ETA 750 A, the job requirements cannot be satisfied by events occurring after the priority date of the labor certification. *See* 8 C.F.R. § 204.5(d). *See also* Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and

On appeal, counsel asserts that the director's request for evidence did not specify that the beneficiary must possess the minimum experience as of the priority date, and, the director erred when the director stated that job experience acquired after the priority date could not be considered.

Counsel submits copies of the following additional documentation: a "Declaration" of the beneficiary dated June 22, 2005, and, a letter from , Tokuyama City, Japan, dated June 3, 2005 that the beneficiary worked as a dental ceramist from April 1, 1992 to March 15, 1995.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (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 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(d) provides in pertinent part:

> Priority date. The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an individual labor certification from the Department of Labor shall be the date the request for certification was accepted for processing by any office within the employment service system of the Department of Labor ...

As a preface to the following discussion, counsel's contention that the director's request for evidence did not specify that beneficiary must possess the minimum job experience as of the priority date is not grounds for appeal is misplaced. When petitions on their face, do not demonstrate eligibility for the preference visa classification sought, the director may review and act upon the petition as submitted. *See* 8 C.F.R. § 103.2(b)(8). In this instance the director plainly indicated that the beneficiary's stated work experience did not "add-up to the 3 years job offered work experience." Further, as this present appeal demonstrates, the petitioner may introduce additional evidence in support of its position in a *de novo* review. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

In the particular facts of this case, counsel is making a contention not supported by regulation. He is asserting that because he was unaware that the minimum requirements stated in the labor certification must be satisfied

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Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

before the priority date because the director did not tell him this requirement, then in that case, the case should be reopened to allow the petitioner to submit addition additional information. It is axiomatic that in a legal forum ignorance of law and regulation is not an excuse or grounds for relief. 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. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). However, since the appeal satisfies this request, counsel's argument is moot on its face.

Counsel has introduced additional evidence on the issue at hand, whether or not the beneficiary had the minimum three years of job experience as a dental ceramist prior to the priority date. Regarding this issue, counsel has submitted upon appeal a "Declaration" of the beneficiary dated June 22, 2005. In pertinent part, the beneficiary states that she has more than four years of experience as a dental ceramist prior to the priority date which is May 12, 1998, derived from her work at Tokuyama City, Japan, from April 1, 1992 to March 15, 1995.

In support of this statement, counsel submits a letter from Tokuyama City, Japan, dated June 3, 2005, that the beneficiary worked as a dental ceramist from April 1, 1992 to March 15, 1995. The description of her duties does not indicate the beneficiary attended an apprentice or training program at the lab to perform the duties of dental ceramist at the facility. The beneficiary's duties as a dental ceramist at that employer are complex.

There is no explanation in the record of proceeding how the beneficiary could work for Tokuyama City, Japan, accomplishing the many skilled tasks required by the job description before attending the Faculty of Dentistry Hiroshima University, Hiroshima, Japan, for two years to attain a certificate as a graduate Dental Technician to work in the field. The description of her duties at oes not indicate the beneficiary attended an apprentice or training program at the lab to learn the job. It is not credible that the beneficiary could have performed the skilled and complex job duties without education and training, education and training that she, in fact, received *after* her employment at

Further, there is no indication in counsel's cover explanatory letters in this matter, in the labor certification, ETA 750 part B submitted by the beneficiary, or in the record as a whole, of approximately three years of job experience in the job prior to the appeal. The Dental Lab, Tokuyama City, Japan work experience was only included in the record after the director's decision to deny the petition.

Ts. petitioner's failure to represent the beneficiary's Tokuyama city, Japan until the appeal. No supporting, independent evidence was submitted such as pay tubs, statements, tax payment evidence or other indicia to support counsel's contention that the beneficiary worked at for about three years. Again, t finds the evidence submitted of the exp 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). 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.

The AAO thus affirms the director's decision that the preponderance of the evidence does not demonstrate

that the beneficiary acquired three years of experience as a dental ceramist before the priority date from the evidence submitted into this record of proceeding and thus the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

ORDER: The appeal is dismissed.