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U.S. Citizenship
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Services

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FILE:

Office: NEBRASKA SERVICE CENTER

Date:

SEP 12 2007

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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 Acting Director, Nebraska Service Center, denied the employment-based visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a metal fabricator. It seeks to employ the beneficiary permanently in the United States as a metal corrugating machine operator. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor (DOL) accompanied the petition. The acting director determined that the petitioner had not established that the beneficiary has the requisite training as stated on the labor certification application and denied the petition accordingly.

On the Form I-290B appeal, counsel stated that she represents the beneficiary.

The regulation at 8 C.F.R. § 103.3(a)(2)(i) states that the affected party shall file the appeal from an unfavorable decision.

The regulation at 8 C.F.R. § 103.3(a)(1)(iii) states, in pertinent part:

(B) *Meaning of affected party.* For purposes of this section and sections 103.4 and 103.5 of this part, *affected party* (in addition to [CIS]) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition.

Citizenship and Immigration Services' (CIS) regulations prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B).

The record in the instant case, however, contains a Form G-28 Notice of Entry of Appearance executed by the petitioner's president and acknowledging counsel. This office finds, notwithstanding counsel's failure to note, on the appeal, that she represents the petitioner, that the petitioner has assented to be represented by counsel and acquiesced in filing the instant appeal.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the acting director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated that the beneficiary has the requisite training as specified in the approved Form ETA 750 labor certification.

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 unavailable in the United States.

The regulation at 8 C.F.R. § 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.

Eligibility in this matter hinges on the petitioner demonstrating 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 DOL and submitted with the instant petition.¹ *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the DOL. Here, the request for labor certification was accepted for processing on April 30, 2001. The labor certification states that the position requires two years of training, but does not further describe the requisite training. The Form I-140 petition in this matter was submitted on June 27, 2005.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.²

In the instant case the record contains a letter dated February 27, 2006 from the petitioner's president, the Form ETA 750, Part B, and a G-325 Biographic Information form. The record does not contain any other evidence relevant to the beneficiary's qualifying employment training.

The petitioner's president's February 27, 2006 letter states that during the beneficiary's fourteen months of employment with the petitioner prior to the priority date the beneficiary received the equivalent of two years of training.

¹ To determine whether a beneficiary is eligible for a third preference immigrant visa, the Service must ascertain whether the alien is in fact qualified for the certified job. In evaluating the beneficiary's qualifications, the Service must look to the job offer portion of the labor certification to determine the required qualifications for the position. The Service 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 Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On the Form ETA 750, Part B the beneficiary stated that he had worked as a Metal Corrugating Machine Operator since April 2000. On the G-325 Biographic Information form, which the beneficiary signed on June 20, 2005, the beneficiary stated that he had worked as a warehouseman for the petitioner since April 2000 and through that date. The record contains no explanation of that discrepancy.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

In a letter dated March 1, 2006 counsel indicated that the beneficiary received his training in his position with the petitioner, and that prior to filing the Form ETA 750 the beneficiary had "fourteen full months of experience." Counsel added that, "By [the priority] date [the beneficiary] was already fully trained and qualified as a Corrugating Machine Operator . . . [having] received the equivalent of the two years of required training and was employed by Champion Metal as a full-time Corrugating Machine Operator."

The acting director denied the petition on April 21, 2006.

On appeal, counsel asserted that the DOL had determined that the beneficiary is qualified for the proffered position and that the decision is outside the authority and expertise of CIS, citing *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK (D. Ore. November 3, 2005); *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)); *Omar v. INS*, 298 F.3d 710 (8th Cir. 2002); and *Chevron v. Naturalization Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

As was noted above, section 203(b)(3)(A)(i) of the Act 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 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, and any other requirements of the individual labor certification."

In the instant case, the approved labor certification states that the proffered position requires two years of training. The issue before us is whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification. The regulations specifically require the submission of such evidence for this classification. 8 C.F.R. § 204.5(l)(3)(B) ("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"). As noted above, the ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

DOL has promulgated regulations to implement these duties. 20 C.F.R. § 656. None of the inquiries assigned to DOL by those regulations, however, involve a determination as to whether or not the alien is qualified for the job offered. This fact has not gone unnoticed by the Federal Circuit Courts of Appeals:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14) [currently found at 212(a)(5)(A)(i)]. *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Relying in part on this decision, the Ninth Circuit Court of Appeals stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983).

The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working

conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

Id. at 1009. (Emphasis added.)

The Ninth Circuit reached a similar decision one year later in *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*:

The Department of Labor (“DOL”) must certify that insufficient domestic workers are available to perform the job and that the alien’s performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien’s entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

736 F. 2d 1305, 1309 (9th Cir. 1984).

See also Black Const. Corp. v. I.N.S., 746 F.2d 503 (9th Cir. (Guam) 1984) (rejecting argument that once employer’s labor certifications had been approved by DOL it was error for INS to deny related immigrant petitions for failure to meet preference status requirements).

We are cognizant of the decision in *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK (D. Ore. November 3, 2005), in which the District Court found that CIS “does not have the authority or expertise to impose its strained definition of ‘B.A. or equivalent’ on that term as set forth in the labor certification.” In contrast to the broad precedential authority of the case law of a United States Circuit Court of Appeals, the AAO is not bound to follow even the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a federal district judge’s decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law, particularly, as in *Grace Korean*, where the case is unpublished. *Id.* at 719.

The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church* at *8 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since CIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a). Moreover, at least two circuits, including the Ninth Circuit overseeing the Oregon District Court, have held that CIS does indeed have the authority and expertise to evaluate whether the alien is qualified for the job. Those Circuit decisions, and not *Grace Korean*, are binding on this office and will be followed in this matter.

The key to determining the job qualifications specified in the labor certification is found on Form ETA-750 Part A. This section of the application for alien labor certification, “Offer of Employment,” describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of training, education, and experience required for the proffered position in this matter, Part A, Item 14 of the labor certification, as filled in by the petitioner, reflects that the position requires no education and no experience, but requires two years of training.

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, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

As discussed above, the role of the DOL in the employment-based immigration process is to make two determinations: (i) that there are not sufficient U.S. workers who are able, willing, qualified and available to do the job in question at the time of application for labor certification and in the place where the alien is to perform the job, and (ii) that the employment of such alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act. Beyond this, Congress did not intend DOL to have primary authority to make any other determinations in the immigrant petition process. *Madany*, 696 F.2d at 1013. As discussed above, CIS, not DOL, has final authority with regard to determining an alien's qualifications for an immigrant preference status. *K.R.K Irvine*, 699 F.2d at 1009 FN5 (citing *Madany*, 696 F.2d at 1011-13). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by DOL. *Id.*

The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (Emphasis added.). CIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (Emphasis added.). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued.

This office does not lightly reject the reasoning of a District Court. The District Court's unpublished decision, however, is not binding on us, runs counter to Circuit Court decisions that are binding on us, and is inconsistent with the actual labor certification process before DOL.

The only evidence in the record that suggests that the beneficiary may have the requisite two years of training is the petitioner's president's February 27, 2006 letter. That letter states that the beneficiary's 14 months of training is the equivalent of two years of training. This office finds that, notwithstanding the petitioner's president's assertion, the beneficiary's fourteen months of training is not two years of training, and does not qualify him for the proffered position pursuant to the requirements specified by the petitioner itself.

As was noted above, pursuant to *Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 CIS may not ignore a term of the labor certification. The evidence submitted does not demonstrate credibly that the beneficiary has

the requisite two years of training. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position. The petition, submitted pursuant to 8 C.F.R. §204.5(l), was correctly denied on this ground, which has not been overcome on appeal.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.