U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

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FEB 14 2005

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC-02-168-50840

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, Director
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 is an importer and wholesaler of vehicle lighting. It seeks to employ the beneficiary permanently in the United States as an importer. 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 was qualified for the proffered position and denied the petition accordingly.

On appeal, counsel submits a brief and previously submitted 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The issue to be discussed in this case is whether or not the petitioner established the beneficiary's qualifications for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is January 4, 1999. *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 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of importer. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	6
	High School	6
	College	4
	College Degree Required	B.S.
	Major Field of Study	Business Administration

The applicant must also have two years of experience in the job offered in order to perform the job duties listed in Item 13, which states "Import vehicle lighting from Taiwan for sale to domestic merchants. Maintain information on FMVSS and photometrics. Negotiate contracts with exporters of Taiwan. Use MAS 90 and Twinbridge to handle correspondence." Item 15 indicates that there are no special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information about the beneficiary's attended colleges and universities, he indicated that he received both a BBA and MBA, studying Business Administration, from the University of Nebraska-Lincoln in May 1995 and 1998, respectively. On Part 15, eliciting information of the beneficiary's work experience, he indicated that he was employed by the petitioner from October 1998 through the date of filing the labor certification application. He states he was their import/marketing analyst and performed the same duties as the proffered position.

With the initial petition, the petitioner submitted the beneficiary's resume; copies of the beneficiary's diplomas and transcripts from the University of Nebraska corroborating the beneficiary's educational credentials as set forth on the ETA 750B; a recommendation letter from the State of Nebraska for an internship he completed with the Department of International Development; and W-2 forms from 1999, 2000, and 2001, evidencing the beneficiary's employment with the petitioner.

Because the evidence was insufficient, the director requested additional evidence concerning the evidence of the beneficiary's qualifications on September 17, 2002. The director stated that the proffered position requires proof of two years of experience with verification in letterform or with copies of paystubs, W-2 forms or equivalent, and stated that the letter submitted was unacceptable for failing to state the amount of hours worked per week or beginning and ending dates of employment.

In response to the director's request for evidence, the petitioner submitted previously submitted evidence and counsel's accompanying cover letter indicates that "[u]nder Item 14, "Related Occupation", [sic] MBA in lieu of 2 years experience, the beneficiary possesses the experience listed on the form ETA-750."

The director denied the petition on January 6, 2003 stating that no evidence was provided to show "that the beneficiary has had two years of experience on the job offered prior to the filing of Form ETA-750 with the Department of Labor."

On appeal, counsel states that the Department of Labor (DOL) accepted the beneficiary's master's degree as equivalent to a bachelor's degree and two years of experience implicitly in the petitioner's response to a DOL deficiency notice. The petitioner submits copies of DOL correspondence on appeal.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), guiding evidentiary requirements for "professionals," states the following:

> 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. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

> 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.

Thus, for petitioners seeking to qualify a beneficiary for the third preference "skilled worker" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification" as clearly directed by the plain meaning of the regulatory provision. And for the "professional category," the beneficiary must also show evidence of a "United States baccalaureate degree or a foreign equivalent degree."

Additionally, 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 DOL correspondence submitted on appeal includes a copy of a DOL-issued deficiency notice that stated the following: "Experience gained with the petitioning employer may not be used to qualify the alien for the position offered. If not other experience can be provided, then the employer should amend the ETA 750A to delete the experience requirement in Item 14." Additionally, the DOL-issued deficiency notice stated that "[t]he requirement for a Master's degree is not considered normal to this occupation and constituted a restrictive requirement. Please submit an amendment to delete the requirement or justify the degree as a business necessity."

Although CIS does not have a copy of the record of proceeding from DOL, counsel submitted what is purportedly the petitioner's response to the DOL deficiency notice. A letter from the petitioner to DOL states the following:

> The alien did not use the experience gained with the petitioning employer for the prospective position of Importer. Please also note that the alien obtained the Master of Business administration from University of Nebraska in May 1998. A master's equivalent is a bachelor's degree plus two years of experience, according to DOL (Exhibit 1). Thus, based on the alien's education [sic] background, he is well qualified for the prospective position.

The referenced Exhibit 1 was not included with the copy of the petitioner's responsive letter to DOL on appeal. The petitioner also stated that they agreed to delete the Master's degree requirement.

The certified ETA 750A indicates that the petitioner initially submitted the form with all of the requirements on Item 14 but under "Experience," set forth an "MBA in lieu of 2 years experience" under "Related Occupation," but subsequently crossed it out and initialed the change, which was approved by DOL on March 26, 2002. The petitioner left the two years of experience requirement intact. Thus, DOL certified the amended ETA 750A without the "MBA in lieu of 2 years experience" optional requirement but with the two years of experience requirement. The ETA 750B was not amended and the petitioner did not indicate that the beneficiary had any additional employment experience other than with the petitioner.

Counsel states that DOL "[implicitly] accepted the petitioner's argument [that the beneficiary is qualified for the proffered position based upon his master's degree] when it approved the labor certification application with the experience requirement remaining in effect instead of being deleted. This acceptance is in accord with [Board of Alien Labor Certification Appeals (BALCA)] decisions." Counsel asserts that DOL's "decision" is controlling and CIS erred in determining that the beneficiary was not qualified for the proffered position. Counsel states that uncited BALCA precedents support the notion that "additional education may be a qualifying factor," and cites *Matter of Capricorn Systems, Inc.*, 93-INA-333 (1995) as BALCA's only check on the use of additional educational requirements as long as other applicants are not rejected on the basis of lacking necessary experience.

At the outset, counsel does not provide legal authority for the applicability of BALCA's precedent to these proceedings occurring under the Department of Homeland Security. Nor does counsel submit how CIS's regulatory authority to verify the beneficiary's qualifications for the proffered position is obviated by DOL.

The BALCA precedent counsel cites works against his arguments. *Matter of Capricorn Systems, Inc.*, states the following:

> Employer argues that in determining Alien's experience, credit should be given for course work taken in obtaining his Master's degree (Employer's Brief at Point 1, B). An employer must establish that the alien possesses the stated minimum reqirements [sic] for the position. Charley Brown's, 90-INA-345 (Sept. 17, 1991). Here, Alien's Bachelor's degree is in an unrelated field to the offered position, and Employer does not argue that it is equivalent. It is therefore not considered. Alien's Master's degree in Information Systems has gained the tacit approval of the CO as an equivalent degree, and we agree that this degree establishes Alien's possession of the minimal educational requirement for the job.

> The issue to be determined therefore becomes whether the Alien's post secondary degree may serve double duty as part of the required experience as well. We find that it may not.
> In all aspects of this Application, the two requirements of experience and education have been separate. In the Form ETA 750 Part A, education and experience requirements are separate items (AF 67). The recruitment advertisement requires a degree plus 2 years experience (AF 47B). In the Employer's rejection letters to the U.S. Applicants, the Employer explicitly states that they are looking for an analyst with a degree and 2 years experience (AF 84, 88, 92, 96).
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> An employer may not require more experience of U.S. workers than the alien possesses. Western Overseas Trade and Development Corp., 87-INA-640 (Jan. 27, 1988). Where the alien does not meet the employer's stated job requirements, certification is properly denied under Section 656.21(b)(6). Marston & Marston. Inc., 90-INA-373 (Jan. 7, 1992). Here, the Alien does not have the 2 years experience required of the U.S. workers who applied for the position. Certification is properly denied in these circumstances.

Counsel did not provide citations to the precedent to support his argument that additional educational requirements may be accepted without being presented on the Form ETA 750A. Here, the petitioner's counsel did not address the critical fact that the requirement accepting a master's degree in lieu of two years of experience was deleted on amendment with DOL. He relied upon that additional deleted requirement in his response to the director's request for evidence. Counsel did not provide evidence to support his assertions that the petitioner did not reject any applicants who may have had a master's degree but no experience like the beneficiary. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). It is unclear whether or not DOL reviewed that substantive part of the petitioner's process, which cannot be reviewed before CIS. The AAO does not have a certified and complete record of proceeding to ascertain what response DOL received from the petitioner concerning its deficiency notice.

Contrary to counsel's assertions, the beneficiary does not meet the requirements of the proffered position. He does not have two years of experience in the proffered position prior to the priority date established in January 1999. He began employment with the petitioner in 1999. He received notice from DOL that he could not establish his qualifications based upon his master's degree, a job requirement that was deleted and approved by DOL. He also received notice from DOL that he could not establish his qualifications if the job requirements continued to include two years of experience. DOL's subsequent certification of the ETA 750 does not indicate approval of the beneficiary's qualifications, and if anything, shows simple error, for which CIS, which is tasked with verifying a beneficiary's qualifications for proposed employment leading to immigration benefits, may make its own determination. *See* 8 C.F.R. § 204.5(l)(3); *Matter of Wing's Tea House*, 16 I&N Dec. at 158; *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. at 406; *Mandany v. Smith*, 696 F.2d at 1008; *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d at 1006; and *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d at 1.

The beneficiary has a bachelor's degree in business administration and therefore meets that particular requirement of the proffered position. The beneficiary has not established that he has two years of qualifying employment

experience prior to the priority date. The letter submitted from the state of Nebraska does not provide details required under 8 C.F.R. § 204.5(l)(3) and the beneficiary did not mention this employment on the ETA 750B. The proffered position does not permit for the petitioner to substitute additional educational credentials for employment experience. The beneficiary's employment experience with the petitioner does not qualify for the proffered position as it was all obtained after the priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The beneficiary has not indicated any other qualifying employment experience. Thus, the beneficiary is not qualified for the proffered position as he has not provided evidence of two years of experience as delineated as a requirement on the ETA 750A.

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.