U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: OCT 06 2006

EAC-03-204-51244

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 Acting Center Director (Director), Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a tree maintenance company. It seeks to employ the beneficiary permanently in the United States as a tree surgeon. As required by statute, a Form ETA 750, Application for Alien Employment Certification (labor certification or the Form ETA 750) approved by the Department of Labor, accompanied the petition. The director denied the petition because the petitioner did not submit the requested evidence to establish that the beneficiary possessed the required two years of work experience as a tree surgeon, and therefore, the petitioner had not established that the beneficiary was qualified for the proffered position.

On appeal, the petitioner's counsel contends that in response to the director's request for evidence (RFE) the petitioner did submit an experience letter from the beneficiary's former employer and submitted the copy of the response to the RFE and a copy of the experience letter. Counsel also argues that the experience letter established that the beneficiary possesses two years of experience, and therefore, the petitioner established the beneficiary's qualification.

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 6, 2001.

In evaluating the beneficiary's qualifications, Citizenship and Immigration Service (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 petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, requires two (2) years of experience in the job offered.

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.

The instant I-140 petition was submitted on July 1, 2003 without any documentation concerning the beneficiary's qualification as required by the above regulation. Therefore, on June 9, 2004 the director issued a RFE relevant to the beneficiary's qualifications as well as the petitioner's ability to pay. After requesting additional evidence for the petitioner's ability to pay the proffered wage, the director specifically requested evidence for the beneficiary's qualifications with detailed instructions pertinent to the evidence as follows:

> Submit evidence to establish that the beneficiary possessed the requested two years of work experience as a tree surgeon as of April 6, 2001, the date of filing.
>
> 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.

The director denied the petition on November 24, 2004 because "[the petitioner's] response did not include evidence as outlined above to establish that the beneficiary had the required two years of work experience as a tree surgeon." Counsel argues on appeal that: "[t]he employer mailed, in advance of the deadline, the requested evidence, along with a letter from the [redacted] with an English translation stating that [the beneficiary] has worked in a Tree Management business in Tegucigalpa, Honduras from 1986 to 1988." However, after completely reviewing and examining all the documents submitted in response to the RFE and kept in the record of proceeding in the instant case, the AAO did not find any copy of the experience letter counsel claimed to have submitted in response to the director's RFE. Counsel responded to the director's RFE with a cover letter from his assistant [redacted] did not mention in his prier letter that an experience letter from the [redacted] being submitted. Counsel did not submit any evidence to support his assertion. 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).

On appeal counsel submits a copy of an experience letter from the [redacted] under Exhibit 3 as evidence that the beneficiary possessed the required two years of work experience as a tree surgeon. 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). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* 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 also notes that the petitioner never submitted the original copy of the experience letter; that the writer signed the experience letter on February 12, 2001 in the City of Nacaome, Department of Valle in Honduras; but that the original experience letter in Spanish was translated into English by [redacted] an assistant to counsel in the instant case, on the same day in Port Chester, New York. There is no evidence showing that the experience letter was faxed to counsel's office. It causes doubt whether the experience letter is fraudulent. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states:

> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

Furthermore, the experience letter verified that the beneficiary worked from 1986 to 1988. Without the starting and ending months of the employment and without confirming its full time status, the AAO finds that the experience letter from the [redacted] dated February 12, 2001 cannot be accepted and considered as primary evidence that the beneficiary possessed the requisite two years of experience set forth on the Form ETA 750. "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. at 591-592.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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.