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

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[redacted]

File: [redacted] WAC-03-134-55150 Office: CALIFORNIA SERVICE CENTER Date: SEP 07 2006

In re: Petitioner: [redacted]
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:

[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 Director, California Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner's business relates to diesel and foreign auto repair. The petitioner seeks to employ the beneficiary permanently in the United States as a diesel mechanic. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's November 22, 2003, denial, the case was denied based on the petitioner's failure to demonstrate that the beneficiary met the qualifications set forth in the certified labor certification. Further, the record reflected multiple inconsistencies in the beneficiary's background.

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.[1]

The record shows that the appeal was timely filed. 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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the alien 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). 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 beneficiary must demonstrate that he had the required skills by the priority date of January 29, 2001.[2] On the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered, as a diesel mechanic with job duties including: "Repairs and maintains diesel engines used to power

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[1] 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).

[2] The labor certification was approved on January 21, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on March 20, 2003.

automobiles and trucks. Uses handtools, precision measuring instruments and machine tools. Diagnoses trouble, disassembles engines, examines parts for defects and excessive wear. Reconditions and replaces parts, such as pistons, bearings, gears, valves, and bushings, using engine latches, boring machines, handtools, and precision measuring instruments. Welds and cut parts, using arc-welding and flame cutting equipment." The petitioner listed no education requirements in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, the beneficiary listed his prior experience as: (1 290 S. Arroyo Pkwy., Pasadena, CA, Diesel/Foreign Automobile Mechanic, September 1998 to December 2000, forty hours per week; and (2) unemployed, January 1998 to September 1998. The beneficiary signed the ETA 750B on February 22, 2001.

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(l)(3):

> (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.

On August 21, 2003, the Service issued a Notice of Intent to Deny ("NOID") requested evidence to corroborate and verify evidence, as well as to address inconsistencies in the record. In response to the NOID, the petitioner sent a revised letter from [redacted] to include his job title and his hours worked. Based on the evidence submitted, the Service Center noted that a number of inconsistencies in the record remained, including: (1) the beneficiary listed experience on Form G-325A not listed on Form ETA 750; (2) dates of the beneficiary's experience verified conflict with dates listed on Form G-325; (3) the beneficiary's job title was listed as diesel mechanic for the petitioned for position, but an individual tax return filed lists him as a clerk, and notes of a CIS interview record his position title as Gas Station Manager; and (4) the beneficiary listed that he worked in California, but records show that the beneficiary had a Nevada driver's license.

Based on the numerous inconsistencies in the evidence, the Service Center denied the case. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), which states: "Doubt raised 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." Further, "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.

As evidence to document the beneficiary's qualifications, the petitioner submitted the following letters:

1. [redacted] located at 290 S. Arroyo Parkway, Pasadena, CA 91105, signed by [redacted]

   ates of employment: September 8 to December 27, 2000, forty hours per week;
   Title: foreign automobile diesel mechanic;
   Job Duties: "repaired and maintained diesel engines used to power automobiles and trucks. Used handtools on precision measuring instruments and machine tools. Diagnosed trouble, disassembled engines, examined parts for defects and excessive wear. Reconditioned and replaced parts such as pistons, bearings, gears, valves, and brushings, using engine latches, boring machines, handtools, and prevision [sic] measuring instruments, welded and cut part, using arc-welding and flame cutting equipment."

2. Letter from petitioner, [redacted] located at [redacted] dated September 5, 2003, signed by [redacted]
   Dates of employment: January 2001 to present
   Title: "foreign Automobile Diesel mechanic"
   Salary: $12.50 per hour

On the Form G-325A submitted with the beneficiary's I-485 Adjustment of Status application, the beneficiary listed that he has been employed as a diesel mechanic with: (1) the petitioner since March 2000; and (2) was previously employed as a diesel mechanic for a shop located at 20900 Ventura Boulevard, in California from May 1998 to March 2000. The G-325A shows several inconsistencies: the G-325A does not list the position with [redacted] the prior experience verified. Further, the G-325A lists that the beneficiary was employed with the petitioner since March 2000, when the letter provided by his employer shows that his employment began almost a year later, in January 2001.

Further, the Service Center raised the issue that the beneficiary listed work with an entirely different employer on Form on G-325, which was not on the ETA 750B. The petitioner contends that the prior attorney who prepared the case did not consider the beneficiary's position with [redacted] from May 1998 to March 2000 to be relevant and did not list that experience on the ETA 750B. Since [redacted] position was part-time and the position only required two years of experience, which the attorney theorized that the beneficiary met by virtue of his position with [redacted] he, therefore, according to present counsel, did not list the part-time experience. The petitioner notes that the beneficiary was unable to obtain payroll records to confirm his employment with [redacted] as the gas station owners had changed. This explanation does not, however, account for why the G-325A was not completed properly in February 2003 by his present attorney to account for all the beneficiary's experience.

Further, the dates listed for the beneficiary's part-time employment with [redacted] on the G-325A, conflict with the experience listed on the ETA 750, which had listed the beneficiary as unemployed from January 1998 to September 1998. According to the petitioner, the prior attorney recorded the wrong dates for the beneficiary's time period of "unemployment." The petitioner contends that the beneficiary was unemployed from January 1998 only until May 1998, most of the time period the beneficiary was in his home country, and he obtained employment shortly after his April 1998 U.S. entry. By way of explanation, the petitioner offers that the prior attorney handed the beneficiary a "blank form to sign," and that the beneficiary

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We note that is unclear whether [redacted] the beneficiary's former employer is related to [redacted] the owner of the beneficiary's current employer.

did not speak, write, or read English at the time that he signed the blank ETA 750, and accordingly was not aware of this error. We note the same objection as above, that this explanation does not account for why the G-325A was not completed properly in February 2003 by his present attorney to account for all the beneficiary's experience.

The Service Center noted additional inconsistencies in the record. The beneficiary had listed that he was a "clerk" and not a diesel mechanic, in the occupation field on his 2001 tax return.[4] The petitioner explains this deficiency noting that the tax returns were prepared by an accountant, and the beneficiary relied on what the accountant prepared.

Additionally, the beneficiary was required to register under NSEERS, the National Security Entry-Exit Registration System.[5] The Service Center noted that at the time of registration, on January 3, 2003, the beneficiary had provided during his NSEERS registration that he worked as a Gas Station Manager, instead of as a diesel mechanic, the petitioned for position. The petitioner claims that the owner was sick, and when he was sick the beneficiary would substitute and work as the Manager. The petitioner submitted documentation to show that the owner had health issues in 1992, and documentation to verify some testing in November 2002. No information was supplied to show that the petitioner had continuing health issues in January 2003.

Further, the Service Center raised the issue that the beneficiary had a Nevada driver's license, but that according to the ETA 750, and form G-325A, he resided and worked in California, and the documentation did not reflect that the beneficiary ever lived in Nevada. The petitioner explains that since California was restrictive in issuing licenses to foreign nationals without proper immigration status, that the beneficiary sought to obtain his license from Nevada, since Nevada did not have the same restrictions. However, the petitioner contends that the beneficiary has never lived in Nevada, and that the address listed on the driver's license is a "private mailbox."

The beneficiary signed an affidavit, attesting to the same responses set forth by the petitioner to the issues that the Service Center raised: that he was unemployed before he came to the U.S.; that he signed a blank ETA-750, his English was poor, and he assumed that the attorney would prepare the form correctly; that he had worked part-time for [redacted] between May 1998 and March 2000; that a friend recommended an accountant and he thought all the information was correct on his tax returns, that the accountant "assumed" that he was a "clerk" since the beneficiary worked at a gas station; that he told the officer at his NSEERS interview that he was a diesel mechanic and was managing the station since his employer was ill; and that he had applied for a Nevada driver's license since he could not obtain a California license, but that he had never resided in Nevada.

The petitioner submitted pay records to confirm the beneficiary's employment with the petitioner. The pay records, dated from March 31, 2001 through September 9, 2003, reflect that the beneficiary was typically paid $500 a week during this time period, for an annual salary of $26,000. A letter provided by the petitioner notes that they employ the beneficiary at a rate of $12.50 per hour, which equates to $26,000 per year. While the petitioner is not required to pay the beneficiary the proffered wage of $40,000 until obtains permanent residence, we note that the wage the beneficiary is currently being paid significantly less than the $40,000

[4] We note that the beneficiary's individual tax return is not contained in record before the AAO.

[5] NSEERS was instituted initially in 2002 as a precursor to the US VISIT system to record and track the exit and entry of nonimmigrants into and out of the U.S. Pursuant to NSEERS, certain groups of nationals were required to attend interviews or call-in registrations during specified time periods.

proffered wage. If the beneficiary is currently working as a diesel mechanic, the petitioner would need to raise his salary $14,000 upon obtaining permanent residence.

The petitioner offered no new evidence or no further independent evidence on appeal. We find that the petitioner has not met the burden in *Matter of Ho:* "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. The petitioner has failed to provide independent objective evidence to explain the numerous inconsistencies in the record. Therefore, the petitioner has not demonstrated that the beneficiary meets the certified requirements listed in the labor certification, and the petition will remain denied.

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.