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U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 04 086 52954 Office: NEBRASKA SERVICE CENTER Date: FEB 14 2007

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, Nebraska Service Center, and subsequently the Administrative Appeals Office (AAO) dismissed the appeal summarily because the petitioner failed to identify specifically any erroneous conclusion of law or statement for the appeal. The petitioner now submits a motion to reopen the matter. The motion will be granted. The appeal will be dismissed. The petition will be denied.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship and Immigration Services (CIS) policy. The petitioner has submitted new documentation with regard to the submission of its appeal materials to the Administrative Appeals Office prior to the summary dismissal dated August 17, 2006. This evidence is viewed as sufficient to reopen the proceedings.

The petitioner is a printing company. It seeks to employ the beneficiary permanently in the United States as a printing machine operator. 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 based on lack of evidence as to the beneficiary's completion of high school, as stipulated on the Form ETA 750, and incomplete ETA Form 750, Part B. 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 has been discussed in these proceedings previously and is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The director noted in his decision that the beneficiary appeared to have the requisite two years of work experience in the job offered, but that no evidence of the beneficiary's educational qualifications, namely graduation from high school, as stipulated on the Form ETA 750, were found in the record.

The director then stated that despite a request for further evidence dated August 10, 2004 that requested such evidence, the petitioner had not provided further evidence as to the beneficiary's academic credentials. The director also stated that the beneficiary did not indicate on Part B, Form ETA 750, that he had attended any schools. The director finally noted that on Item 15 of Part B, the beneficiary had not provided details as to his claimed employment with the foreign employer identified on the form. The director determined that 8 C.F.R. § 103.2(b)(a)(1), in pertinent part, states that every form must be executed and filed in accordance with the instructions on the form and that Form ETA 750, Part B directed the beneficiary to provide information on his former employer. For this additional reason, the director denied the petition.

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 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 30, 2001.

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] On appeal, counsel resubmits a certificate of employment with translation from the printing company [redacted] in Trencin, Slovakia. Counsel submits for the first time, a secondary vocational school certificate from Trencin, Slovakia, with translation. The school certificate is entitled "Apprentice Certificate" and states the beneficiary passed his final apprentice examination in the printer-developer branch and received a certificate from the Secondary Apprentice Training Center, [redacted] 24. The certificate is dated December 16, 1982. This school is located in present day Slovakia, the former Czechslovakia.

Counsel also submits an amended Form ETA 750 that describes the beneficiary's attendance in secondary school and also provides further details with regard to his employment with the [redacted]e company. Counsel notes that the prior Form ETA 750, Part B was prepared on April 28, 2001, two days prior to the expiration of the Congressional extension of Section 245(i) program and was filed with the IDES [2]on April 30, 2001. Counsel states that as a result, the form included only skeletal information that was never supplemented because neither the IDES nor the U.S. Department of Labor ever returned the form for corrections.

On appeal, counsel asserts that the documentation submitted to the record on appeal proves that the beneficiary had obtained the specific vocational preparation for the proffered job prior to filing the Form ETA 750.

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).

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 printing machine operator. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education

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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).

[2] Counsel does not identify further the IDES acronym; however, within the context of the labor certification program in place in 2001, this is probably the state of Illinois' Employment Services program.

Grade School	Marked "Complet"
High School	Marked "Complet"
College	N/A
College Degree Required	N/A
Major Field of Study	N/A

The applicant must also have 2 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.

The beneficiary set forth his credentials on Form ETA-750, Part, and did not provide any information as to names and addresses of schools attended. The beneficiary also did not provide any information with regard to the Slovakian employer identified in item 15b on Part B. The beneficiary signed his name under a declaration that the contents of the form are true and correct pursuant to 28 U.S. C. He does not provide any additional information concerning his employment background on that form. As noted previously, the petitioner did submit additional evidence with regard to the beneficiary's previous employment with Teplicke in its response to the director's August 2004 request for further evidence. Thus, whether the beneficiary has the requisite two years of work experience as a printing machine operator is not an issue in these proceedings. However, the question of whether the beneficiary has the requisite completion of a high school education remains an issue.

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.

It is noted that the petitioner was provided 84 days (twelve weeks) to provide a response to the director's request for evidence. Three additional days were provided because the request for evidence was sent to the petitioner by mail. The request for evidence was issued on August 10, 2004. The response was due on November 2, 2004. The petitioner's response was dated October 28, 2004, and was timely received by the service center on October 29, 2004. However, in its response, neither counsel nor the petitioner provided any further evidence as to the beneficiary's secondary education.

The regulation at 8 C.F.R. § 103.2(b)(8) states the following:

> Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or [CIS] finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises

> underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence. . . . In such cases, the applicant or petitioner shall be given 12 weeks to respond to a request for evidence. Additional time may not be granted.

Additionally, the regulation at 8 C.F.R. § 103.2(b)(13) states the following: "*Effect of failure to respond to a request for evidence or appearance.* If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied."

The regulations are clear that failure to respond to a request for evidence shall be considered abandoned and denied. Thus, the director should not have exercised favorable discretion in accepting late evidence and should have denied the petition as abandoned for failure to provide a timely response to the director's request for evidence. Denials for abandonment cannot be appealed. 8 C.F.R. § 103.2(b)(15). Nevertheless, as the director's decision was based on the merits of the evidence, we will similarly adjudicate the appeal.

Furthermore, 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.* In the alternative, counsel could have provided some explanation as to why such evidence was not available or could not be made available during the 84 days provided by the director to submit the requested evidence. However, counsel in his submission in response to the director's second request for further evidence, stated nothing with regard to the beneficiary's school credentials. 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.

In addition, the petitioner submits an amended Form ETA 750 to the AAO on appeal. A petitioner must establish the elements for the approval of the petition at the time of filing. While a new I-140 petition with accompanying Form 9089, the successor to the legacy Form ETA 750 following the publishing of new regulations, may be submitted to CIS without prejudice, the AAO does not accept amended documents on appeal. 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). Furthermore, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

The AAO thus affirms the director's decision that the petitioner did not establish that the beneficiary completed his high school education based on 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. It is further noted, that even if the AAO considered the evidence submitted on appeal to the record in its deliberations, the record is not clear that the receipt of a certificate from a secondary school vocational program is the equivalent of a high school diploma, based on the Czechslovakian educational system in place when the beneficiary received his certificate.

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.