U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 22 2007

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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 is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction corporation. It seeks to employ the beneficiary permanently in the United States as a construction worker. 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, *inter alia*, that the petitioner had not established that the beneficiary did not meet the minimum qualifications as stated in part 14 of the Form ETA, Application for Alien Employment Certification as of the date the request was accepted for processing by any office within the employment service system of the U.S. Department of Labor.

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 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 September 205 denial, the single issue in this case is whether or not the petitioner had established that the beneficiary met the minimum qualifications as stated in part 14 of the Form ETA 750 A , Application for Alien Employment Certification as of the date the request was accepted for processing by any office within the employment service system of the U.S. Department of Labor.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

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.

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 indicated on the appeal form filed on October 19, 2005, that he was submitting a separate brief and/or

[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).

evidence with the appeal. Counsel has submitted an explanatory letter dated October 17, 2005, and no additional evidence.

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, Parts 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of construction worker. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	Blank
	High School	04
	College	Blank
	College Degree Required	Blank
	Major Field of Study	Blank
	Training	Blank
	Experience	.....
	Job Offered	.....
	Number –Years / Mos.	Blank (as certified)
	Related Occupation	.....
	Number –Years | Mos.	Blank (as certified)
	Related Occupation ...	.....
	Specify	Blank

Item 15 of Form ETA 750A is blank.

The beneficiary set forth his credentials on Form ETA-750B, entitled "Statement of Qualifications of Alien," and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On that Form, the educational section, Part 11, is also blank.

On Part 15 of Form ETA 750B, eliciting information of the beneficiary's work experience, the beneficiary represented that he has been employed since June 199 by the petitioner as a laborer foreman work experience, the petitioner employed the beneficiary as a laborer from September 1998 through June 1999The beneficiary does not provide any additional information concerning his employment background on that form.

According to an employment verification letter by [redacted] dated August 3, 2005, found in the record of proceeding, [redacted] Inc., of Frisco, Colorado, employed the beneficiary as a construction worker since 1996, and "He is currently paid $15.00 per hour." According to the record, there is over-lapping work experience with the petitioner and [redacted] Inc.

The record of proceeding also contains a Form G-325, Biographic Information sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form under a section eliciting information about the beneficiary's occupations within a five year period, the beneficiary represented that he construction worker from August 1996 to the present time. The date of signing of the CIS form was May 13, 2005. The petitioner also submitted the beneficiary's resume that stated that he was employed by [redacted] of Denver, Colorado for 5 months in 1998 as a plumber, and, variously as a chicken processor, worker and construction worker helper in El Salvador from 1990 through August 1994.

On appeal, counsel asserts that the beneficiary does not have a high school diploma, but the beneficiary did attend school in El Salvador for nine years. Counsel contends that according to the education evaluation report submitted from [redacted] Inc. the beneficiary had the education and work experience equivalent of an associate's degree in building construction from an accredited institution of higher education, and that therefore that " ... is clearly more than 4 years of a high school education ...."

The regulation 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.
>
> (D) *Other Workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

On June 7, 2005, the director requested pertinent evidence, *inter alia*, that the petitioner submit evidence such as a copy of diploma, certificate, or transcript issued by the educational institution where the beneficiary received his education.

In response the petitioner submitted copies of the following documents: the beneficiary's resume, that under the topic "Education," stated the beneficiary attended "1977-1986, [redacted] a la [redacted], and, 1987-1988, [redacted] " a letter from [redacted] the petitioner and beneficiary's counsel dated August 10, 2005, stating that while the beneficiary has met the minimum educational requirements of a high school education, "we could not obtain a high school diploma;"[2] six pages of educational transcripts with English translations; an "Evaluation of Work Experience" dated August 9, 2005 prepared by [redacted] Inc.; and an employment verification letter by [redacted], dated August 3, 2005, of [redacted] and [redacted] Inc., of Frisco, Colorado, that employed the beneficiary as a construction worker since 1996, as well as other documentation relating to the petitioner's 2001 U.S. federal tax return.[3]

The subject Form ETA 750 Part A requires the completion of four years of high school studies. Petitioner's clear intent is expressed in the certified Alien Employment Application. A four-year high school education is required.

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[2] There was no further explanation why the diploma could not be obtained. Counsel further stated that the beneficiary had taken the GED (high school graduation equivalency) examination.

[3] The IRS Form 1120S return for 2001 stated on Line 21, "Ordinary income (loss) ..." <$33,498.00>. The symbols <*a number*> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

Counsel contends that job experience together with the above mentioned educational experience satisfies the educational requirement for the preference category, that is to say, four years of high school studies. Despite counsel's arguments, CIS will not accept a degree equivalency when a labor certification plainly and expressly requires four years of high school studies.

The petitioner failed to submit evidence sufficient to demonstrate that the beneficiary has four years of high school studies.

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.