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U.S. Citizenship and Immigration Services

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[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 01 2007
WAC-02-283-54670

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 is a newspaper, and seeks to employ the beneficiary permanently in the United States as a management analyst ("International Management Analyst"). 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 denial, the case was denied on July 13, 2005 based on discrepancies in information related to the beneficiary's work history. The director found that the petitioner therefore did not demonstrate that the beneficiary met the requirements of the certified ETA 750.

The AAO takes a *de novo* look at issues raised in the revocation 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 is properly filed, 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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional or a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on January 27, 1999. The proffered wage as stated on the Form ETA 750 is $63,128.00 per year based on a 40-hour work week.[2] The Form ETA 750 was certified on August 13, 2002, and the petitioner filed the I-140 on the beneficiary's behalf on September 19, 2002. Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: February 1, 1990; gross annual income: $14,438,904.00; net annual income: $69,078.00; and current number of employees: 200.

The director issued a Notice of Intent to Deny ("NOID") on January 16, 2003 requesting that the petitioner provide: evidence that the beneficiary met the requirements of the certified ETA 750, and to submit evidence of the beneficiary's prior work experience, along with the beneficiary's W-2 forms. The petitioner responded. The director then issued a second Notice of Intent to Deny ("NOID") on October 18, 2004, which questioned that the beneficiary's listed work experience on Form ETA 750B conflicted with her listed passport status of "unemployed."

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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 petitioner initially listed an annual salary of $47,000 per year. DOL required that the wage be increased to $63,128 prior to certification.

Following consideration of the petitioner's response, the director denied the petition. The director questioned that the beneficiary was employed with an employer in China from April 1993 to April 1998 when the beneficiary entered the U.S. in September 1997, and listed a U.S. address on her Form G-325 filed with her adjustment of status application. Further, the beneficiary listed that she was employed with a second employer from July 1990 to April 1993. However, her passport issued during this time period listed that she was unemployed, which contradicted her statement that she was employed. The veracity of the beneficiary was therefore in question. *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 a result, the petitioner had failed to demonstrate that the beneficiary met the qualifications as set forth in the certified Form ETA 750.

The petitioner appealed and the matter is now before the AAO. On appeal, counsel provided documentation to address the alleged deficiencies related to both issues. Counsel contends that the beneficiary did work for an employer in China from April 1993 to April 1998, and that experience would exhibit the beneficiary's two years of employment experience required to meet the certified Form ETA 750. Further, counsel submitted documentation, which he asserted resolved the alleged discrepancy between the beneficiary's work from 1990 to 1993, and her passport designation as "unemployed."

First, we will examine the evidence submitted to document the beneficiary's qualifications, and then address counsel's additional arguments. 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 petitioner must also 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).

The beneficiary must demonstrate that she had the required skills by the priority date. On the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered, as an international management analyst with job duties including:

> Analyze company's systems and procedures to devise & oversee the most efficient means of accomplishing business goals; collect & analyze company's current conditions to seek potential newspaper & printing export possibilities for int'l market & make recommendations to management; institute & manage int'l client accounts; manage int'l sales database pertaining to promotional activities & implement forecast models/analyze quantitative data to evaluate sales trends.

The petitioner listed education requirements as a Bachelor's degree in International Trade in Section 14, and listed no other special requirements for the position in Section 15 on the Form ETA 750A.

On the Form ETA 750B, the beneficiary listed her prior experience as: (1) unemployed, from April 1998 to present (signed on December 31, 1999); (2) [redacted] Beijing, China, from April 1993 to April 1998, Business Manager (International Management Analyst); and (3) [redacted], Ltd., Beijing, China, Assistant to the President from July 1990 to April 1993.

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.

As evidence to document the beneficiary's qualifications, and that the beneficiary worked for [redacted] from April 1993 to April 1998, the petitioner submitted the following letters:

1. **Letter from [redacted]** (name not listed, but the signature appears to be [redacted], dated September 15, 1998, which was initially submitted in support of the beneficiary's change of status from B-1 to F-1 in relation to a prior application.
   Title: Business Manager
   Dates of employment: "[The beneficiary] has been employed in our company since April 5, 1996 as a business manager."
   Job duties: not listed
   The letter generally provides:

   > She entered the United States on September 5, 1997 in B-1 classification. Subsequently, and before the expiration of her B-1 status on December 4, 1997, [the beneficiary] requested and was granted an extension of her B-1 status until June 3, 1998, in order to conclude our business in the United States. Toward the conclusion of our business . . . in April 1998, [the beneficiary] became aware of the opportunity to improve her English skills at Language Systems-International College of English . . in .. . California. She was accepted as a full-time student . . . beginning on April 27, 1998. By that time, [the beneficiary] had almost completed our business matters.

2. Letter from [redacted], Portland, OR, dated January 24, 2003.

> [redacted], was the president of [redacted]. from September 1992 to May 2001. This is to certify that [the beneficiary] was employed by our company as International Management Analyst from April 1993 to April 1998. [The beneficiary] was responsible to analyze the company's systems and procedures to devise and oversee the most efficient means of accomplishing business goals.

Additionally, in support of counsel's argument that the beneficiary remained employed with [redacted] from her September 1997 entry until April 1998, counsel has also provided a copy of the beneficiary's bank statement showing four payments in December 1997 from [redacted] each in the amount of $1,985.

Several points are relevant based on the above. First, and critically, the letter dated September 15, 1998 from [redacted] provided on behalf of the beneficiary identifies that the beneficiary only initially joined the company in April 1996, and not in April 1993, as a business manager. The letter does not state or provide that the beneficiary was previously employed with the company in another position. Counsel in his brief filed with the appeal similarly writes regarding the letter, "the letter shows not only did [the beneficiary] become employed with the company on April 5, 1996, but that in fact it was the company which sent her to the U.S." This would effectively mean that her experience with the company would be from April 1996 to September 1997, and unless the petitioner can document clearly that the beneficiary was employed until April 1998, the beneficiary would not have the required two years of experience as an "international management analyst."

Counsel contends that the language "in order to conclude our business in the United States; toward the conclusion of our business; and by that time, [the beneficiary] had almost completed our business matters" would show that the beneficiary came to the U.S., but continued her employment with [redacted] and lead one to the "logical inference" that the beneficiary was employed until April 1998. We find such language vague and inconclusive for the purpose of documenting the beneficiary's required prior work experience, and standing alone insufficient to document the required two years of experience. Further, the initial letter lists the beneficiary's position as a business manager, and not as and international management analyst, the experience required for the position.

The January 24, 2003 letter from the president of [redacted] provided that the beneficiary started employment in April 1993, and not in April 1996 as the first letter lists, and remains in question as the dates listed directly conflict with the first letter. Further, we note that the first letter, listing the beneficiary's start date as April 1996, was issued at a time when the beneficiary's work experience was not in question, and, therefore, might be considered more reliable. The conflict in evidence raises significant doubts regarding the accuracy of the letters, which confirm the beneficiary's experience. *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. Therefore, we do not find the second letter credible, which lists the beneficiary's experience from April 1993 to April 1998, but neither letter appears entirely reliable.

Further, regarding the time period from September 1997 to April 1998, counsel suggests that the payment sent to the beneficiary's bank account in December 1997 reflects that the beneficiary was employed until April 1998. We would not draw a similar conclusion. Counsel offered no evidence to show that the amount

transferred was the beneficiary's regular salary, or an agreed upon salary for her "work" in the U.S. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Absent any corroborative information or documentation, the payment could represent the beneficiary's final pay, or money owed for work previously completed. Further, the payments were made in December 1997, and counsel submitted no documentation to exhibit that similar payments continued until April 1998, when the beneficiary allegedly terminated her employment. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 **I&N Dec. 190 (Reg. Comm. 1972)). Absent such conclusive documentation, the petitioner has not** documented that the beneficiary has the required two years of experience necessary to meet the requirements of the certified ETA 750.

Further, although not raised in the director's denial, we find that the petitioner also failed to establish that the beneficiary had the required degree for the position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also 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 regulations define a third preference category professional as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." *See* 8 C.F.R. § 204.5(l)(2). The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a professional that:

> (C) *Professionals.* 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 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 showing that the minimum of a baccalaureate degree is required for entry into the occupation

The petitioner submitted a copy of the beneficiary's diploma, along with translation. However, the petitioner did not submit a credentials evaluation to show that the foreign degree was equivalent to a U.S. Bachelor's degree in the specified field of International Trade, and, therefore, is insufficient to demonstrate that the beneficiary has the required equivalent degree.

Further, the record of proceeding contains two different translations of the beneficiary's degree, which are slightly different, and relevant to whether the beneficiary has a degree in the listed required field of study. The first translation, which was submitted with the beneficiary's H-1B petition, lists that the beneficiary's major was "international business." The second translation submitted with the I-140 petition lists that the beneficiary's major was "international trade." The certified ETA 750 requires that the individual have a bachelor's degree with a major in international trade. The position as certified does not list and does not allow for any related or alternate fields of study, such as international business. Based on the two differing translations, and the absence of an educational evaluation for the degree's U.S. equivalency, we would not conclude that the beneficiary has a Bachelor's degree in the required field of study. Therefore, the petitioner

has not demonstrated that the beneficiary has either the prior two years experience as a international management analyst required for the position, or that the beneficiary has the equivalent of a U.S. bachelor's degree in the required major of International Trade.

Related to the second issue raised in the director's denial, the director questioned the beneficiary's experience listed on the Form ETA 750B, where she had listed that she was an assistant from 1990 to 1993. The beneficiary's passport was issued in 1992 and listed her work status as "unemployed." First, we note that her experience as an assistant would not document that she had the required two years of experience as an international management analyst to qualify her for the certified ETA 750. The issue regarding the beneficiary's experience for this time period relates to the beneficiary's credibility. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Counsel contends that this is not an inconsistency, but rather the result of the Chinese government's "unique" procedure for granting passports. In support, counsel has forwarded several letters in order to explain the Chinese system of issuing passports, and how the beneficiary's passport could list her as "unemployed" while he asserts that she was employed as listed on her ETA 750B.

1. Letter from [redacted], Business Advisors and Lawyers, Pasadena, California. Mr. [redacted] identifies himself as a lawyer admitted to practice in China. Mr. [redacted] examined beneficiary's prior passport, current passport, the government's regulations on "flowing persons,"[3] and interviewed the beneficiary. By way of explanation, he provides that following the Tiananmen Square episode, the Chinese government retained tight control on the issuance of passports (the beneficiary's passport was issued in 1992, approximately three years after the Tiananmen incident). The letter provides:

> It was an administrative rule of China in 1992 that for a citizen to apply for a passport, the citizen must first go through a political examination on his or her file. As set forth in the Supplementary Notification, a "flowing person," i.e. a person without a life-time job position, should go to the flowing service agency to go through a political examination on the file before any passport can be issued for traveling for private reasons (as opposed to traveling due to an assignment for a life-time employer or government agency.) In 1992, when the beneficiary applied for her passport to travel for private reasons in order to visit Singapore she must submit herself to the Neighborhood Committee (i.e. a flowing service agency) in the district she resided, and not the employer. That was because she was an employee by contract at the company. A contractual employment was not deemed at the time a life-time position under the Chinese planned economy. . . . at her 1990 to 1993 employment . . . she chose to be an employee by contract as such type employment would allow her to travel for private reasons given the fact a life-time position would most likely only allow her to travel due to job assignment . . . hence the decision for the choice of her employment by contract. With that status, though, the Neighborhood Committee considered her as a flowing person, and as such, her passport showed her being unemployed in the context of the planned economy in 1992.

[3] The petitioner submitted a translated "supplemental notification on Enhancing Personnel Files Management of Flowing Persons" related to the Chinese government's file management system on Chinese citizens.

2. Letter from [redacted] Security Center, [redacted] Beijing, China, which provides:

> This letter is intended to explain the discrepancy, if any, related to [the beneficiary's] occupation appearing on her passport . . . between 1990 to 1995, I worked for Border Entry and Exit Administration . . . the official organization that issues passports to all Chinese residents . . . back then [in 1992, when the beneficiary's passport was issued], if a person kept his or her "personal dossiers" (a package containing a person's lifelong key documents) at neighborhood committee, he/she would be designated as "unemployed" on his/her passport. Most full time employees kept their "personal dossiers" with the company. However, people who were working as contractors had to keep their personal dossiers at neighborhood committee. Therefore, although they had jobs, they still fell into the category of "unemployment" on issuance of passports. Ms[redacted]s case was exactly one of these."

3. Letter from [redacted] Beijing, China, an attorney licensed to practice law in China. The letter provides an explanation regarding the Chinese government's practice of issuing passports;

> For every citizen residing in urban areas in China the government maintains . . . a personal file or dossier by the government. The file would follow her when she goes to college, gets a job or transfers to a new job. If she has a permanent job in a state-owned entity, the file would be kept by the personnel section of the entity. Then the file would be transferred to the new entity if she is transferred to work there. In other situations, such as a person who has no job upon graduation from school or university, or who has a job which is not . . . permanent in nature or the employer is not a state-owned entity, the file should be kept at the neighborhood committee over the residential area where the person resides. In the case of [the beneficiary], since her job at the state-owned entity was not permanent in nature, she had no choice but to present a letter from the neighborhood committee when applying for her passport. In so doing, she was listed as unemployed on that passport based on the government bodies' inner rules and the fact that the letter was from the neighborhood committee.

Counsel further provided several letters to document the beneficiary's employment in question:[4]

1. Letter from Personnel Department, [redacted], with translation. "This is to certify that [the beneficiary] has been employed as a general manager's assistant during the period from July 1990 through March 1993. [The beneficiary] has performed remarkably during the period of employment."

2. Letter from [redacted] "It is my pleasure to write this reference for [the beneficiary] who worked at CITIC from July 1990 to April 1993 . . . during early 1990s, I was a department head at this subsidiary. [The beneficiary] was an assistant to the General Manager at this company."

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[4] Again, we note that her employment for 1990 to 1993 would not be used to document the beneficiary's two years of experience as required on the certified ETA 750, but rather the petitioner must resolve the issue of her employment during this time period to demonstrate that the beneficiary attested accurately and honestly regarding her prior experience.

3. Letter from [redacted] Industrial Bank, Beijing, China. "From 1991 to 1993, I worked in . . . another subsidiary of CITIC, for about three years, I know [the beneficiary] was working with the same company during the same time period, I was transferred to CITIC Industrial Bank in 1994."

Based on the evidence provided, we would conclude that it is possible that a Chinese individual could have a passport, which listed that they were "unemployed" while they held a position of a temporary nature. However, even if we accept this to be true in the beneficiary's case, based on discrepancies in information related to the beneficiary's work experience from 1993 to 1998 as outlined above, the beneficiary's credibility is still in question. *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. Accordingly, the petitioner cannot demonstrate that the beneficiary meets the requirements of the certified ETA 750.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.