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U.S. Citizenship and Immigration Services

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[redacted]

File: WAC-05-235-50832 Office: CALIFORNIA SERVICE CENTER Date: OCT 18 2007

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 ("director"), 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 an importer and wholesaler of lamps, lighting, and home decor, and seeks to employ the beneficiary permanently in the United States as a payroll and timekeeping clerk ("Payroll Administrator"). 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 July 27, 2006 decision, the petitioner filed to classify the petition and position as a professional or skilled worker. However, the position listed on the certified ETA 750 was not for a professional or skilled worker, but for an unskilled worker. The petitioner was given an opportunity to request a different classification, but failed to do so. The petition was accordingly denied as the petition did not meet the requirements for a professional or skilled worker.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).[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 skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1153(b)(3)(A)(ii), 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." Section 203(b)(3)(A)(i) of 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. Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other 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 not available in the United States.

On March 1, 2006, the director issued a Request for Evidence ("RFE"), which noted that the petitioner had requested E31 or E32 classification for a professional or skilled worker, but that the certified Form ETA 750 only required one year of experience. The RFE further provided: "therefore, the alien does not appear to qualify for the requested classification.[2] The petitioner is requested to clarify." The petitioner responded.

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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] We note that the issue is that the position, rather than the alien, would not be classified as a skilled worker position as it required less than two years of prior experience. Therefore, the petitioner would be unable to

On July 27, 2006, the director denied the petition as the petitioner did not request any alternate classification in the RFE, and based on the experience required, the petition could only be categorized as an "other worker," and not as a "skilled worker" as the petition was filed. The petitioner appealed and the matter is now before the AAO.

Citizenship and Immigration Services ("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).

On the Form ETA 750A, the "job offer" for a payroll administrator provides:

> Involved in the processing of all employee pay and deductions resulting in the distribution of payroll checks; maintenance of employee payroll database; data entry of earning deduction, garnishments and advances; investigation of questionable entries as necessary; review and calculation of deductions and net pay; perform check printing and distribution with other payroll information; report generation and distribution including tax withholding returns.

Further, the job offered listed that the position required:

Education:	None listed
College:	N/A
Major Field Study:	N/A
Experience:	1 year in the job offered, Payroll Administrator.

The petitioner did not list any other special requirements.

Related to the experience requirement, the Form ETA 750 initially listed 2 years of prior experience in the job offered, but the number "2" contains a line through it with a "1" written next to it as a correction. The experience box is further marked "EDD" with initials to designate a change made at the first level of labor certification processing with the California State Workforce Agency, the Employment Development Department ("EDD").

On Form I-140, the petitioner completed the form and checked the box to classify the petition under the professional category, which requires a minimum of a bachelor's degree, or under the skilled worker category, which requires two years or more of experience. As the position only required one year of experience and no degree, the position did not qualify for categorization as either a professional or as a skilled

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file a petition for a skilled worker, and classify the beneficiary as a skilled worker based on the Form ETA 750 as drafted and certified.

worker. Instead, based on the experience required, the position would be categorized as an unskilled or other worker. *See* 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), which provides classification for a worker capable of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

In response to the RFE, counsel contended that the petitioner had requested EB3 classification[3] as a professional or skilled worker based on the two years of prior experience required by the labor certification. Further, counsel provided that the beneficiary had over fourteen years of experience in the job offered as well as a bachelor's degree.

The director's decision provided that since the minimum qualifications and experience listed were for less than two years, the position could not be classified as a skilled worker. Further, the petitioner did not request consideration under the lesser category of unskilled, or other worker. The director additionally noted that, "The California Employment Development Department (EDD) has amended the experience portion to require one year of experience working in the offered job. Correspondence between the petitioner and EDD clarifying this amendment were not submitted with this petition."

On appeal, the petitioner provides "there was no substantial evidence that classification should be as other worker. The certified LC does not clearly indicate that minimum requirement was amended."

The director's decision specifically provided that correspondence between the petitioner and EDD could assist in resolving this issue. The petitioner did not submit such evidence on appeal. 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).

On appeal, counsel again provides that the petition was submitted for EB3 categorization as a professional or skilled worker, and that CIS "failed to properly recognize and consider the proffered evidence." In support, counsel submitted a copy of the signed Form I-140, exhibiting that the petitioner requested EB3 categorization, and a copy of the experience letter for the beneficiary, exhibiting that she had extensive prior experience in the position offered.

The documents that counsel has submitted are not relevant to the issue. Because the petitioner checked the EB3 box on Form I-140, does not result in the petition qualifying as an EB3 petition for a professional or skilled worker. The underlying Form ETA 750 lists that only one year of prior experience is required, which would result in, and could only result in, classification as an "unskilled worker" as noted above.[4] The petitioner has provided no evidence to demonstrate that the amendment lowering the experience from 2 years to 1 year was not fully accepted as counsel contends. 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). Going on record without supporting documentary evidence is not sufficient for purposes of

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[3] EB3 refers to the employment-based third preference immigrant visa category for professional, or skilled workers as set forth in 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii), and 8 C.F.R. § 204.5(l)(2),Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i) respectively.

[4] Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other 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 not available in the United States. *See also* 8 C.F.R. § 204.5(l)(2).

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)).

Further, the beneficiary's experience is not in question. The letter provided would accurately document that she has over one year of experience, which could be used to satisfy the requirements of the Form ETA 750. The issue at hand is the classification of the position.

The petitioner provided no further evidence on appeal to demonstrate that the petitioned for position would qualify as a professional or skilled worker petition.

Based on the foregoing, the petitioner has failed to establish that the requirements of the certified ETA 750 would warrant I-140 classification as a skilled worker. 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.