U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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PUBLIC COPY

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: APR 06 2009

EAC 05 227 52298

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a glass installation firm. It seeks to employ the beneficiary permanently in the United States as a glazier. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director concluded that the petitioner had failed to demonstrate that the beneficiary possessed the requisite qualifying experience as of the visa priority date, and denied the petition accordingly.

On appeal, counsel maintains that the petitioner has demonstrated that the beneficiary's work experience meets the requirements of the approved labor certification.

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).

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 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.

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the ETA 750 is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA 750 was accepted for processing on April 30, 2001.

The Immigrant Petition for Alien Worker (I-140) was filed on August 10, 2005. Counsel, indicated that the petitioner it wished to substitute[1] the instant beneficiary for the original beneficiary named in the Form ETA 750, which had been approved by DOL with the above-stated priority date. The petitioner provided Part B of the ETA 750, which is the "Statement of Qualifications of Alien." It specifies the substituted beneficiary's individual educational and experiential qualifications for the certified job described on Part A and is attested by the beneficiary's original signature. Form ETA 750's instructions tell the beneficiary to "list all jobs held for the past three (3) years." It also instructs the beneficiary to "list any other jobs related to the occupation for which the alien is seeking certification as indicated in item 9." To be eligible for approval, a beneficiary must have all the education, training, and

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[1]DOL recently amended the administrative regulations at 20 C.F.R part 656 through a final rule-making published on May 17, 2007, which took effect on July 16, 2007 (71 FR 27904) ("DOL final rule"). (As this petition was filed prior to these amendments a request for substitution will be permitted.) The DOL final rule included several provisions that significantly impacted adjudication of Form I-140 petitions that require DOL-approved labor certifications as a supporting document. New 20 C.F.R. 656.11 prohibits the alteration of any information contained in the labor certification after the labor certification application is filed with DOL, to include the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. Earlier, in 1991, DOL had issued regulations which no longer permitted the substitution of beneficiaries in permanent labor certifications. 20 C.F.R. §§656.30(c)(1), 56 Fed. Reg. 54920, 54925 (Oct. 23, 2001). However, those regulations were successfully challenged as violative of APA rulemaking. *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994). DOL subsequently reinstated the former rules permitting substitution, and set forth guidelines for substitutions. Memo, Farmer, Adm. Office of Regional Management DOL, Memo No. 37-95 (May 4, 1995), *reprinted in* 72 No. 19 *Interpreter Releases* 666, 678-82 (May 4, 1995) [Prior to A/S approval or actual employment, there is no limit to the number of substitutions]. In March, 1996, however, DOL delegated responsibility for substituting LC beneficiaries to the INS when LC has been approved. To substitute employer must submit: (a) I-140 (or new I-140 if one with former beneficiary submitted); (b) part B of ETA750 signed by new beneficiary; (c) proof that new beneficiary met all requirements for position at the time LC initially filed; (d) original ETA and DOL certification or if previously submitted to the INS (with prior I-140), photocopies of ETA's and DOL certification; and (e) a written notice of withdrawal of the first I-140 if previously filed. Memo, Crocetti, Assoc. Comm., Adjudications, HQ 204.25P (Mar. 7, 1996); *reprinted in* 73 No. 14 *Interpreter Releases* 436, 444-46 (Apr. 8, 1996); Memo, Farmer, Admin. Regional Management, DOL (Mar.22, 1996), *reprinted in* 73 No. 14 *Interpreter Releases* 436, 447-48 (Apr. 9, 1996). *See also Kurzban's Immigation Law Sourcebook, 721* (Ninth ed. 2004).

experience specified on the labor certification as of the petition's priority date. *See* 8 C.F.R. § 103.2(b)(1), (12). *See also 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).

In this case, Part B of the ETA 750 was signed by the substituted beneficiary on August 5, 2005. Although Item 15 designated a job held as a glazier at a business identified as a glazier, working 40 hours per week, no other information relevant to this job or any other job was specified by the beneficiary as her work experience.

Nevertheless, in support of the beneficiary's qualifying employment, the petitioner provided copies of employment verification letters to the underlying record. They may be summarized as follows:

1. A letter, dated August 15, 2004 from the company manager of [redacted] that stated that the beneficiary was employed by this company from July 3, 2002 until August 15, 2004. Her job was described as installing and fixing glass, plastic windows, skylights, storefronts and commercial door windows. This letter failed to verify full-time work and the experience was obtained after the April 30, 2001 priority date set forth on the ETA 750.

The director issued a request for evidence on June 27, 2006, instructing the petitioner to submit a new Part B of the ETA 750 completed and signed by the beneficiary. The director also advised the petitioner that the letter submitted by [redacted] failed to verify that the beneficiary acquired this experience as of the priority date of April 30, 2001. The petitioner submitted a second letter:

2. A letter, dated March 17, 2003, signed by [redacted] of "[redacted]" was submitted in response to the director's request for evidence. [redacted] is a firm located at 24 [redacted]. Mr. [redacted] states in this letter that the beneficiary worked at this firm full-time as a glazier from January 2, 1998 until January 31, 2000. He also describes her duties as installing glass in windows, skylights, and storefronts. [redacted] does not identify himself as an owner, employer or trainer.

The new ETA 750B was signed by the beneficiary on September 5, 2006 and lists only her job for [redacted]. with dates identified as January 1998 to January 2000.

The director denied the petition on October 27, 2006. He noted that the letter from [redacted] in [redacted] was dated August 15, 2004 and claimed employment with this company from July 3, 2002 until August 15, 2004. The director questioned the authenticity of this document as the beneficiary entered the United States on July 15, 2003 and remained until March 15, 2004.

The director also raised doubts about the second letter submitted from [redacted] Israel which was dated March 17, 2003 and claimed that the beneficiary's employment with this firm

was from January 2, 1998 to January 31, 2000. The director questioned why this letter was not submitted earlier as it purportedly confirmed the beneficiary's required employment as of the visa priority date and was submitted by experienced counsel who had filed numerous other petitions.

On appeal, counsel submits a letter, dated November 2, 2006. He states that he is well aware of the experience requirement. As to the inconsistencies of dates of the beneficiary's presence raised by the first letter submitted from the [redacted] company in Israel, counsel merely claims that in the age of the computer and internet, "it is not impossible for a person to work for his/her job from abroad." He asserts that "even though beneficiary was in the United States, it does not in any way preclude her from working for her foreign company. It is the way of the business world." Counsel states that the second employment verification letter establishes that the experience requirement described by the ETA 750 has been met.

We do not find counsel's assertions on appeal to be persuasive. To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, United States Citizenship and Immigration Services (USCIS) is bound to follow the pertinent regulatory guidelines pursuant to 203(b)(3)(A)(i) of the Act. USCIS jurisdiction includes the authority to examine an alien's qualifications for preference status and to investigate the petition under section 204(b) of the Act, 8 U.S.C. § 1154(b). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by the DOL. *Madany 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 v. Coomey,* 662 F.2d 1 (1st Cir. 1981); *Denver v. Tofu Co. v. INS,* 525 F. Supp. 254 (D. Colo. 1981); *Chi-FengChang v. Thornburgh,* 719 F. Supp. 532 (N.D. Tex. 1989). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Dragon Restaurant,* 19 I&N Dec. 401, 406 (Comm. 1986).

In this case, it is noted that the beneficiary signed both the first ETA 750B and the second ETA 750B under penalty of perjury. On the earlier ETA 750B, she failed to identify any specific employer. The subsequent ETA 750B failed to identify all past jobs held in the past three years, thereby omitting her claimed employment at [redacted]. As noted above, the [redacted] letter failed to identify her employment as full-time. This letter also failed to corroborate counsel's theory that the beneficiary may have somehow performed her job through the "internet" as a "glazier," with listed job duties of "install[ing] and fix[ing] glass and plastic windows, skylights, storefronts and commercial door windows" from her location in the United States yet employed by [redacted] in Israel. Counsel's assertions in this regard do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Regarding the undated letter from [redacted] in Tel Aviv, Israel, as noted above status is not identified on this letter. As such, it fails to comply with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) that requires the author of such a letter to designate his title.

The AAO finds neither of these letters to be credible. It is noted that 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. Doubt cast 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). This principle applies in this case, where there is evidence of inconsistent submission of ETA 750Bs, an employment letter that conflicts with the beneficiary's presence in the United States and a subsequent submission of an earlier letter and an ETA 750B that attempts to remedy this deficiency.

This office concurs with the director's assessment that the petitioner has not established that the beneficiary possessed the requisite work experience as of the priority date of April 30, 2001.

Beyond the decision of the director, it is noted that the regulation at 8 C.F.R. 204.5(g)(2) requires a petitioner to establish its *continuing* ability to pay the proffered wage as of the priority date. In this case, the petition was filed on August 10, 2005. The priority date of April 30, 2001 was established by the ETA 750. The only financial documentation provided is a copy of the petitioner's 2001, 2002 and 2003 federal income tax returns. There is no financial documentation covering 2004 or 2005. As the record currently stands, the petition is not eligible for approval on this basis.

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*, 299 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 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.