U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 29 2009

WAC-06-012-50448

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: 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, Texas Service Center. The subsequent appeal was remanded to the director by the Administrative Appeals Office (AAO) to consider another possible ground of ineligibility. Pursuant to the AAO's remand, the director reopened the matter, issued a request for evidence (RFE), and subsequently denied the petition premised upon the petitioner's failure to establish that the beneficiary possessed the requisite two years of experience prior to the priority date. The matter is certified to the AAO for review. The director's new decision will be affirmed and the petition will remain denied.

The petitioner operates a business related to custom computer configuration and fabrication. It seeks to employ the beneficiary permanently in the United States as an electrical and electronic equipment assembler (computer technician). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089 or labor certification), approved by the Department of Labor (DOL), accompanied the petition. Pursuant to DOL regulations which took effect on March 28, 2005, the ETA Form 9089 replaces the Form ETA 750 Application for Alien Employment Certification which was previously in use. *See* Employment and Training Administration, U.S. Department of Labor, *20 CFR Parts 655 and 656, Labor Certification for the Permanent Employment of Aliens in the United States; Implementation; Final Rule*, 69 Fed. Reg. 77325, 77327 (Dec. 27, 2004).

Certifications by regional service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security (DHS). *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

The regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) states in pertinent part:

> (iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;
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> . . .
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> (B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when

the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act;

Pursuant to the delegation cited above, the AAO exercises the appellate jurisdiction formerly exercised by the Associate Commissioner for Examinations.

As set forth in the director's new decision on June 27, 2008, the single issue in this case is whether or not the petitioner has demonstrated with credible regulatory-prescribed evidence that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date.

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 ETA Form 9089 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted on August 16, 2005.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon certification. In response to the director's certification, counsel submits a brief and copies of three experience letters with their new English translations and the translator's certificates. Other relevant evidence in the record includes three original experience letters in Chinese with their English translations submitted in response to the director's January 28, 2008 RFE and an experience letter in Chinese dated March 15, 2005 from [redacted] Manager of [redacted] Computer Service with its English translation submitted with the initial filing. The record does not contain any other evidence relevant to the beneficiary's qualifications.

In the brief submitted in response to the director's certification, counsel asserts that there are no inconsistencies between the beneficiary's statements on the ETA Form 9089, on the Form G-325A and the experience letters.

To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, U.S. Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. *See Matter of Silver Dragon*

Chinese Restaurant, 19 I&N Dec. 401, 406 (Comm. 1986). The Application for Permanent Employment Certification, ETA Form 9089, section H, sets forth the minimum education, training and experience that an applicant must have for the position of computer technician. In the ETA Form 9089 submitted with the instant petition, section H describes the requirements of the offered position as follows:

4.	Education: minimum level required.						
	x None	High School	Associate's	Bachelor's	Master's	Doctorate	Other
5.	Is training required?				Yes	x No	
6.	Is experience in the job offered required for the job?				x Yes	No	
6-A.	If yes, number of months of experience required:				24		
7.	Is there an alternate field of study that is acceptable?				Yes	x No	
8.	Is there an alternate combination of education and experience that is acceptable?				Yes	x No	
9.	Is a foreign educational equivalent acceptable?				Yes	x No	
10.	Is experience in an alternate occupation acceptable?				Yes	x No	

The beneficiary states his work experience on ETA Form 9089, section K. As his relevant experience, he states in pertinent part that he worked for [redacted] in Shenyang, China as a full time computer technician from March 1, 1995 to April 1, 1997. The beneficiary did not provide any further information pertinent to his relevant work experience on that form.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The issue here in the instant case is whether the petitioner with all documents submitted established the beneficiary's requisite two years of experience as a computer technician prior to the priority date under the requirement set forth at 8 C.F.R. § 204.5(g)(1). The instant I-140 petition was submitted on October 14, 2005 with an employment verification in Chinese language dated March 15, 2005 from [redacted] Computer Service and its English translation as evidence pertinent to the beneficiary's qualifications as required by the above regulation. On appeal, this office noted that the English translation was submitted without a certificate of translation. The translation of the [redacted] Computer Service letter dated March 15, 2005 did not comply with the terms of 8 C.F.R. § 103.2(b)(3), which provides:

> *Translations.* Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has

certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Therefore, USCIS cannot accept them as primary evidence to establish the beneficiary's requisite experience and thus, the AAO remanded the matter to the director.

In response to the director's January 28, 2008 RFE, counsel submitted an original employment verification from [redacted] the manager of [redacted] & Technology Computer Systems, Ltd.[1] with its English translation and a certificate of translation from [redacted] English translation). Although the translator dated the certificate of translation April 22, 2008, the original Chinese letter was not dated. It is not clear when the letter was issued. While the [redacted]s English translation states that this letter is to verify that the beneficiary **worked** for [redacted] Computer Service, this office notes that this undated original Chinese letter is on letterhead of a company named [redacted]e & Technology Computer Systems, Ltd. and the letterhead also contains its trade name '[redacted]Computer" in the left upper corner. However, the original Chinese version does not contain any words verifying that the beneficiary worked for Shenyang [redacted] Computer Service. Instead, the author, [redacted], the manager of [redacted]Science & Technology Computer Systems, Ltd. states that the beneficiary worked for its [redacted] subsidiary. However, the record does not contain any evidence showing that [redacted] Computer Service is a subsidiary of [redacted]e & Technology Computer Systems, Ltd. in Liaoning Province.

This office accessed the website of [redacted]e & Technology Computer Systems, Ltd. at hppt://www.founderpc.com[2] on August 22, 2008 as indicated on the letterhead. However, the website does not provide any information about [redacted] Computer Service and its relationship with [redacted]e & Technology Computer Systems, Ltd. or Founder Group in China. Further, while the [redacted] English translation says that the beneficiary worked as a computer technician and the job duties include computer system installing, assembling, maintenance, testing and etc., this office cannot find the words "computer technician" in the original Chinese version and the duties he performed included computer assembling, maintenance and testing, but not computer systems. In addition, the Chinese version lists the writer's title in the company as a manager, which the translator translated as a general manager.

Therefore, it is concluded that the [redacted] English translation of the original Chinese letter from Fangzheng Science & Technology Computer Systems, Ltd. did not comply with the terms of 8 C.F.R. § 103.2(b)(3) because it is not an accurate translation of the original Chinese version. It is further concluded that the original Chinese letter from [redacted]e & Technology Computer

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[1] As we will discuss the translation issue in detail below, the original Chinese letter is on letterhead of [redacted] & Technology Computer Systems, Ltd. and the name of the company was translated in error. This office will refer to this employment verification as one from & Technology Computer Systems, Ltd. based on the original Chinese version.

[2] The website in fact is the home page for the Founder Group.

Systems, Ltd. failed to demonstrate that the beneficiary worked as a computer technician for [redacted] Computer Service for at least two years. The beneficiary is therefore not qualified for the proffered position prior to the priority date of August 16, 2005 because the experience letter failed to indicate the beneficiary's position or title and also the evidence in the record does not establish the parent-subsidiary relationship between [redacted] Science & Technology Computer Systems, Ltd. and [redacted] Computer Service.

On certification, counsel submits a copy of the [redacted] & Technology Computer Systems letter with a new English translation and certificate of translation from [redacted] English translation). However, the translation provided by [redacted] contains the same deficiencies as the translation by [redacted] Although [redacted] provides a notarized certificate of translation to verify that his English translation is a true and correct translation of its Chinese version, just like [redacted] translation, [redacted] translation added the employer's name as [redacted] Computer Service, the beneficiary's title as a computer technician and the writer's title as a general manager without any reference from the original Chinese version. [redacted] translation is based on the same Chinese version the [redacted] translation comes from. Therefore, [redacted] English translation of the [redacted] Computer Systems letter also fails to comply with the terms of 8 C.F.R. § 103.2(b)(3) because it is not an accurate translation of the original Chinese version.

In response to the director's RFE, counsel also submitted two other employment verifications: one dated February 26, 2008 from the manager of [redacted] (the February 26, 2008 letter) and the other dated March 12, 2008 from the former president of Liaoning Liming Real Estate (Liming March 12, 2008 letter). Both letters were submitted with English translations from [redacted] The Liming March 12, 2008 letter verifies the beneficiary's sales experience, and therefore, it is irrelevant to the beneficiary's requisite two years of experience as a computer technician. The [redacted] February 26, 2008 letter is to verify the beneficiary's part-time experience from May 1997 to April 2001. However, this letter does not include the beneficiary's title/position at [redacted]. Therefore, it failed to demonstrate that the beneficiary possessed the requisite two years of experience as a full-time computer technician prior to the priority date. The English translation of the [redacted] February 26, 2008 letter added the beneficiary's title as a computer technician, the experience in computer systems and the writer's title as a general manager without any reference from the original Chinese version. Therefore, for the same reasons discussed above, the English translation did not comply with the terms of 8 C.F.R. § 103.2(b)(3).

Additionally the experience claimed in the [redacted] February 26, 2008 letter is not supported by the beneficiary's statements on the ETA Form 9089. The petitioner and the beneficiary cannot be excused for not providing the beneficiary's relevant employment history on the form because as counsel discusses on certification the ETA Form 9089 clearly requires to "list all jobs the alien has held during the past 3 years. Also list any other experience that qualifies the alien for the job opportunity for which the employer is seeking certification." It raises a doubt that the petitioner is trying to make a new change in the beneficiary's employment history to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988); *see also Matter of Leung*, 16 I&N Dec. (Dist, Dir. 1976) (denied on other

grounds but noting that experience not listed on an application for labor certification is not credible.) The new translation from [redacted] submitted on certification cannot resolve the deficiencies contained in the original Chinese version. In addition, the [redacted]s English translation also has the same defects as [redacted]s in adding computer technician as the beneficiary's title, computer systems experience to the computer experience and changing the writer's title from a manger to a general manager.

Furthermore, the three experience letters have the same format and the exact same wording except for the company's names, writer's names, starting and ending dates, and addresses. Thus, the evidentiary value of these letters is reduced because, while signed, it is not clear that the signers authored the language in the letters.

During the adjudication of the certification, it has come to light that documentation in the record suggests an additional basis upon which to deny the petition which was not developed by the director in his decision to deny dated June 27, 2008. In its discretion, this office issued a notice of derogatory information (NDI) to the petitioner notifying of this additional basis on which the Form I-140 could be denied and providing the petitioner with an opportunity to respond to such findings prior to the issuance of any final decision by the AAO. On November 25, 2008, the AAO received a response to the NDI. The petitioner responded to the NDI with a letter dated November 11, 2008 from [redacted] Vice President of the petitioning entity. In the letter, [redacted] gives his explanation to each of the issues brought in the NDI and indicates that the petitioner would like to provide confirmations for his explanation if USCIS requires. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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." "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." However, the record of this case does not contain any independent objective evidence to support the petitioner's explanation and to resolve the inconsistencies addressed in the NDI. Therefore, the petitioner failed to overcome the grounds of denying the instant petition addressed in the AAO's NDI.

The AAO concurs with the director that the defects and inconsistencies in the experience letters reduce the evidentiary value of the letters, and therefore, cannot be considered as primary evidence to meet the requirements set forth at 8 C.F.R. §§ 204.5(g)(1) and 103.2(b)(3). The record does not contain independent objective evidence to resolve the inconsistencies and to establish the beneficiary's previous employment as a computer technician for at least two full-time years with either [redacted] or [redacted] prior to the priority date.

Therefore, the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience in the job offered for the proffered position as required by the ETA Form 9089 with the experience letters submitted.[3]

On certification counsel asserts that there are not inconsistencies between the experience letters and the beneficiary's statements on forms. However, 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 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)).

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Here, that burden has not been met. Counsel's assertions on certification cannot overcome the ground of denial in the director's decision. The director's decision must be affirmed.

ORDER: The director's June 27, 2008 decision is affirmed. The petition remains denied.

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[3] In addition, since the record contains inconsistencies and raises doubts about the evidentiary value of the experience letters from the beneficiary's former employers, if the petitioner were to pursue this matter, the petitioner would need to prove their case better and submit independent objective evidence. Examples include but are not limited to, the employer's corporate documents, the employer's payroll records or personnel records, the beneficiary's income statements showing his compensation from [redacted] Computer Service or T[redacted] or taxation records showing his income from his employment with these companies during the time period, to resolve the inconsistencies, to demonstrate the beneficiary's employment with [redacted] Computer Service, and to establish the parent-subsidiary relationship between [redacted] Science & Technology Computer Systems, Ltd. and S[redacted] Computer Service. The record does not contain such evidence submitted previously or on certification.