U.S. Department of Homeland Security
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Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 1 8 20

WAC 0326153404

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:

SELF-REPRESENTED

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 employment based immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted as a motion to reopen and the previous decisions of the director and the AAO will be affirmed. The petition will remain denied.

The petitioner is a video and film production company. It sought to employ the beneficiary permanently in the United States as a video tape editor. 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 determined that the petitioner had not established that the beneficiary possessed the requisite three years of employment experience beginning on the priority date of the visa petition and denied the petition accordingly.

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 AAO further notes that 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).

In this matter, the AAO dismissed the appeal on August 25, 2006, concurring with the director's decision that the petitioner had failed to establish that the beneficiary obtained the requisite three years of work experience in the job offered as a video tape editor as specified on the Form ETA 750. The AAO additionally found that the petitioner had not established that the beneficiary had attended the requisite six years of college as specified on the ETA 750.

On September 22, 2006, the petitioner, through counsel,[2] filed a motion for reconsideration. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or CIS policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or

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[1] The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

[2] Because counsel was listed on a Form G-28 filed by [redacted] who is not eligible to practice law, a letter of inquiry was sent by this office to the petitioner to ascertain whether counsel is still representing the petitioner and to request a current, properly completed Form G-28. The letter was sent on February 9, 2009, giving the petitioner 15 days to respond. As advised in the letter, since the petitioner has not responded, it will be treated as self-represented in this proceeding.

other documentary evidence. 8 C.F.R. § 103.5(a)(2). With the motion, counsel submits copies of selected employment verification letters, a letter from the Ministry of Culture and Education from Argentina, and a copy of the beneficiary's diploma. As noted in the AAO's previous decision, these documents were previously submitted to the record without a certified English translation as required by 8 C.F.R. § 103.2(b)(3). Because this motion is submitted with new translations that are consistent with the regulation, it will be considered as a motion to reopen in accordance with 8 C.F.R. § 103.5(a)(2).

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.

The petitioner must demonstrate that a beneficiary has the necessary education, training and experience specified on the labor certification as of the priority date. The filing date or priority date of the petition 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 Form ETA 750 was accepted for processing on January 12, 1998.

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must have. Included in the educational requirements specified on item 14 is that an applicant for the certified position must have attended six years of college. A college degree in electronic engineering is required as indicated in item 14 and item 15, which lists other special requirements. The level of degree is not specified, such as an associate's, bachelor's, master's degree. Three years of work experience in the job offered of video tape editor is also required.

The Immigrant Petition for Immigrant Worker (Form I-140) was filed on September 16, 2003. Relevant to the beneficiary's work experience, the director examined an employment verification letter that the petitioner submitted in response to the director's request for evidence issued on January 2, 2004. It indicated that a company called [redacted] in Cordoba (Argentina) employed the beneficiary as a video tape editor, cameraman, and technician from June 18, 1995 to August 20, 1997. The letter reflected that the manager, [redacted], signed the letter. The director found that this period of employment experience represented two years and two months and did not demonstrate that

the beneficiary had met the minimum requirements of three years of experience as of the priority date of January 12, 1998.[3]

Prior counsel's appeal[4] was filed on November 19, 2004. On appeal, the AAO reviewed the arguments and documentation submitted including: 1) copies of the beneficiary's educational documents; 2) an evaluation report on the beneficiary's education; 3) a copy of a letter from a former employer in Argentina; 4) copies of the petitioner's signed tax returns for the years 1998 to 2002; 5) a partial unsigned copy of Part B of an ETA 750; and 6) copies of four additional letters from the beneficiary's former employer in Argentina. The AAO dismissed the appeal, concluding that the evidence did not support the petitioner's assertion that the beneficiary had obtained three years of experience in the offered position as of the priority date. In rendering this decision, the AAO considered the evidence submitted and noted that relevant to the beneficiary's experience, the petitioner had submitted copies of an additional four letters on appeal, all dated November 1, 2004, each appearing to be authored by [redacted]. One letter indicates that the earlier letter, dated April 25, 1998, which was submitted to the director, was a mistake, and that the commencement date of the beneficiary's employment with this company was March 18, 1992. Another letter of the same date contains a chart of compensation paid to the beneficiary from 1992 to 1996 and indicates that it represents his wages as a video editor and technician from March 1992 to June 1996. It also bears a certification, signature and seal of a public accountant. The other two letters indicate that the beneficiary performed independent work for the same company during 1996 and 1997 and was paid on three different dates for this work.

In reviewing these letters, the AAO noted an inconsistency in the format of the compensation chart related to the [redacted]s payment of additional compensation to the beneficiary, dated November 1, 2004. The AAO found that there was a notable absence of any first-hand source documentation supporting the detailed figures presented as compensation paid to the beneficiary from 1992-1996, in the chart format as submitted on appeal. The AAO further noted the discrepancy between the manager's earlier letter dated April 25, 1998, claiming a commencement date of June 18, 1995, that was submitted prior to the director's decision, and the start date claimed by three of the letters, dated November 1, 2004, submitted on appeal reflecting that the beneficiary's employment began on March 1992. As additionally stated, the AAO also determined that while the November 1, 2004, letter from the manager claimed that a mistake was made on the earlier letter dated April 25, 1998, no evidence was offered to establish which start date is valid.

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[3] On appeal, the AAO withdrew the director's additional finding that a majority of the beneficiary's experience did not qualify because it was gained prior to his college degree.

[4] Former counsel was [redacted] of Sherman Oaks, California, including named associates on the notice of entry of appearance (Form G-28). On October 4, 2007, [redacted] entered a guilty plea to one count of conspiracy and two counts of visa fraud in the U.S. District Court of the Central District of California. In March 2008, he was sentenced to two years in prison, home confinement and probation.

Related to the AAO's conclusion that the petitioner had not established that the beneficiary had obtained the requisite three years of experience as of the priority date, it was noted that the record contained an incomplete ETA 750 because Part B, which delineates the beneficiary's education and experience as signed under penalty of perjury by the beneficiary, was omitted. It was noted that the ETA 750, Part B, which was submitted on appeal only consisted of a portion of page two, reflecting the beneficiary's purported experience with "[redacted]" in Cordoba, Argentina. It was also provided without the signature and name blocks.[5] As noted in the AAO's decision, Part B of the ETA 750 requires the beneficiary to state all experience within the last three years and any other jobs related to the occupation for which certification is sought.

On motion, as noted above, counsel submits certified English translations of each of the November 1, 2004, letters submitted on appeal, as well as the beneficiary's diploma. The internal format inconsistencies appearing in the chart of compensation were adequately addressed by counsel as attributable to an error in translation concerning the additional compensation paid in Argentina. However, the AAO's main concerns were not addressed, such as the lack of explanation of how the manager's earlier letter, dated April 25, 1998, alleging specific dates of employment, was a "mistake," as well as a lack of adequate first-hand source documentation, such as payroll records, official wage or tax records, which specifically support the beneficiary's employment with [redacted] as set forth on the chart submitted on appeal.

Counsel also states on motion that the AAO's determination that no signed, complete ETA 750 B is contained in the record is erroneous. Counsel adds that the ETA 750 Part A and Part B were sent at the onset of the case through an amendment requested by EDD, which was accepted by the Director. If that were the case, then it raises a question why the petitioner provided a copy of the ETA 750 B on appeal that was incomplete and unsigned. An I-140 petition seeking to sponsor a beneficiary under section 203(b)(3) of the Act must be accompanied by the required individual labor certification. Even if otherwise eligible, this petition could not approved as the record currently stands. *See* 8 C.F.R. § 204.5(a)(2).

Based on the foregoing, the AAO does not find that the petitioner provided sufficient independent objective evidence that the beneficiary acquired three years of employment experience in the certified position of video tape editor as required by the terms of the labor certification. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). 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).

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[5] It is noted that the United States Citizenship and Immigration Services (USCIS) electronic records do not reflect a previous I-140 filed with this labor certification by the petitioner on behalf of this beneficiary.

As noted above, beyond the decision of the director, the AAO dismissed the appeal because the evidence failed to establish that the beneficiary completed six years of college as specified by the terms of the Form ETA 750. The AAO noted that the beneficiary's transcript did not indicate the number of courses that would constitute full-time study at the National Technical University in Cordoba, Argentina. As noted in the AAO's previous decision, the record contains a credentials evaluation issued by the International Education Research Foundation, Inc. on February 10, 1998, indicating that the beneficiary's diploma from the National Technical University, issued on October 4, 1996, represents a U.S. equivalent of a Bachelor of Science degree in Electronic Engineering.

On motion, counsel asserts that the beneficiary has completed the requisite six years of college as set forth of the labor certification. He/she submits a copy of a letter, dated November 15, 2004, from the Ministry of Culture and Education in Argentina indicating the National Technical University was created in order to allow students to pursue part-time study at night and work during the day. Counsel indicates that the beneficiary was employed full-time in 1992 and attended classes as well, resulting in the completion of a six-year course as indicated on his grade transcript.

As noted above, the Form ETA 750 requires a degree in electronics engineering. It does not define the level of degree required. It also requires six years of college. The credentials evaluation states that the beneficiary's diploma represents the U.S. equivalent to a Bachelor of Science degree in Electronics Engineering. The credentials evaluation fails to state that the beneficiary's studies were equivalent to six years of college in the U.S. A U.S. bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, although the evidence established that the beneficiary obtained a degree in the appropriate discipline, it failed to establish it was predicated on the U.S. equivalency of six years of college.

The AAO finds that the petitioner has not met its burden in establishing that the beneficiary possessed the requisite work experience or had six years of college as of the priority date, as required by the terms of the Form ETA 750. 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 motion to reopen is granted. The prior decision of the AAO, is affirmed. The petition remains denied.