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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 27 2010

SRC 07 200 51899

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The AAO remanded the decision to the director for further consideration. The director withdrew his initial decision, issued a notice of intent to deny, allowed the petitioner an opportunity to reply, and then entered a decision to deny. The director has now certified that decision to this office for review. The AAO will affirm the director's decision. The petition will remain denied.

The petitioner is a construction business. It seeks to employ the beneficiary permanently in the United States as a construction carpenter (supervisory carpenter). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary was qualified to perform the duties of the proffered job as of the priority date of the visa petition. Therefore, the director denied the petition.

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.

According to the director's August 17, 2010 decision, which has been certified to this office for review, at issue in this case is whether the petitioner has established that the beneficiary had completed an 11th grade education as of the April 30, 2001 priority date, as required by the Form ETA 750, as certified by the DOL.

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 Form ETA 750 as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The Form ETA 750 indicates that the position requires two years of experience in the proffered position, and an 11th grade education. The qualified applicant also must be able to work overtime, to work on weekends and to work some nights.

The AAO conducts review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal or at the time of certification.[1]

[1] The submission of additional evidence on appeal or at time of certification is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). Here, the petitioner did not submit any statement or evidence into the record subsequent to the director's certification of the matter to the AAO.

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 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).

In this case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of construction carpenter. Item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	--
	High School	11
	College	--
	College Degree Required	--
	Major Field of Study	--

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. The applicant must be able: to work overtime, to work weekends and to work nights. Item 15 of Form ETA 750A does not reflect any additional special requirements.

The beneficiary set forth his credentials on Form ETA-750B and on April 19, 2001 signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. At Part 11, eliciting information of the beneficiary's educational background, the beneficiary stated that from September 1968 through July 1975, he attended elementary school. From September 1975 through July 1978, he attended junior high school. From September 1978 through July 1980, he attended high school. From September 1982 through July 1985, he stated that he attended college. After arriving in the United States, the beneficiary attended Los Angeles Adult School from September 1990 through June 1994.

In response to the director's January 9, 2008 request for evidence in which the director asked the petitioner to show that the beneficiary had an 11th grade education, the petitioner submitted an evaluation of the beneficiary's educational background on American Education Research Corporation letterhead stationery that is not signed and is dated February 29, 2008. This evaluation reviewed various transcripts which belong to the beneficiary and concluded that he had completed the equivalent of a 10th grade education at an accredited high school in the United States. The petitioner also submitted a Los Angeles Unified School District Adult School Eighth Grade Diploma issued to [redacted] on June 20, 1994. The petitioner did not reply to the director's March 24, 2010 Notice of Intent to Deny in which the director requested evidence that the beneficiary had completed the 11th grade as of the priority date. The petitioner submitted no evidence to this office subsequent to the certification of the director's August 17, 2010 decision.

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 did not submit evidence that the beneficiary meets the educational requirements of the Form ETA 750, as certified. Namely, the petitioner has failed to establish that, as of the April 30, 2001 priority date, the beneficiary had completed an education deemed to be the equivalent of an 11th grade education at an accredited high school in the United States as required by the Form ETA 750. Therefore, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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 director's August 17, 2010 decision is affirmed. The petition remains denied.