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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B6

Date: SEP 09 2011 Office: TEXAS SERVICE CENTER FILE: [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a construction, excavation, and demolition company. It seeks to employ the beneficiary permanently in the United States as a heavy equipment operator and mechanic. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the beneficiary did not possess the required training and experience for the offered position as set forth in the Form ETA 750. The director denied the petition accordingly.

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.

As set forth in the director's February 2, 2009 denial, the single issue in this case is whether the beneficiary possessed the required training and experience for the offered position as set forth in the Form ETA 750.

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 AAO conducts appellate 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 upon appeal.[1]

The petitioner must establish that the beneficiary is qualified for the offered position. Specifically, the petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, U.S. Citizenship and Immigration Services (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. *Coorney,* 661 F.2d 1 (1st Cir. 1981).

[1] The submission of additional evidence on appeal 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). 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).

The required education, training, experience, and special requirements for the offered position are set forth at Part A, Items 14 and 15, of Form ETA 750. In the instant case, the labor certification states that the position has the following minimum requirements:

Block 14:

Education: [None Listed]

Training: 1 year in Repair and Operation of Heavy Equipment.

Experience: 2+ years in the job offered.

Block 15: New York state driver's license required.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he has a college degree in accounting and work experience in Guatemala as a truck driver, tractor trailer driver, forklift operator, and mechanics helper.

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.

In a request for evidence (RFE), the director requested evidence that the beneficiary "has the one year training, two years experience, and any other requirements of the labor certification (NY driver's license)."

In response to the RFE, the petitioner submitted a statement, a copy of the beneficiary's completion certificate for Supervisor Drug & Alcohol Training,"[2] a completion certificate for a seven-hour site safety course, and a copy of the beneficiary's New York driver's license. The petitioner also submitted evidence showing they requested verification of the beneficiary's prior employment with [redacted] and that [redacted] responded stating they could not locate the beneficiary's information.

The director denied the petition because the "petitioner has not established that the beneficiary completed one year training in repair and operation of heavy equipment prior to September 29, 2003." Additionally, the beneficiary's prior employment with [redacted] could not be verified.

On appeal, the petitioner submitted a work experience letter from [redacted] This letter, signed by [redacted] states that the beneficiary worked as a Sorter, and later as an operations supervisor, at [redacted] from March 13, 1995 through October 20, 2000.

AAO finds the June 10, 2009 letter submitted by [redacted] does not establish that the beneficiary had the required 2+ years of experience in the job offered or the related occupation of "repair and operation of heavy equipment." The letter provides a detailed description of the beneficiary's job duties, but it does not state that the beneficiary operated or repaired heavy equipment or worked as a mechanic as required by the Form ETA 750. Therefore, the letter is insufficient evidence and not acceptable to document that the beneficiary has the qualifying experience as required by the proffered position. The AAO further notes that the beneficiary did not indicate on the Form ETA 750 that he worked for [redacted] from March 13, 1995 through October 20, 2000. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by the DOL on the beneficiary's Form ETA 750, lessens the credibility of the evidence and facts asserted.

The record also contains three work experience letters from the beneficiary's prior employers.

The letter from [redacted] states that the beneficiary worked as an [redacted] However, this letter lacks the exact dates in which the beneficiary worked there, as well as a sufficient description of the job duties for the beneficiary. Thus, the letter fails to accurately document that the beneficiary had the required 2+ years in the job offered. Therefore, the letter is insufficient evidence and not acceptable to document that the beneficiary has the qualifying experience as required by the proffered position. *See* 8 C.F.R. § 204.5(1)(3)(ii)(A).

The letter from [redacted] states that the beneficiary worked as a pilot and mechanic of heavy transport equipment at [redacted]

[2] No completion date was listed on the certificate.

However, this letter lacks the exact dates in which the beneficiary worked there, as well as a sufficient description of the job duties for the beneficiary. Thus, the letter fails to accurately document that the beneficiary had the required 2+ years in the job offered. Therefore, the letter is insufficient evidence and not acceptable to document that the beneficiary has the qualifying experience as required by the proffered position. *See id.*

The third letter from [redacted] signed by [redacted] states that the beneficiary worked as an operator and mechanic at [redacted]. However, this letter lacks the exact dates in which the beneficiary worked there, as well as a sufficient description of the job duties for the beneficiary. Thus, the letter fails to accurately document that the beneficiary had the required 2+ years in the job offered. Therefore, the letter is insufficient evidence and not acceptable to document that the beneficiary has the qualifying experience as required by the proffered position. *See id.*

Furthermore, the record contains no evidence that the beneficiary has completed the one year of training in Repair and Operation of Heavy Equipment. Thus, the record does not establish that the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification.

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 appeal is dismissed.