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U.S. Citizenship
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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 22 2005
WAC-03-131-51248

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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a roofing company. It seeks to employ the beneficiary permanently in the United States as a roofer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary was qualified for the proffered position and denied the petition accordingly.

On appeal, counsel submits a brief and re-submits previously submitted evidence.

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 issue to be discussed in this case is whether or not the petitioner established the beneficiary's qualifications for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is May 18, 1999. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, 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).

In the instant 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 roofer. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	Blank
	High School	Blank
	College	Blank
	College Degree Required	Not needed
	Major Field of Study	Blank

Training is not needed, however, the applicant must have four years of qualifying employment experience in order to perform the job duties listed in Item 13, which is incorporated into the record of proceeding and will not be recited in this decision. Qualifying employment experience cannot be obtained in a related occupation as the petitioner wrote

"N/A" in the box that would provide for such employment experience. Item 15 indicates that there are no other special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he indicated that he was employed as a roofer with the petitioner since February 1991 and prior to that as a roofer with n Ensenada, Baja California, Mexico from January 1987 through January 1991. The duties performed in both positions are exactly identical to the duties of the proffered position.

With the initial petition, the petitioner submitted no evidence pertaining to the beneficiary's qualifications for the proffered position. The director requested additional evidence on June 10, 2003, requesting, *inter alia*, evidence of the beneficiary's qualifications that conform to the regulatory requirements of 8 C.F.R. § 204.5(l)(3).

In response to the director's request for evidence, the petitioner submitted a letter, signed by (Mr. stating that the beneficiary began his employment with them as a general laborer in September 1991, was promoted in February 1992 to felter (lay out rolls only), then promoted to loader (load and stack roof tile) in February 1993, and finally promoted once again in January 1995 to certified forklift operator. Mr. stated that they had difficulty hiring a qualified roofer and "did not hire [the beneficiary] for the purpose of training him to fill the position offered." Mr. also stated that "[w]ith regard to the [beneficiary's] qualifications to do the job being offered, the [beneficiary] is not claiming direct experience at the time the ETA 750 was filed. The [beneficiary] is claiming experience in a related occupation."

The director denied the petition on February 10, 2004, noting that the letter from Mr. discussed the beneficiary's employment in the roles of general laborer, felter, loader, and certified forklift operator, but that those positions were not included in block 13 of the ETA 750A as duties that would be performed in the proffered position. Additionally, the director noted that the petitioner did not set forth qualifying employment experience in related occupations. Finally, the director noted that the petitioner failed to corroborate the beneficiary's assertion that he obtained qualifying employment experience as a roofer with Carpinteria Herrera Hernandez in Mexico.

On appeal, counsel asserts that "Delitzer Corporation of Newhton[1]" and "regulations" allow for qualifying employment experience "to be gained in a different position than the one being petitioned for." Counsel does not provide any citations, but explains that a "dissimilar" position test requires an employer to show that the proffered position is not similar to the position the beneficiary has held with the petitioning employer. Counsel asserts that the beneficiary acquired the skills of a roofer through various promotions. Additionally, counsel states that Carpinteria Herrera Hernandez in Mexico went out of business in 1991 but the beneficiary was able since the denial to locate a former supervisor who provides a sworn and notarized declaration on appeal, in Spanish with a certified English translation, that the beneficiary worked as a roofer from January 1997 through January 1991 with Carpinteria Herrera Hernandez in Mexico. The former supervisor, (Mr. provides his contact information and provides a detailed description of the duties the beneficiary performed while working at Carpinteria

[1] Counsel submits duplicate briefs on appeal that are almost identical. However, one brief contains a citation for this case and one does not. The citation provided is "Delitizer Corporation of Newton, 91-INA-53, 9 Immig. Rptr. B3-141 BALCA July 21, 1991."

Herrera Hernandez.

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.

Additional evidence is in the record of proceeding that is pertinent to the adjudication of the beneficiary's stated qualifications for the proffered position. In connection with an application to adjust status to lawful permanent resident based upon the underlying visa petition, the beneficiary submitted Form G-325, Biographic Information sheet. The Form G-325 has multiple sections and two sections that elicit employment information for the past five years as well as the beneficiary's last occupation prior to coming to the United States. The beneficiary signed the form in February 2003 above a statement informing the signatory of penalties for knowingly and willfully falsifying or concealing a material fact. On the Form G-325, the beneficiary left only the portion concerning his last occupation abroad blank but indicated that he worked as a roofer with the petitioner since February 1991.

The problem that arises in this case is the multiple inconsistencies in information and representations provided by the petitioner and the beneficiary. *Matter of Ho*, 19 I&N Dec. 582, 591 (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." *Matter of Ho*, 19 I&N Dec. at 591-592 also states: "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."

Additionally, the AAO notes that some factual assertions put forth came from counsel throughout these proceedings. 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).

The multiple inconsistencies between the statements of counsel, the petitioner, and the beneficiary are discussed as follows. The beneficiary misrepresented his employment capacity with the petitioner on two immigration forms, which he signed above warning penalties about perjury or misrepresentation. He unequivocally represented that he was a roofer for the petitioner since February 1991 on both the Form ETA 750B and the G-

325. Mr. letter states that "the [beneficiary] is not claiming direct experience at the time the ETA 750 was filed. The [beneficiary] is claiming experience in a related occupation." Mr. letter suggests that the beneficiary did not have roofing experience when he was hired. Mr. Barber's letter clearly states that the beneficiary was not hired as a roofer in 1991 but instead as a general laborer, and also held positions as a felter, loader, and certified forklift operator. Mr. never states that those promotions provided the beneficiary with the skills to perform the duties of roofer nor did he state that the beneficiary could perform or even has performed roofing duties. Counsel also stated on appeal that the beneficiary gained qualifying employment experience through his promotions, not that he had roofing experience when he was hired in 1991.

On the other hand, counsel states on appeal that the beneficiary is now able to contact a former supervisor at his alleged former place of employment in Mexico, His immigration case has been pending since May 1999, and presumably he began the procedure of collecting evidence and supporting documentation prior to actual submitting the application to DOL, and between February 10, 2004, the date of the director's decision, and March 5, 2004, the date counsel submitted the appeal[2], the beneficiary finds the critical evidence to proving his case. Because of the circumstances surrounding this submission on appeal, the AAO affords the declaration by Mr little weight, especially since there is no other corroborating evidence of this alleged employment.

It is also noted that the director previously requested such evidence and provided the petitioner an opportunity to submit it earlier in these proceedings. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO does not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* The explanation provided by counsel on appeal is not satisfactory as to how the beneficiary suddenly found his former supervisor in less than 30 days when he could not find him for over 5 years previously. Thus, the declaration is precluded from consideration by the application of *Soriano*. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel refers to *Matter of Delitzer of Newton*, 88 INA 482 (BALCA 1990), however she has not demonstrated how precedent issued by DOL's Board of Alien Labor Certification Appeals (BALCA) is binding on the Department of Homeland Security's CIS. *Delitzer* stated that a beneficiary's on-the-job training could be accepted as qualifying employment experience if the proffered position is a different job than the position that the beneficiary gained his on-the-job experience. BALCA stated that the specific duties of the positions held by the alien would guide the determination concerning similarity including such criteria as the following:

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[2] Counsel submitted two almost identical appeals, both timely, but one was date stamped by CIS on the 5th of March 2004, while the other was date stamped by CIS on the 10th of March 2004.

> relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position was filled previously, whether the position is newly created, the prior employment practices of the employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job and the job salaries.

Id. at 9-10.

In the instant case, DOL had no notice or opportunity to analyze the labor certification application through *Delitzer's* holding since it was not on notice that the beneficiary would be qualifying for the proffered position through employment of dissimilar positions with the petitioning employer. The Form ETA 750B indicated that the beneficiary was a roofer from February 1991 onwards with the petitioner, not a felter, loader, and certified forklift operator, duties and skills from positions that he would subsequently claim, not before DOL but before CIS, qualified him for the proffered position. Since the proper representations and information were not provided to DOL, the AAO is not inclined nor required to analyze the beneficiary's qualifications according to *Delitzer's* holding. Even if the AAO did analyze the beneficiary's qualifications according to *Delitzer's* holding, however, Mr. [redacted] letter does not provide sufficient detail, as delineated by *Delitzer* and quoted above, to determine whether the beneficiary's duties while holding the positions of felter, loader, and certified forklift operator were dissimilar to yet provided the qualifying experience to perform the duties of a roofer.

Thus, because of the inconsistent representations made concerning the beneficiary's prior employment experience, the AAO concurs with the director's determination that the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position because there is insufficient evidence that he has four years of qualifying work experience.

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.