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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: DEC 11 2007

IN RE: Petitioner: [Redacted]
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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a secretary (bilingual secretary). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's April 5, 2006 denial, the director determined that the petitioner had not established that the beneficiary had the requisite experience as stated on the labor certification application. The director denied the petition accordingly.

The record shows that the appeal is properly, filed and 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.

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 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant 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 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 appeal¹. On appeal, the petitioner submits a letter dated April 28, 2006 and copies of documents previously submitted. Relevant evidence in the record includes an employment certification dated September 15, 2005 from Jozef Lamer, the president of JL Unlimited (JL's September 15, 2005 letter), a letter dated January 20, 2006 from Jozef Lamer, the president of JL Unlimited (JL's January 20, 2006 letter), a letter dated February 23, 2006 from the beneficiary (the beneficiary's February 23, 2006 letter), the beneficiary's associate degree and transcripts from Westchester Community College, and the beneficiary's individual tax returns for 1996 through 1999. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, the petitioner asserts that the JL's January 20, 2006 letter verified the beneficiary's experience with JL Unlimited company as a full-time secretary/bilingual from July 1996 till July 1998.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and 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 bilingual secretary. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	8 years
	High School	4 years
	Experience	
	Job Offered	2 years
	Related Occupation	Blank

The duties of the proffered position are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements. However, the duties at Item 13 includes requirement that "must be fluent in Polish & English."

The beneficiary set forth her credentials on Form ETA-750B and signed her name on April 7, 2001 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, she represented that she worked 40 hours per week as a bilingual secretary for Bacik Karpinski Assoc. Inc. (Bacik Karpinski) located at 518 Pine Street, Jamestown, NY 11372 from April 1994 to July 1999. She did not provide any additional information concerning her employment background 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) of 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.

The instant I-140 petition was submitted on October 24, 2005 with the JL's September 15, 2005 letter as evidence pertinent to the beneficiary's qualifications as required by the above regulation. The director issued a request for additional evidence (RFE) on December 6, 2005 requesting the petitioner to submit evidence to establish that the beneficiary possesses the required two years of experience as a bilingual secretary as of April 30, 2001, the date of filing because there was inconsistency between the JL's September 15, 2005 letter and the beneficiary's statement on the Form ETA 750B. In response to the director's RFE, the petitioner submitted the JL's January 20, 2006 letter, the beneficiary's February 23, 2006 letter, the beneficiary's associate degree and transcripts from Westchester Community College, and the beneficiary's individual tax returns for 1996 through 1999.

The issue in the instant case is whether the petitioner with these documents established the beneficiary's requisite experience prior to the priority date under the requirement set forth at 8 C.F.R. § 204.5(g)(1). The regulation requires such evidence must be in the form of letter from a current or former employer or trainer and must 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. Both the JL's September 15, 2005 letter and the JL's January 20, 2006 letter were on letterhead of the company with the company's address and contact information and signed by Jozef Lamer as the president of the company. They are letters from a former employer. The JL's September 15, 2005 letter stated concerning the beneficiary's work experience in pertinent part that:

I hereby certify that [the beneficiary] had been gainfully employed in my company as a full-time secretary/bilingual from July 1996 to July 1998.

[The beneficiary]'s duties included reading and responding to mail/faxes in Polish/English; to schedule appoints; to establish record keeping procedure and file coding systems as needed. She is fluent in Slovak, Polish and English.

This letter verified that the beneficiary was employed as a full time bilingual secretary for two years from July 1996 to July 1998 and included a specific description of the duties the beneficiary performed as required by the regulation. However, as the director noted in his RFE dated December 6, 2005, this experience letter provided inconsistent information with the beneficiary's statements on the Form ETA 750B that the beneficiary worked for Bacik Karpinski as a bilingual secretary from April 1997 to July 1999. Without further clarification, the AAO cannot accept this experience letter as primary evidence to establish the beneficiary's qualifications for the proffered position in the instant case.

In response to the director's RFE, the petitioner submitted the JL's January 20, 2006 letter to resolve the inconsistency. This letter explained concerning the beneficiary's work experience in pertinent part that:

Please note that my company is in construction business, which mostly works with subcontractors (other renovation and construction companies). The company has projects in New York, New Jersey, Connecticut, and also has started business with architectural companies in Eastern Europe (Poland, Slovak Republic and Czech Republic). One of my sub-contractors was: [REDACTED] We collaborated in many projects mostly in New York State.

[The beneficiary] was a secretary able to communicate in English, Polish, Slovak and Czech languages, and I made an agreement with my sub-contractor, and also with [the beneficiary], that she will work as a full-time secretary, who used her bi-lingual skills in the offices of my company and [REDACTED]. She used to work 40 hours per week, combining those hours between two offices. Our co-operation took places between April 1997 till July 1999.

During the period, from July 1998 till July 1999, our contracts in NY State were managed from [REDACTED] office, so that's why [the beneficiary] stayed there most of her time. However, my company, JL Unlimited was the one, who was the employer.

On[sic] April 2001, when [the beneficiary] signed ETA B Application, she put [REDACTED] as her previous employer, and failed to put my company's name as her main employer.

This letter still contains inconsistencies with the beneficiary's statements on the Form ETA 750B, the JL's September 15, 2005 letter and itself. For the period of the beneficiary's employment, the beneficiary claimed her full-time employment with [REDACTED] from April 1997 to July 1999; however, the JL's September 15, 2005 letter verified the beneficiary's full-time employment with JL Unlimited from July 1996 to July 1998; and the JL's January 20, 2006 letter claimed the beneficiary's full-time employment with both JL Unlimited and [REDACTED] (part-time employment with each of them) from April 1997 to July 1999 while in the meantime it also confirmed the beneficiary's full-time employment with JL Unlimited from July 1996 to July 1998. The JL's January 20, 2006 letter stated that the inconsistency between the JL's September 15, 2005 letter and the beneficiary's statements on the Form ETA 750B was due to the beneficiary's error. However, this letter did not explain the inconsistencies between the first letter and the second letter, and the record does not contain any explanation from the beneficiary regarding her alleged mistake.

The record does not contain any evidence to support the beneficiary's full-time employment as a bilingual secretary with JL Unlimited for the period from July 1996 to April 1997. The petitioner did not submit any evidence including an experience letter from [REDACTED] to verify the beneficiary's part-time experience for the period from April 1997 to July 1999. Nor did the writer explain how JL Unlimited claimed to be an employer of the beneficiary for the period from July 1998 to July 1999 while she worked in [REDACTED] office most of her time. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) 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. The JL's January 20, 2006 letter was not submitted with such independent objective evidence. Without independent objective evidence, such as the beneficiary's paystubs or paychecks from the employer, the employer's payroll records or personnel records showing the beneficiary's title, pay rate, working hours and employment period, to establish the beneficiary's requisite two years of experience as a bilingual secretary, the JL's January 20, 2006 letter cannot resolve the inconsistency indicated in the director's RFE and further cannot establish the beneficiary's qualifications for the proffered position in the instant case. The petitioner's assertion on appeal that the JL's January 20, 2006 letter established the beneficiary's employment with JL Unlimited as a full-time secretary/bilingual from July 1996 to July 1998 is misplaced.

In response to the director's RFE, the petitioner submitted the beneficiary's tax returns to support her employment experience. These tax returns indicated that the beneficiary reported her business income of \$5,757 for 1996, \$5,842 for 1997, \$5,638 for 1998 and \$7,184 for 1999 on line 12 of the Form 1040 as self-employed secretary. The tax return did not show that the beneficiary had any wages, salaries tips or other income for these years, nor did the tax return verify that any income the beneficiary reported in the tax returns was paid by JL Unlimited or Bacik Karpinski as compensation for her employment as a bilingual secretary. In addition, the amount of the beneficiary's income for each of these years did not establish her full-time employment. Therefore, with the beneficiary's tax returns for 1996 through 1999 the petitioner failed to support the JL's September 15, 2005 and January 20, 2006 letters and further failed to establish that the beneficiary possessed the requisite two years of experience as a full-time bilingual secretary prior to the priority date in the instant case.

The petitioner's assertions on appeal cannot overcome the grounds of the director's denial. The AAO thus affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience as a full-time bilingual secretary from the evidence submitted into this record of proceeding and thus the petitioner has not demonstrated that she 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 appeal is dismissed.