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



U.S. Citizenship
and Immigration
Services

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BC

JUN 20 2007

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER
WAC-05-130-52033

Date:

IN RE: Petitioner:
Beneficiary:

[REDACTED]

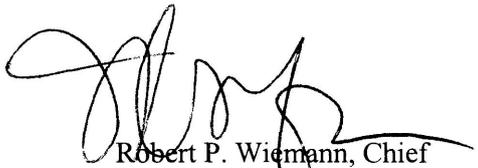
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Chief
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 sustained.

The petitioner is an optical service and store. It seeks to employ the beneficiary permanently in the United States as a dispensing optician (optician). 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). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with a two year Associate Degree in Optical Dispensing and two years of experience in the job offered. 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 November 3, 2005 denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary possessed the requisite two year Associate Degree in Optical Dispensing and two years of experience in the job offered and was qualified for the proffered position prior to the priority date.

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).

The instant petition is for a substituted beneficiary.¹ The original Form ETA 750 was accepted on February 21, 2002. The I-140 petition was submitted on April 5, 2005. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal². On appeal, counsel submits a certificate of graduation and transcripts from Daegu Health College and an employment certificate issued by World Optic. Co, Ltd. in Busan, South Korea. Other relevant evidence in the record

¹ An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

² 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).

includes the beneficiary's license as an optician issued by Minister of Health & Welfare, Republic of Korea, a career certificate from See Channel Glass in Busan, Korea and a certificate of graduation from Dongham Health Technical College. The record does not contain any other evidence relevant to the beneficiary's educational background and requisite experience.

On appeal, counsel asserts that the evidence being submitted clearly establishes that the beneficiary has met all of the minimum requirements as stated in Part 14 and 15 of the Form ETA 750.

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 optician. Item 14 requires two years of college studies, an associate degree in optical dispensing, and two years of experience in the job offered.

The beneficiary set forth her credentials on Form ETA-750B and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. The beneficiary did not provide her educational background information in Part 11. On Part 15, eliciting information of the beneficiary's work experience, she represented that she has been working as an optician for the petitioner since February 2005. Prior to that, she represented that she worked as an optometrist for See Channel Glass in Busan, Korea from May 2002 to September 2004. She does not provide any additional information concerning her employment background on that form.

The record of proceeding contains a copy of the beneficiary's license for optician issued by Minister of Health & Welfare, Republic of Korea showing she was registered as an optician on June 28, 1995, a certificate of graduation from Dongham Health Technical College and a career certificate from See Channel Glass verifying that the beneficiary worked for the company as an optometrist from May 2002 to September 2004. The director determined that the submitted certificate of graduation from Dongham Health Technical College did not indicate that the beneficiary has a two year Associate Degree majoring in Optical Dispensing, that no college or university transcript or a photocopy of diploma was submitted, and that the beneficiary's experience from See Channel Glass was earned after the priority date in the instant case. Therefore, the director determined that the beneficiary was not qualified for the proffered position.

On appeal, counsel submits a certificate of graduation and transcripts from Daegu Health College and an employment certificate issued by World Optic. Co, Ltd. in Busan, South Korea. The certificate of graduation from Daegu Health College indicates that the beneficiary's attendance began on March 5, 1993 and that she graduated on February 3, 1995 from the Department of Ophthalmic Optics of that college; the certificate of graduation also indicates that the beneficiary was awarded an Associate Degree. The transcript of Academic Records from Daegu Health College confirms the beneficiary's Date of Admission: March 5, 1993, Date of Graduation: February 3, 1995, Department: Ophthalmic Optics and that the beneficiary took 39 courses (with 76 credits) in optics and related during the four semesters from 1993 to 1995.

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) or 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. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The employment certificate submitted on appeal is dated December 28, 2005 from [REDACTED] Representative Director of World Optic. Co, Ltd. with the company's address. The letter certifies that the beneficiary worked for the company as an optician from February 11, 1996 to November 30, 2001.

Upon reviewing the complete record, the preponderance of the evidence demonstrates that the beneficiary possessed the required educational requirements of two years of college studies and an associate degree in optical dispensing, and that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date as set forth on the Form ETA 750, and therefore, the petitioner has established that the beneficiary is qualified for the proffered position.

Counsel's assertions on appeal have overcome the director's findings and demonstrate that the beneficiary met the educational and experience requirements of the proffered position as designated on the Form ETA 750 prior to the priority date.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.