



U.S. Citizenship
and Immigration
Services

Invasion of personal privacy

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: APR 22 2009

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

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner is a dairy farm. It seeks to employ the beneficiary permanently in the United States as a heavy equipment operator (dairy farm supervisor). 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 petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. 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.

As set forth in the director's April 6, 2006 denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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 DOL 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 January 14, 1998.

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 appeal.¹ On appeal, counsel submits an undated letter from [REDACTED] of [REDACTED] letter) regarding the beneficiary's prior work experience. Other relevant evidence in the record includes a letter dated December 20, 2005 from [REDACTED] of [REDACTED]

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).

letter) regarding the beneficiary's prior work experience, together with IRS Forms W-2 issued by to the beneficiary in 1996 and 1997. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the letter establishes that the beneficiary is qualified for the proffered job.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 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 heavy equipment operator (dairy farm supervisor). 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 | none required |
| Major Field of Study | blank |

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. Item 15 of Form ETA 750A does not reflect any 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 represented that he has worked full-time for the petitioner as a heavy equipment operator from January 1997 to the date he signed the Form ETA 750 on January 14, 1998; that he worked full-time as a heavy equipment operator for from January 1996 to December 1996; and that he worked full-time as a heavy equipment operator for from January 1993 to December 1995. He does not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(1)(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 response to the director's request for evidence dated December 5, 2005, the petitioner submitted the [REDACTED] letter and the beneficiary's IRS Forms W-2 issued by Liberty Dairy in 1996 and 1997 as evidence of the beneficiary's two years of prior work experience in the proffered job. The director determined that [REDACTED] employed the beneficiary on a part-time basis, that I [REDACTED] employed the beneficiary for only a brief period in 1997, and that the [REDACTED] letter fails to identify the beneficiary's inclusive dates of employment or provide a specific description of the duties performed by the beneficiary. Thus, the director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. We also note that the dates listed for the beneficiary's employment with [REDACTED] in the [REDACTED] letter conflict with the dates the beneficiary listed for his employment with [REDACTED] on Form ETA 750B. The [REDACTED] letter states that the beneficiary was employed by [REDACTED] in 1996 and 1997, while the beneficiary indicated on Form ETA 750B that he worked full-time as a heavy equipment operator for [REDACTED] of [REDACTED] from January 1996 to December 1996. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner has not resolved the inconsistencies with independent, objective evidence of the beneficiary's employment with [REDACTED]

On appeal the petitioner submits the [REDACTED] letter and asserts that it establishes that the beneficiary is qualified for the proffered job. The [REDACTED] letter states that the beneficiary worked for [REDACTED] "for more than 2 years as a Supervisor and a Milker." The letter further indicates that the beneficiary worked full-time from January 1994 to February 1997. The [REDACTED] describes the beneficiary's duties as follows:

He was a good employee; and Supervisor. He would make sure the other employees would do the job right. He would always be on time and always knew what he was doing, he also knew how to work the machines we used to milk the Cows. [REDACTED] got to

train a few of the new employees and did a great job.

The [REDACTED] letter does not confirm that the beneficiary has two years of experience in supervising and coordinating the activities of workers engaged in operating and repairing heavy machinery on a dairy farm as required by the ETA 750. Specifically, the letter does not confirm that the beneficiary has experience supervising the repair of heavy machinery on a dairy farm. Further, the dates listed for the beneficiary's employment with [REDACTED] in the [REDACTED] letter conflict with the dates the beneficiary listed for his employment with [REDACTED] on Form ETA 750B. The [REDACTED] letter states that the beneficiary was employed by [REDACTED] from January 1994 to February 1997, while the beneficiary claimed that he worked full-time as a heavy equipment operator for the [REDACTED] from January 1993 to December 1995 on Form ETA 750B. Once again, 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. *Matter of Ho*, 19 I&N Dec. at 591-592. The petitioner has not resolved the inconsistencies with independent, objective evidence of the beneficiary's employment with [REDACTED]

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of full-time experience in the job offered from the evidence submitted into this record of proceeding. Thus, 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 appeal is dismissed.