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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B6

FILE: [REDACTED] Office: TEXAS SERVICE CENTER
SRC 07 015 52930

Date: APR 23 2009

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)

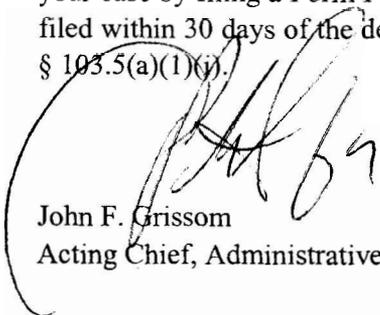
ON BEHALF OF PETITIONER:

[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 Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be dismissed.

The petitioner is a general contractor. It seeks to employ the beneficiary permanently in the United States as a contract specialist. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director concluded that the petitioner had failed to demonstrate that the beneficiary possessed the requisite qualifying work experience and requisite educational credentials as of the visa priority date, and denied the petition accordingly.

On appeal, the petitioner, through counsel provides additional evidence and maintains that the petitioner has demonstrated that the beneficiary's educational credentials and employment experience meet the requirements of the ETA 750.

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).

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(l)(3) further 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.

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on March 12, 2003.¹

On Part 5 of the Immigrant Petition for Alien Worker (I-140), filed on October 20, 2006, the petitioner claims to have been established on January 1, 1992, to currently employ four workers, to have a gross annual income of \$392,025, and an annual net income of \$25,121.

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position of contract specialist must have. In this matter, item 14 states that four years of college is required, culminating in a B.A. in Management. An applicant must also have two years of work experience in the job offered as a contract specialist. No other alternate combination of education or experience is described.

Part B of the ETA 750 was signed by the beneficiary on March 7, 2003. Item 15 of Part B instructs an applicant to list all jobs held during the last three years and to list any other jobs related to the occupation for which the applicant is seeking certification. Here, the beneficiary claims one job. He states that he was employed as a contract specialist for "Godoo Imaginations, Inc." of ██████████ ██████████ Seoul, Korea from November 1998 to November 2001. From November 2001 to the present (date of signing), the beneficiary claims no employment.

Relevant to employment experience gained in the job offered by the priority date of March 7, 2003, the petitioner initially provided a "Certificate of Job Experience," dated January 16, 2002, from ██████████ the President of Godoo Imaginations Inc. He simply affirmed the beneficiary's employment as a contract specialist from November 1998 to November 2001. This letter did not list the beneficiary's job duties in accordance with 8 C.F.R. § 204.5(l)(3).

In response to the director's request for evidence of the beneficiary's educational credentials, the petitioner also included two additional documents related to the beneficiary's employment

¹ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

experience. One is another "Certificate of Job Experience," dated November 17, 2006, from [REDACTED], President of Godoo Imaginations Inc. He again certifies the beneficiary's employment as a contract specialist and lists two projects in 2000 and 2001 that the beneficiary planned and supervised and one project in 1998 that the beneficiary planned, estimated, managed and supervised in 1998. The petitioner also provided a letter, dated November 21, 2006, in English, from [REDACTED] the President of Domyung Engineering Co., Ltd. of Seoul, Korea. [REDACTED] states that the beneficiary worked as a contract specialist from March 1991 to October 1998. He lists four construction projects that the beneficiary planned, managed or supervised during a period from 1991 to 1997 and affirmed the beneficiary's experience as a contract specialist from these projects as acquiring experience in estimating, management, scheduling and subcontractor management. It is noted that this job was not listed by the beneficiary on Part B of the ETA 750. *See Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.)

The petitioner's response also included a credential evaluation of the beneficiary's education, but did not include a copy of his diploma and transcript as requested by the director. The evaluation is dated December 4, 2006 and was submitted by Multinational Education & Information Services, Inc. (MEI) [REDACTED] evaluates the beneficiary's 1980 Bachelor of Science in Agriculture degree from Chungbuk National University and determines that it is the equivalent to a four-year program of post-secondary academic studies in Science and transferable to an accredited U.S. university. [REDACTED] concludes, using a three for one formula, that a combination of the beneficiary's degree and the beneficiary's professional work experience is the U.S. equivalent of a Bachelor Degree in Science and Marketing Management.

In denying the petition on December 19, 2006, the director notes the discrepancy of the omission of the beneficiary's employment with Domyung Engineering Co., Ltd on the ETA 750B. She also notes that the petitioner failed to provide a copy of the beneficiary's diploma and official transcript from Chungbuk University and failed to explain why the ETA 750B listed the degree (presented as from "Choongbuk University) as a B.A. in Management. She denied the petition for these reasons.

The petitioner filed a motion to reopen/reconsider. Counsel submitted the following:

- 1) A graduation certificate from Chungbuk National University in English, an accompanying grade transcript in English, as well as a copy of a grade transcript in Korean. The certificate and transcript describes the beneficiary's degree as a Bachelor of Science in Agriculture (Management).
- 2) A second credential evaluation from [REDACTED], dated January 3, 2007. This time, [REDACTED] determines that the beneficiary's B.A. degree in Agriculture is, standing alone, the U.S. equivalent of a Bachelor Degree in Science and Marketing Management. He also states that the beneficiary's courses included principle of law, mathematics, principle of economics, agricultural economics, experimental statistics and education.

- 3) A graduation certificate from ChungJu University in English accompanied by a Korean document appearing to be the graduation certificate. The English version states that the beneficiary graduated on February 25, 1987 and received a one year Master's Degree in Management from the Industrial & Management Business School.
- 4) A Korean document and English translation from the Korean Construction Technology Association, signed by [REDACTED], confirming that the beneficiary obtained the highest level 1 for qualification in Construction Progress management Level 1. The document is dated January 8, 2007 but does not confirm when the beneficiary obtained this credential.
- 5) A document in both Korean and English indicating a membership in the Korea Interior Contractors Association held by [REDACTED], of Godoo Imginations, Inc." (sic). This document is dated October 25, 1999.

The director denies the motion and reaffirms the denial of the petition. She questions the second evaluation from MEI in its conclusion that the beneficiary's degree from Chungbuk could represent a degree in marketing management as the beneficiary's transcript showed no courses in marketing. The director also noted the discrepancies in the two MEI evaluations in basing the same conclusion on a combination of education and professional experience, or alternatively, on education alone. The director also notes that the beneficiary's master's degree, although claimed to have been awarded in 1987, was not claimed on the ETA 750B and was not submitted with a transcript or evaluation. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

On March 29, 2007, the petitioner appealed the director's decision on the motion to reopen and reconsider without submitting a notice to appeal. Counsel supplied an academic transcript from Cheongju University relating to the beneficiary's master's degree as well as an evaluation of this and the beneficiary's bachelor's degree from Chungbuk University. [REDACTED] of the International Education Consulting submitted this evaluation, dated March 26, 2007. [REDACTED] determined that the beneficiary's bachelor of science degree in Agriculture (Management) is the U.S. equivalent of a Bachelor of Animal Science from an accredited college or university. He further determined that a combination of the beneficiary's bachelor of science in agriculture and his one year master's degree in management from Cheongju University is the U.S. equivalent of a Bachelor of Animal Science and Business Management from an accredited college or university.

The director denied this motion based on the inconsistencies presented by the MEI evaluations and the omission of any mention of the beneficiary's master's degree from the ETA 750.

On appeal from this decision, counsel asserts that the two MEI evaluations were not inconsistent because if a bachelor's degree can be determined from transcripts submitted with certain courses taken, then it can be determined from a combination of experience and education. Counsel claims

that the beneficiary's master's degree was not listed on the ETA 750 B because the petitioner was convinced that it was not necessary.

We do not find counsel's assertions on appeal to be persuasive. To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, United States Citizenship and Immigration Services (USCIS) is bound to follow the pertinent regulatory guidelines pursuant to 203(b)(3)(A)(i) of the Act. USCIS jurisdiction includes the authority to examine an alien's qualifications for preference status and to investigate the petition under section 204(b) of the Act, 8 U.S.C. § 1154(b). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by the DOL. *Madany 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 v. Coomey*, 662 F.2d 1 (1st Cir. 1981); *Denver v. Tofu Co. v. INS*, 525 F. Supp. 254 (D. Colo. 1981); *Chi-FengChang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). 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 Dragon Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).

With reference to the certificate(s) of experience submitted by Godoo Imaginations Inc., it is noted that the beneficiary's employment is characterized as a contract specialist throughout his 1998 to 2001 employment. However, as noted above, his membership in the Korea Interior Contractors Association from 1999 describes him as a managing director. The record does not credibly explain this discrepancy in job descriptions, or, as possibly suggested by the record, the beneficiary's financial or ownership connections with Godoo Imaginations Inc. Additionally, the beneficiary failed to include his employment as a contract specialist with the Domyung Engineering Co., Ltd. on the ETA 750B. The beneficiary signed the ETA 750B under penalty of perjury and was instructed to list all jobs during the last three years and to *list any other jobs* related to the occupation for which the applicant is seeking certification. We do not conclude that the petitioner has credibly established that the beneficiary acquired the requisite two years of experience as a contract specialist. See *Matter of Leung*, 16 I&N at pp. 14-15.

Similarly, as the director noted, the beneficiary's attendance at Chungju University and his subsequent one-year master's degree in management awarded in 1987 was omitted from the ETA 750B, which would have been a significant inclusion, particularly in a case where a B.A. in Management is the required credential and the job is related to construction not agriculture. 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. Inconsistencies must be resolved in the record by the petitioner through 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. See *Matter of Ho*, 19 I&N Dec. 582, at 591-592.

Further, with relation to the beneficiary's credential from Chungbuk University, the official Korean language certificate of graduation from this institution was not submitted, and with the exception of a

certified English translation related to the degree from Chungju University, none of the Korean language documents were submitted with a certified English translation consistent with the terms of 8 C.F.R. § 103.2(b)(3) providing for full English language translations which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

We further concur with the director's observations about the evaluations submitted from MEI and find them to be well-founded. The first evaluation relied on a formula derived from the non-immigrant regulations allowing three years of experience to equate to one year of higher education. See 8 CFR § 214.2(h)(4)(iii)(D)(5). The second one, using the same considerations, determined that the beneficiary's bachelor's degree alone would represent a bachelor's degree in science and marketing management, where as the director noted, the beneficiary did not take any marketing at this university. These evaluations are not considered probative of the beneficiary's educational credentials. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Based on the above, we do not conclude that the petitioner has convincingly established that the beneficiary possesses the required B.A. in Management as set forth on the approved labor certification. The beneficiary was required to have a bachelor's degree on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed.

Beyond the decision of the director, it is noted that the petitioner filed the I-140 on October 20, 2006. The financial documentation submitted in support of the continuing financial ability to pay the proffered wage of \$40,150 per annum extended through 2005 but did not include any documentation for 2006 as required by the regulation at 8 C.F.R. § 204.5(g)(2). As the current record stands, the petitioner did not establish its continuing ability to pay the proffered wage.

It is additionally noted that the principal shareholder of the petitioner and the beneficiary share similar names. Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). When and if future proceedings may be initiated, further investigation may be warranted including consultation with the DOL as to whether any such relationship was considered in the labor certification proceedings.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the

initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also 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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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.