

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6

File: [REDACTED]
LIN 07 114 52100

Office: NEBRASKA SERVICE CENTER

Date: AUG 11 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, 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates a construction business. It seeks to employ the beneficiary permanently in the United States as a heavy equipment supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, certified by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary possessed the requisite experience for the position beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record demonstrates that the appeal was properly filed, was timely, and made 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 denial dated March 3, 2009, the single issue in this case is whether or not the beneficiary possessed the requisite experience for the position beginning on the priority date of the visa petition.

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 July 19, 2004 and certified on January 2, 2007. The proffered wage as stated on the Form ETA 750 is \$19.27 per hour (\$40,081.60 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position or two years of experience in the related occupation of heavy equipment operator.

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

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 July 19, 2004. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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).

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.

¹ The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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).

The Form ETA 750 states that the position requires two years of experience in the proffered position or two years of experience in the related occupation of heavy equipment operator. The job duties as stated on the Form ETA 750A Section 13 are as follows:

To supervise heavy machine operators, crew of ten including caterpillars excavators 320 and 235; and bulldozers D-8, D-6, D-4, loaders 963+973. [sic]

On the Form ETA 750, the beneficiary states that he worked as a heavy equipment operator for NCI New Construction, Inc. in Vienna, Virginia starting in March 1991. The beneficiary did not list the date in which he stopped working there. The beneficiary also states that he worked as a heavy equipment operator for the petitioner in Chantilly, Virginia. The beneficiary did not list his dates of employment with the petitioner.

The petitioner submitted a letter documenting the beneficiary's prior work experience for the petitioner.

Letter dated February 2009;
Position title: heavy equipment supervisor;
Dates of employment: "from May 25, 2003 until present;"
Description of duties: "To service Heavy Machine Operation, Crow often including Caterpillars, Excavator 320, and 235, Bulldozer D-8, D-6, D-4, and Loader 936, 973."

The AAO finds the February 2009 letter submitted by the petitioner to lack the legible name of the owner/manager. The AAO notes that the beneficiary only worked for the petitioner for a little over a year before the priority date. Thus, the letter fails to document accurately that the beneficiary had the full two years of required experience as required by 8 C.F.R. § 204.5(1)(3)(ii)(A). Therefore, the letter is insufficient evidence and is not acceptable to document that the beneficiary has the qualifying experience as required by the proffered position.

On appeal, the petitioner submitted a letter from NCI New Construction, Inc. in Vienna, Virginia documenting the beneficiary's prior work experience for that company.

Letter dated June 21, 1999;
Position title: heavy-duty equipment operator;
Dates of employment: "He joined our company April 7, 1993."
Description of duties: None listed.

The AAO finds the June 21, 1999 letter submitted by NCI New Construction, Inc. to lack a description of the beneficiary's duties there. The AAO also finds the letter to contain different information regarding the beneficiary's dates of employment there from the information listed on the Form ETA 750. The letter states that the beneficiary worked there from April 7, 1993 until at least June 21, 1999. However, the Form ETA 750 states that the beneficiary began working there in March 1991.

On appeal, the petitioner asserts that the owner of NCI New Construction, Inc., [REDACTED] passed away in 2004, so the letter the submitted is the only one that the petitioner will be able to obtain in order to evidence the beneficiary's prior work experience with NCI New Construction, Inc.

The AAO finds that the letter from NCI New Construction, Inc. fails to document accurately that the beneficiary had the full two years of required experience as required by 8 C.F.R. § 204.5(l)(3)(ii)(A). *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.

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.

Therefore, the letter from NCI New Construction, Inc. is insufficient evidence and is not acceptable to document that the beneficiary has the qualifying experience as required by 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.