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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

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FILE: [REDACTED]
EAC-03-082-51621

Office: VERMONT SERVICE CENTER

Date: JUN 17 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:

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 for the substituted beneficiary was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's June 3, 2005 decision will be withdrawn. The appeal will be dismissed and the petition will be denied.

The petitioner is an upholstery company. On January 15, 2003, the petitioner filed the I-140 petition to seek to employ the substituted beneficiary¹ permanently in the United States as a furniture upholsterer (upholsterer) under Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). On June 3, 2005, the director denied the petition as the petitioner failed to provide a certified copy of Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification), approved by the Department of Labor (DOL).

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.

On appeal, counsel asserts that the original labor certification approved by the DOL was submitted to USCIS with the immigrant petition on behalf of the original beneficiary. Counsel also submits a photocopy of the certified Form ETA 750. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.² The AAO notes that the record of the

¹ We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services ("USCIS") based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. 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.*, Immigration and Naturalization Service, *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 shows that the director issued a request for evidence (RFE) to request the petitioner submit an eligible copy of the certified

proceeding contains a copy of the certified Form ETA 750A for an original alien and Form ETA 750B for the instant beneficiary as substituted alien. Therefore, the director's June 3, 2005 decision must be withdrawn.

However, 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). 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).

During the adjudication of instant appeal, information has come to light that seriously compromises the credibility of the claims. On March 20, 2008, the AAO issued a notice of derogatory information (NDI) granting the petitioner 30 days to respond. The petitioner's timely response has been incorporated into the record.

As set forth in the AAO's March 20, 2008 NDI, the only issue 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 Act 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 original Form ETA 750 was accepted on January 5, 1999.

In response to the AAO's NDI, counsel submits a brief, a confirmation letter dated March 31, 2008 from [REDACTED], a personal history of the beneficiary issued by [REDACTED] on November 28, 2002, and a confirmation letter dated April 3, 2008 from [REDACTED] to rebut the finding by the U.S. Consulate in Seoul, Korea that the employer could not verify the beneficiary's employment. In response, counsel asserts that the beneficiary's former employer, [REDACTED] and her co-worker, [REDACTED]

Form ETA 750, and the petitioner failed to submit the requested copy. However, counsel asserts on appeal that the original copy of the labor certification has already been submitted to USCIS with an immigrant petition on behalf of the original beneficiary. Therefore, the AAO does not find that the record in the instant case provides any reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[REDACTED], verified the beneficiary's employment with that company from August 1, 1992 until March 30, 1996. In addition, [REDACTED] and [REDACTED] state that the person who received telephone calls from the U.S. Consulate is not in a position to verify the beneficiary's previous employment since she has been employed for eight years.

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. 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 Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of furniture upholsterer. In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Experience
 - Job Offered 2 years
 - Related Occupation Blank

The duties 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 her credentials on Form ETA-750B and signed her name on December 19, 2002 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 has been unemployed since March 1996. Prior to that, she worked as a full-time (working 40 hours per week) upholster at [REDACTED] in Seoul, Korea from August 1992 to March 1996. She did not provide any additional information concerning her employment background.

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 issue in the instant case is whether the petitioner has established the beneficiary's requisite two years of experience as an upholsterer prior to the priority date under the requirement set forth at 8 C.F.R. § 204.5(g)(1). The instant I-140 petition was submitted on June 15, 2003 with a notarized certificate of the beneficiary's personal history and its English translation as evidence of the

beneficiary's qualifying experience. This certificate of personal history was issued on November 28, 2002 by [REDACTED] person in charge at Dong Seung Office Chair located at # [REDACTED] South Korea. It states in pertinent part that:

Personnel Affairs: -- Names in Full: [REDACTED]

-- Resident Card No.: [REDACTED]

-- Address: [REDACTED]

Matters of Experiences: -- Working Hours: From August 1, 1992 to March 30, 1996
-- Grade and Position: Position of Good Production
-- Section of Works: Sewing Section

In response to the AAO's RFE, counsel asserts that the company is no longer in operation and that it closed in 2003. Operation of the Company has been taken over by Unix Co., Ltd. Counsel submits a certificate of business registration for Dong Seung Industrial Co. issued by Superintendent of Seo-Busan Tax Office in Korea on February 11, 2003 as evidence that the company was established in 1979. This certificate of business registration lists [REDACTED] as the president of the company. It shows that [REDACTED] was the representative of the beneficiary's former employer although the names and addresses of the company appear differently from the certificate of personal history for the beneficiary. In addition, it is also noted that the certificate of personal history was issued on behalf of the beneficiary's employer in 2002 while the company was still in operation.

The regulation at 8 C.F.R. § 204.5(g)(1) requires evidence relating to qualifying experience from former employer include a specific description of the duties performed by the alien. The certificate of personal history does not include a specific description of the duties performed by the beneficiary at Dong Seung Office Chair, nor does it indicate that the beneficiary worked for the company in an upholsterer position. It is not clear whether the beneficiary worked for the company named Dong Seung Office Chair or Dong Seung Industrial Co., Ltd. Therefore, the AAO cannot accept the certificate of personal history as primary evidence of the beneficiary's qualifying two years of experience in the job offered as required by the regulation.

In addition, the AAO also notes that the record of proceeding in the instant case contains inconsistent information about the beneficiary's employment with [REDACTED] from the certificate of personal history. As quoted above, the certificate of personal history verifies that the beneficiary worked for the company from August 1, 1992 to March 30, 1996 and lists an address at # [REDACTED] [REDACTED] as the beneficiary's address during the employment. However, on the Form G-325A Biographic Information signed by the beneficiary on December 30, 2002, the beneficiary indicated that she lived at [REDACTED] [REDACTED] Korea from January 1996 to June 2001. The record does not contain any

³ The record contains a copy of the beneficiary's passport with the same resident card number. The AAO identifies the employee for whom the certificate of personal history was issued as the beneficiary in the instant case.

solid objective evidence to establish the beneficiary's correct address during the period from January 1996 to March 1996. Nor does the record contain any explanation or evidence to explain how the beneficiary managed to work in Busan, the southern city in Korea while living in Daejun, a city in the middle of Korea. *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 unsolved inconsistencies in the record raises doubt on the reliability of the certificate of personal history and the beneficiary's alleged employment history with Dong Seung Office Chair. 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. See *Matter of Ho*, at 582, 591.

For the reasons above, the AAO concurs with the Consular investigation report that the petitioner failed to establish the beneficiary's qualifying experience with regulatory pre-scribed evidence. Therefore, the petition cannot be approved.

In response to the AAO's RFE, [REDACTED] provides a confirmation letter dated March 31, 2008. In this letter he verifies that the beneficiary worked full time at [REDACTED] for four years and was charged with making models and cutting patterns to change sofa cloth and sewing. However, he acknowledges that he cannot submit any documentary evidence to support his verification of the **beneficiary's employment**. **With material inconsistencies remaining unresolved and without independent objective evidence, attempts to explain or reconcile such inconsistencies will not suffice to establish the beneficiary's qualifications in this matter.** Like his certificate of personal history dated November 28, 2002, [REDACTED] did not include the beneficiary's position or title at [REDACTED]. In addition, it is not clear whether the beneficiary's duties described in [REDACTED] March 31, 2008 letter would be sufficient for the beneficiary to qualify for the beneficiary to perform the duties of the proffered position described at the Form ETA 750A, Item 13. **Furthermore, unlike the November 28, 2002 letter, [REDACTED]'s March 31, 2008 letter cannot be accepted as a letter from the beneficiary's former employer because the company the beneficiary claimed to have worked for was closed in 2003 and [REDACTED]'s March 31, 2008 letter is only a letter provided personally as a former supervisor of the beneficiary.** Without other objective independent evidence, a personal letter from the beneficiary's former supervisor cannot be considered as primary evidence to meet the requirements set forth at 8 C.F.R. §§ 204.5(g)(1) and 103.2(b)(3).

In response to the AAO's RFE, counsel also submits a letter dated March 31, 2008 from [REDACTED]. According to the letter, she answered the phone calls from the U.S. Consulate in Seoul, Korea. However, the record shows that she was not in a position to verify the beneficiary's employment because the beneficiary's claimed employment was before she started her employment with this company. Therefore, [REDACTED] March 31, 2008 letter cannot establish the beneficiary's qualifying experience.

The record also contains a confirmation letter dated April 3, 2008 from [REDACTED] (April 3, 2008 letter) as a coworker of the beneficiary. In her letter, [REDACTED] verifies that the

beneficiary worked for the company for four years with her in the same division. According to this letter [REDACTED] drew a pattern for cushions and pillows for sofas and chairs and the beneficiary cut it out, took pieces together, and sewed them. The description of the beneficiary's duties is different from the one provided by [REDACTED]. The record does not contain any objective evidence to resolve this inconsistency. Neither [REDACTED] nor [REDACTED] explain the sources of their descriptions. In addition, a letter from a coworker can only be considered as secondary evidence when the regulatory required experience letter from the beneficiary's former employer is not available. In this instant case, the petitioner submitted a letter from the former employer but the letter does not meet the requirements set forth at 8 C.F.R. §§ 204.5(g)(1) and 103.2(b)(3). Therefore, [REDACTED] April 3, 2008 letter cannot be considered to be sufficient to establish the beneficiary's qualifying experience.

Therefore, the petitioner did not establish with regulatory-prescribed evidence the beneficiary's prior at least two years of experience as an upholsterer, and further failed to establish that the beneficiary is qualified for the proffered position. Counsel's assertions on appeal and in response to the AAO's RFE cannot overcome the finding of the consular investigation.

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 director's June 3, 2005 decision is withdrawn. The appeal is dismissed and the petition is denied for the reason above.