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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

B6

FILE: LIN 06 130 52082 Office: NEBRASKA SERVICE CENTER Date: JUN 2 2 2009

IN RE: Petitioner: [redacted]
Beneficiary:

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

The petitioner is a publishing company. It seeks to employ the beneficiary permanently in the United States as machinist. As required by statute, an 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 experience 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 work experience meets the requirements of the approved labor certification.

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.

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.

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 ETA Form 9089 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 ETA 750 was accepted for processing on January 21, 2004.

Part 5 of the Immigrant Petition for Alien Worker (I-140), which was filed on March 30, 2006, indicates that the petitioner was established in1944 and employs 282 workers.

Item 14 and item 15 describe the education, training and experience that an applicant for the certified position must have. In this matter, item 14 requires only two years work experience in the job offered as a machinist or two years in a related occupation defined as a book binder.

On January 10, 2007, the director issued a request for evidence to the petitioner. The petitioner was instructed to submit evidence of its ability to pay the proffered wage and evidence that demonstrated that the beneficiary had acquired two years of experience in the job offered or two years of experience in a related occupation as of the priority date of January 21, 2004. The director advised the petitioner that "[e]vidence must be in the form of letter(s) from current or former employer(s) giving the name, address, and title of the employer and a description of the experience of the alien, including specific dates of employment and specific duties.

The petitioner responded with evidence of its ability to pay the proffered salary but failed to submit evidence of the beneficiary's employment experience consistent with the provisions of 8 C.F.R. § 204.5(l)(3) and the director's request for evidence.

The director denied the petition on May 21, 2007. The director determined:

> Form ETA-750 was accepted on January 21, 2004. In part 14 and 15 of that form the petitioner required that, at a minimum, a prospective employee would have two years experience as a machinist or a book binder. However that record contains no evidence verifying the beneficiary's experience. As the petitioner has not demonstrated that the beneficiary met the minimum requrements at the time the request for certification was filed, she cannot be found to be qualified.

On appeal, the petitioner, through counsel, asserts that the beneficiary has obtained the necessary experience. Counsel submits two employment verification letters. One letter, signed by [redacted], the human resources manager of Venus Laboratories, Incorporated, confirms the employment of "[redacted]" for that company.

The other letter provided by counsel is signed by the human resources manager of the petitioner, [redacted]. Ms. [redacted] affirms that [redacted] (ID [redacted] has worked as a handworker in the bindery from February 26, 2001 until January 9, 2003.

At the outset, it is noted that 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).

Additionally, the director specifically requested this evidence from the petitioner before the director denied the petition. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed on this basis.

Moreover, even if considering these letters, we do not find them to be probative of the beneficiary's experience. First, the letter from Venus Laboratories does not refer to the beneficiary but to an entirely different individual, [redacted][1] Second, the petitioner's letter affirming the

[1] Even if the beneficiary was the employee discussed in this letter, it would not be considered probative of her work experience. She failed to include this job in her employment history claimed on Part B of the ETA 750, which was signed by the beneficiary on September 24, 2003, under penalty of perjury. *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.)

beneficiary's employment as a handworker in the bindery department does not specify whether she was a book binder or a machinist or whether she worked full-time or part-time. The letter also does not document two full years as claimed but approximately 22 months and 14 days. Finally, the dates specified on the petitioner's employment letter do not correspond to the beneficiary's claims of employment as described on Part B of the ETA 750, signed by the beneficiary on September 24, 2003. On Part 15 of Part B of the ETA 750 the beneficiary claims that she started working for the petitioner on February 2, 2000 as a book binder and worked until April 2002. She also states that she has worked for the petitioner as a machinist from April 2002 until the present (date of signing). It is noted that 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The inconsistencies and omissions arising from the employment verification letters provided on appeal and the claims of employment stated on Part B of the ETA 750 do not credibly establish that the beneficiary has acquired two years of experience as machinist or two years experience as a machinist. This office concurs with the director's assessment that the petitioner has not established that the beneficiary possessed the requisite qualifying employment experience as of the priority date.

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.

ORDER: The appeal is dismissed.