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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:

EAC 05 255 51748

Office: VERMONT SERVICE CENTER

Date:

MAR 05 2009

IN RE:

Petitioner:

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:



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 director, Vermont Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a sales company.¹ It seeks to employ the beneficiary permanently in the United States as a sales manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary was qualified to perform the duties of the proffered position. The director noted in his decision that the petitioner had twice submitted to the record a Spanish language letter with translation from [REDACTED] Guatemala City, that did not provide sufficient details as to the beneficiary's work duties as a sales manager with the Guatemalan company. Thus, the director determined that the beneficiary did not have the two years of relevant work experience, as stipulated by the Form ETA 750. 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 has been discussed in these proceedings previously and 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 August 11, 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 U.S. Department of Labor 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 April 30, 2001.

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

¹ The petitioner identifies itself as a sales company on the I-140 petition. In a letter that accompanied the initial I-140 petition date February 11, 2005, the petitioner also stated it was a party rental company and its assets included but are not limited to renting supplies for parties.

Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

With the initial petition, the petitioner submitted a letter from [REDACTED] dated September 29, 2002. In this letter, [REDACTED] stated that the beneficiary worked for [REDACTED] from December 1989 to March 1992 as Sales Manager, with no further details as to the beneficiary's work duties. In response to the director's Request for Evidence (RFE) dated October 24, 2005, the petitioner resubmitted [REDACTED] letter.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide an additional letter of work experience with more details on the beneficiary's job duties as Sales Manager from the beneficiary's claimed former employer in Guatemala. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

On appeal, counsel submits a new undated letter from [REDACTED] that states the beneficiary worked for [REDACTED] de Guatemala from December 1989 to March 1992 as a Sales Manager. Mr. [REDACTED] then states, "In this position, [the beneficiary] directed staffing, training and performance evaluations to develop and control sales program; coordinated sales distributions by establishing sales territories, quotas, and goals and advises dealers, distributors, and clients concerning sales and advertising techniques; analyzed sales statistics to formulate policy and to assist dealers in promoting sales, reviewed market analyses to determine customer needs, volume potential, price schedules, and discount rates."

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 letter on appeal to be considered, it should have submitted the document 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.

The AAO will further examine the beneficiary's qualifications in this proceeding. To determine whether a beneficiary is eligible for an employment based immigrant visa, U.S. 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

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).

(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 Sales Manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	12
	High School	(blank)
	College	(blank)
	College Degree Required	(blank)
	Major Field of Study	(blank)

The applicant must also have 2 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.

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(1)(3):

(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 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 11, with regard to his academic credentials, the beneficiary represented that he attended elementary school at Colegio Nacional Americano, Guatemala from February 1981 to October 1984 and at Colegio Salizano Don Bosco from February 1985 to October 1991, with an additional eight months of high school at Colegio Hispano Americano, Guatemala from February 1992 to October 1992. In total the beneficiary

completed ten years of both elementary and high school level instruction.³

On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked for the petitioner from January 2001 until the date he signed the Form ETA 750, Part B on April 25, 2001. He also represented that he worked for [REDACTED] Gaithersburg, Maryland, as a sales manager from October 1996 to April 2000.⁴ The beneficiary did not indicate any prior work experience as a Sales Manager with [REDACTED] on the Form ETA 750, Part B.

Thus, the Form ETA 750, Part B, which does not indicate the beneficiary was employed as a Sales Manager in Guatemala, conflicts with the experience letter submitted. *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 letters from [REDACTED] that were intended to corroborate the beneficiary's previous experience as a Sales Manager, are from an employer not identified on the Form ETA 750, with no further explanation provided by the petitioner for the submission of this evidence. *See Matter of Leung*, 16 I&N 12 (BIA 1976). This decision was decided on other grounds, but the court deemed the applicant's testimony concerning employment omitted from the labor certification to be not credible. The AAO further notes that the dates of previous employment as a Sales Manager indicated in Mr. [REDACTED]'s letters⁵ overlap with the beneficiary's last three years of elementary and high school in Guatemala. Therefore, even if the beneficiary was employed with [REDACTED], it is not clear that this employment would be full-time and satisfy the two-year experience requirement.

Additionally, all of the letters that the petitioner submitted from [REDACTED] failed to indicate the entity's business activity, and size of the organization in order to determine whether the business would actually have needed a Sales Manager to carry out the duties that [REDACTED] identified in the letter submitted on appeal.

The AAO thus affirms the director's decision that the petitioner failed to establish that the beneficiary had the required two years of experience necessary to meet the terms of the certified labor certification.

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.

³ The AAO notes that the ETA Form 750, Part A requires twelve years of grade school, not the ten years of elementary and high school indicated by the beneficiary on Part B.

⁴ The petitioner did not submit any documentation to evidence the beneficiary's employment with this entity.

⁵ December 1989 to March 1992.

ORDER: The appeal is dismissed.