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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**

B6

FILE:

[REDACTED]
SRC 07 151 51022

Office: TEXAS SERVICE CENTER

Date:

APR 07 2010

IN RE:

Petitioner:

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).

Perry Rhew
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 appeal will be dismissed.

The petitioner is a metal fabrication company. It seeks to employ the beneficiary permanently in the United States as a welder. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. 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 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 December 15, 2007 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. The director determined that the beneficiary had less than two years of qualifying experience as required on the Form ETA 750.

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 labor certification application, 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 labor certification application 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 Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, counsel submits a brief stating that the petitioner has established the beneficiary's qualifications to perform the duties of the proffered position. In support of that assertion, counsel submits the following: a corrected translation of a statement of

¹ 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 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).

experience from a prior employer [REDACTED] stating that the applicant worked as a welder for that organization from June 19, 1989 until March 11, 1991; a copy of a Final Determination letter from the United States Department of Labor; and a copy of the Form ETA 750 (Application For Alien Employment Certification). Other relevant evidence in the record includes a copy of a training certificate indicating that the applicant participated in "The Training Of Philosophy and Metalic of TQC" in August of 1989 (the record does not contain a description of the training received, hours of training or any other information from the organization/person who performed the training). The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the director did not consider all of the evidence when determining that the beneficiary lacked the required experience which would qualify him to perform the duties of the proffered position. Counsel states that in addition to the employment experience letter from [REDACTED] the petitioner submitted, in response to an October 23, 2007 Request For Evidence (RFE), a letter from the beneficiary's prior employer stating that the beneficiary began employment on March 21, 1989 as a probationary employee, and that the beneficiary worked in that capacity until June 18, 1989. Counsel further states that the beneficiary's former employer submitted a letter (in response to the RFE) stating that the beneficiary completed welding training in August of 1989 that lasted 21 days. The record does not contain a letter from the beneficiary's former employer attesting to his probationary employment, nor does the response of the petitioner to the RFE indicate that any such letter is included with the response. The only evidence in the record about the applicant's training is a copy of a certificate indicating that the applicant received training in August of 1989. As previously stated, the training is not described in detail, nor does the record establish the duration of the training or whether the training took place outside the beneficiary's normal working hours. It is noted that the record of proceeding contains two English translations of the employment letter supplied by [REDACTED] which is written in Portuguese. One English translation is dated January 18, 2008, and states that the beneficiary was employed from June 19, 1989 until March 11, 1991. A previously submitted English translation states that the beneficiary was employed from May 19, 1989 until March 11, 1991.²

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States 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

² It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. Doubt cast on any aspect of the petitioner's proof may 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, 591-92 (BIA 1988).

(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). According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. The beneficiary indicates that he was employed by [REDACTED] as a welder from November of 1997 until March of 2000. He does not provide any additional information concerning his employment background on that form.

The record of proceeding also contains a Form G-325 Biographic Information sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. That document was signed by the beneficiary on April 2, 2007 under penalty of law for knowingly and willfully falsifying or concealing a material fact. The applicant states that he has been employed by the petitioner since 1997. The beneficiary does not list his last occupation abroad although the information is requested on the Form G-325.

The regulation at 8 C.F.R. § 204.5(1)(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 AAO affirms the director's decision that a preponderance of the evidence does not demonstrate that the beneficiary acquired two years of qualifying experience as of the priority date of the applicable labor certification. The record contains a statement from a prior employer in Brazil [REDACTED] which indicates that the applicant was employed by it as a welder from June 19, 1989 until March 11, 1991, less than two years. That employment is not listed on the ETA Form 750. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976)(where the BIA notes that if the beneficiary's claimed qualifying experience is not listed by the beneficiary and certified by the DOL on the labor certification application, this undermines the credibility of the assertion that the beneficiary has such experience.) The only other evidence submitted by the applicant in support

of his qualifying experience is a copy of a training certificate earned by him in August of 1989. The approved Form ETA 750 does not require training for the performance of the proffered position, but requires two years of experience. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of 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.