

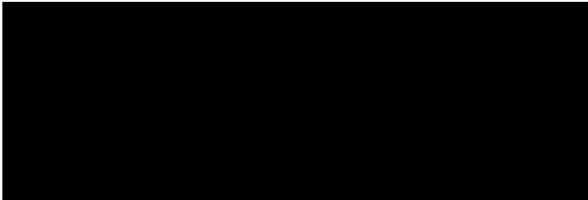


U.S. Citizenship
and Immigration
Services

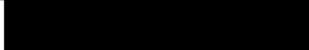
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FILE:



Office: TEXAS SERVICE CENTER

Date:

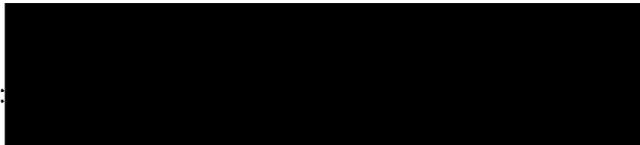
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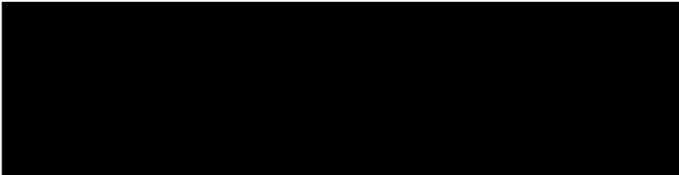
Petitioner:

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, 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 painting company. It seeks to employ the beneficiary permanently in the United States as a painter/rag painter. As required by statute, the petition is accompanied by Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not demonstrated that the beneficiary had the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the instant petition. The director denied the petition accordingly.

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.

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.

In evaluating the beneficiary's qualifications, U.S. citizenship and Immigration Services (USCIS) must look to the job offer portion of the alien 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on the Form ETA 750 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).

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.

In the instant case, the Form ETA 750 states that the position requires six years of grade school, two years of high school and two years of experience in the job offered. On the Form ETA 750B the beneficiary listed his education as follows:

School	Field of Study	Dated Attended
	Primary	02/1960 – 12/1965
	Secondary	02/1977 – 12/1981

In addition, the beneficiary indicated that he had been employed as a rag painter by [REDACTED] from February 1997 to January 2000.

As noted by the director, no evidence was submitted with the petition to establish that the beneficiary had obtained the required six years of grade school and two years of high school. On appeal, counsel has submitted a certificate, with English translation, indicating that the beneficiary possessed the knowledge required by the Supplementary Primary Official Course, according to a test administered by the Division of Supplementary Primary Education. With respect to the beneficiary's secondary education, counsel states that the beneficiary attended a **night program** at [REDACTED] from which he graduated in 1981. Counsel states that the beneficiary's completion of the program represents a comparable level of education to completion of high school in the United States. However, counsel further states that the beneficiary did not receive any record of his successful completion of the program at [REDACTED]. Counsel further states that [REDACTED] has closed and that the beneficiary is unable to obtain records of his attendance and graduation from the school.

In addition, counsel has submitted an affidavit from [REDACTED] a former school teacher from Brazil. [REDACTED] states that she is familiar with the educational system of Brazil. She explains in the affidavit that the beneficiary's education from [REDACTED] was equivalent to completing the fifth grade in the United States. [REDACTED] further states that the beneficiary's education at [REDACTED] was equivalent to completing the 12th grade in the United States. Finally, [REDACTED] states that graduates of [REDACTED] did not receive certificates or diplomas evidencing their completion of the program. In addition, counsel has submitted a declaration from [REDACTED] in which the declarant states that [REDACTED] has closed and he was unable to locate it at a different address.

The regulation at 8 C.F.R. § 103.2(b)(2) states:

(i) General. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

The petitioner has not submitted sufficient documentation to establish that documents from [REDACTED] do not exist or cannot be obtained. Nor has the petitioner submitted two or more affidavits to demonstrate the unavailability of documentation from [REDACTED] or relevant secondary evidence. Therefore, the petitioner has failed to demonstrate that the beneficiary had the education required by the Form ETA 750.

With respect to the beneficiary's experience, the petitioner initially submitted a letter from the beneficiary's previous employer which stated that the beneficiary worked for [REDACTED] as a painter from February 1998 to December 1999. As noted by the director, this letter shows that the beneficiary possessed only twenty two months of experience as a painter, rather than the two years of experience required by the Form ETA 750. Further, the dates of employment listed in the letter conflict with the dates of employment listed by the beneficiary on the Form ETA 750B.

On appeal, counsel states that the beneficiary worked for [REDACTED] for more than two years and that the purpose of the letter submitted with the I-140 petition "was not to state the total time the Beneficiary worked for [REDACTED] but merely to state what amounts to a subset of that total time to clarify union dues issues and IRS contributions for a specific period in which the beneficiary worked for [REDACTED]." In addition, counsel submitted a letter from [REDACTED] of [REDACTED] which states that the beneficiary worked for [REDACTED] as a painter from February 1997 to January 2000. Counsel also submitted a second letter from [REDACTED] which states that the previously submitted letter which listed the beneficiary's dates of employment as February 1998 to December 1999 "was expedited to clarify union dues and to prove contribution to the IRS." It is unclear why inaccurate dates of employment would be needed for purposes relating to union dues or IRS contributions. Further, 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). No such evidence has been provided to resolve the inconsistencies in the two employment letters. Therefore, the evidence does not establish that the beneficiary had two years of experience as required by the Form ETA 750B.

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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.