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U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship  
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Services

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MAR 08 2010

FILE:

SRC 08 157 50427

Office: TEXAS SERVICE CENTER

Date:

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision. The director concluded that the appeal was untimely filed, and treated the appeal as a motion. The director dismissed the motion and affirmed the initial denial of the petition. The matter is now before the Administrative Appeals Office (AAO). The AAO will withdraw the director's decision on the untimely appeal and motion, and will adjudicate the appeal on the merits. The appeal will be dismissed.

The petitioner claims to be a marine consultant business. It seeks to permanently employ the beneficiary in the United States as a marine technical representative. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).<sup>1</sup> The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).

The director denied the petition on February 19, 2009. The decision states that the petitioner did not establish that the beneficiary possessed the required experience for the offered position as of the priority date.

The petitioner appealed the decision. The record of proceeding contains a Form I-290B, Notice of Appeal or Motion, with a receipt date stamp of March 25, 2009. March 25, 2009 is 34 days after the February 19, 2009 date of the denial.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. See 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the date of actual receipt. See 8 C.F.R. § 103.2(a)(7)(i). Nevertheless, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. § 103.5(a)(2) or a motion to reconsider as described in 8 C.F.R. § 103.5(a)(3), the appeal must be treated as a motion, and a decision must be made on the merits of the case.

Based on the date stamp on the Form I-290B, the director concluded that the appeal was filed late, and, without forwarding the appeal to the AAO, treated the appeal as a motion. On September 17, 2009, the director affirmed the February 19, 2009 denial of the petition and dismissed the motion. The matter is now before the AAO.

As a threshold matter, the AAO concludes that the director's consideration of the appeal as a motion without first forwarding the matter to AAO was contrary to the regulations and shall be withdrawn.

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<sup>1</sup>Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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.

After the entry of the decision denying the petition and the subsequent filing of an appeal, the regulations permitted the director to treat the appeal as a motion only if "favorable action" was warranted. 8 C.F.R. § 103.3(a)(2)(iii). If the acting director was not inclined to take favorable action, the regulations state that the acting director "shall promptly forward the appeal and related record of proceeding to the [AAO]." 8 C.F.R. § 103.3(a)(2)(iv). The director is obligated to forward all such appeals to the AAO, including those that the director believes may have been untimely filed. The requirement at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) that untimely appeals meeting the requirements of motions must be treated as motions only applies after the appeal has been forwarded to the AAO and rejected by this office as untimely pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1). Therefore, since favorable action was not taken, the director lacked the authority to consider the untimely appeal as a motion, and the decision affirming the prior denial shall be withdrawn.

In addition, the evidence in the record of proceeding is sufficient to establish that the appeal was timely filed. The record contains correspondence from counsel dated September 30, 2009. Counsel claims in the correspondence that the appeal was timely filed. In support of this claim, counsel attached to the correspondence a copy of a U.S. Postal Service Express Mail mailing label and a printout of a tracking statement for the package to which the label was affixed. The mailing label is addressed to the U.S. Citizenship and Immigration Services (USCIS) Texas Service Center, and the tracking statement indicates that the package was delivered at 11:02AM on March 24, 2009. Counsel represents that the label and tracking statement relate to the instant appeal. This evidence is sufficient to establish that the appeal was received on March 24, 2009, the final day to timely file the appeal.

The appeal is therefore properly filed, timely, and makes a specific allegation of error in law or fact. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b); *see also Janka v. U.S. Dept. of Transp.*, 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.<sup>2</sup>

As set forth in the director's denial, at issue on appeal is whether the beneficiary possessed the required experience for the offered position.

In order to obtain classification in the requested employment-based preference category, the petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 204.5(l)(3)(ii)(B); 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. at 159; *see also Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). In the instant case, the priority date is August 28, 2007,

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<sup>2</sup>The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). In evaluating the requirements for the offered position, USCIS must look to the job offer portion of the labor certification. 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. Iwine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coorney*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

The minimum education, training, experience and skills required to perform the offered position are set forth at Part H of ETA Form 9089. In the instant case, the labor certification states that the position requires "60 months experience as an officer on a tank vessel and 12 months as a senior officer on a tank vessel."

On the labor certification, signed by the petitioner and beneficiary under penalty of perjury, the beneficiary's experience is set forth at Part K as follows:

Job 1

Start date: January 15, 2007  
End Date: Not applicable

Job 2

Start date: September 20, 2006  
End Date: January 12, 2007

Job 3

Start date: December 1, 2003  
End Date: September 14, 2006

The record also contains several certificates of service as evidence of the beneficiary's experience as an officer and senior officer. These documents cover the beneficiary's employment from 1988 through 2003. It is noted that none of the beneficiary's claimed experience as an officer and senior officer on a tank vessel is set forth at Part K of the labor certification, despite the instructions on ETA Form 9089 to list all jobs the alien has held during the past three years as well as "any other experience that qualifies the alien for the job opportunity for which the employer is seeking certification."

In denying the petition, the director states that "[b]ecause this experience was not listed on the ETA-9089, this experience cannot be used to establish that the beneficiary meets the experience requirements of the [labor certification]." In support of this statement, the director cites *Matter of Leung*, 16 I&N Dec. 12 (Reg. Comm. 1976), as standing for the proposition that "new employment not listed when the labor certification was certified or when the visa petition was filed is not credible for the issuance of an immigrant visa classification."

On appeal, counsel claims that the facts of *Matter of Leung* are distinguishable from the instant case, and that its holding does not prohibit the consideration of employment experience that is not listed on the labor certification. Counsel also states that the DOL is responsible for determining whether there are sufficient U.S. workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of similarly employed U.S. workers, while USCIS is responsible for determining whether or not the alien is qualified for a specific immigrant classification or the job offered. Therefore, counsel argues that failing to document the beneficiary's qualifications for the DOL on the labor certification should not be fatal to its attempt to establish that the beneficiary qualifies for the offered position, because it is USCIS, and not the DOL, that is responsible for determining whether the beneficiary qualifies for the offered position.<sup>3</sup>

*Matter of Leung* is a decision designated as precedent. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all USCIS employees in the administration of the Act. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

In *Matter of Leung*, the District Director concluded that the beneficiary's claim of prior employment experience was not credible. In reaching this decision, the District Director considered the entire record of proceeding, and one relevant factor mentioned was the fact that the beneficiary claimed to have employment experience that was not listed on the labor certification. Therefore, failing to list employment experience on the labor certification is a relevant factor when assessing whether or not the beneficiary did, in fact, possess the claimed experience.

Further, any experience requirements for skilled workers must be supported by letters from employers giving the name, address, and title of the employer, and a description of the experience of the alien. 8 C.F.R. § 204.5(l)(3)(ii)(B). Evidence relating to qualifying experience shall be in the form of letters from current or former employers and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien. 8 C.F.R. § 204.5(g).

The submitted evidence of the beneficiary's experience is in the form of certificates of watch-

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<sup>3</sup> Counsel also references *Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987 (7<sup>th</sup> Cir., 2007), for the premise that DOL determines the requirements of the proffered position. *Hoosier Care* stands for the limited interpretation of what constitutes "relevant" post-secondary education under the skilled worker regulation and has no applicability to the facts of the current case.

keeping service or certifications of service. These certificates state the beneficiary's dates of service, the ship on which the beneficiary served, and the beneficiary's title. These certificates are not letters from the employer, they do not give the address and title of the employer, they do not provide a specific description of the duties performed by the beneficiary, and they do not state whether the beneficiary served on tank vessels. Although some of the certificates state that the beneficiary "was an officer in full charge of watch for eight hours out of every twenty-four hours at sea," this is not sufficiently detailed to meet the requirements of 8 C.F.R. § 204.5(g) or (l)(3)(ii)(B).

Finally, even if the evidence were sufficient under the regulations, the petitioner fails to offer any credible explanation for its "inadvertent" omission of this additional work experience from the ETA Form 9089 when the instructions to Park K clearly require the listing of all experience which qualifies the beneficiary for the job offered. It is incumbent upon the petitioner 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In summary, the record does not contain sufficient evidence to establish that the beneficiary possessed the required experience for the offered position. The labor certification does not list any of the beneficiary's qualifying experience. Further, the evidence of the beneficiary's qualifying experience does not meet the requirements of 8 C.F.R. § 204.5(g) and (l)(3)(ii)(B).

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.