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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington DC 20529-2090



U.S. Citizenship
and Immigration
Services

B6

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER Date:

FEB 28 2011

IN RE:

Petitioner:

[REDACTED]

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

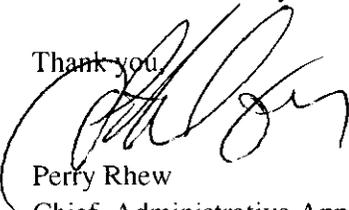
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The employment based visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed the appeal. The matter is now before the AAO on a motion to reopen. The petitioner's motion will be granted and the petition will remain denied.

The petitioner is an interior construction (drywall) contractor. It seeks to employ the beneficiary permanently in the United States as a drywall installer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition.¹ The director determined that the petitioner had failed to demonstrate that the beneficiary possessed the requisite qualifications as specified on Item 14 of the ETA 750 as of the visa priority date. The director denied the petition on August 5, 2008.

The AAO dismissed the petitioner's appeal on July 28, 2010.

On August 30, 2010, the petitioner filed a motion to reopen the AAO's decision.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The record shows that the motion was 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.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). In this case, as the petitioner submitted new evidence relating to the beneficiary's training, the AAO will consider its filing as a motion to reopen.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3) provides in pertinent part:

(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

¹ A duplicate ETA 750 was provided to the director from DOL upon the petitioner's request to USCIS to obtain the duplicate.

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.

The petitioner must demonstrate that a beneficiary has the necessary education, training and experience specified on the labor certification as of the priority date. The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment 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 Form ETA 750 was accepted for processing on November 5, 2002, which establishes the priority date.²

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must have. In this matter, item 14 states that the alien must have a minimum of six months of "on site" training. Additionally, the alien must have six months of work experience as a drywall installer as of the priority date or nine years of experience in a related occupation. The "related occupation" is not specified. Counsel states that the firm that prepared the labor certification "incorrectly completed the form" and that the petitioner had intended training plus experience of one year combined, rather than six months of training plus six months of experience. In this case, however, 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 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the AAO's July 28, 2010, decision dismissing the appeal, it was explained that the evidence submitted in support of the beneficiary's six months of on-site training and six months of work experience were not sufficient. The AAO stated:

Counsel submits two employment verification letters. One letter, signed by the petitioner's human resources representative, [REDACTED] is dated September 25, 2008, and confirms that the beneficiary "obtained in excess of 3 months training as a drywall installer when he first began employment on January 5, 2000."

The other letter provided by counsel is signed by [REDACTED], an estimator at [REDACTED]. He states that the beneficiary worked

² If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

for [REDACTED] "in November 1997 Until July of 1998." [REDACTED] does not identify himself as a trainer or direct employer of the beneficiary and fails to identify the beneficiary's job or duties with [REDACTED]. Counsel asserts on appeal that this letter together with an online description of [REDACTED] as a drywall/insulating contractor is enough to credit the beneficiary with nine [years] of work experience in a related occupation. We do not concur. As stated above, the beneficiary's job with [REDACTED] was not described in any way by [REDACTED]. Undocumented assertions by counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).³

* * *

. . . It may not be concluded that these letters represent the required training and experience set forth on the labor certification approved by DOL. [REDACTED] letter failed to confirm that the beneficiary had onsite training equaling at least six months as a drywall installer, rather than "in excess of 3 months." Further, as noted above, [REDACTED] letter failed to identify any job that the beneficiary performed for [REDACTED]. The letters fail to establish that the beneficiary had six months of onsite training plus six months of work experience in the position offered or nine years of work experience in a related occupation. . . .

It is noted that the requirements of training and experience are distinct and separate. On motion, the petitioner through counsel, submits another letter from [REDACTED]. She states that the beneficiary acquired six months of training as a drywall installer when he commenced employment with the petitioner on January 5, 2000.⁴ However, the AAO additionally notes that an employer cannot include as a requirement for the job offer any training or experience that the beneficiary gained working for the employer.⁵ Further, the petitioner submitted no additional evidence of the beneficiary's previous work experience from [REDACTED] that would cure the deficiencies of letter from [REDACTED] as discussed above. As noted above, [REDACTED] failed to identify himself as a trainer or direct employer of the beneficiary and failed to identify the beneficiary's position held with [REDACTED]. Further, he failed to confirm whether the job was part-time

³ It is additionally noted that the beneficiary failed to claim the [REDACTED] employment on Part B of the ETA 750 B. *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.)

⁴The beneficiary states on the Form ETA 750 that he began employment with the petitioner in February 1999. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

⁵ *See e.g. Matter of Loews Anatole Hotel*, 89-INA-230 (Bd. Alien Lab. Cert. App. June 12, 1990); 20 C.F.R. § 656.21(b)(5) (2003).

or full-time, and as noted herein, this experience was not listed by the beneficiary on the certified labor certification.

The petitioner has failed to establish that the beneficiary possessed the required experience as set forth in the terms of the 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.

ORDER: The motion to reopen is granted. The prior decision of the AAO, dated July 28, 2010, is affirmed. The petition remains denied.