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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

Date: **OCT 27 2011**

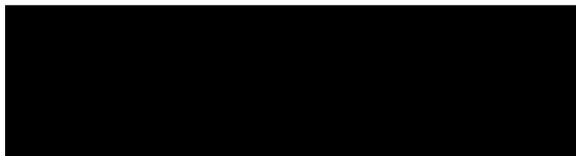
Office: NEBRASKA SERVICE CENTER

FILE: 

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:

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,
Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a food processing business. It seeks to employ the beneficiary permanently in the United States as a director of logistics. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the beneficiary did not possess the required experience for the offered position as set forth in the Form ETA 750. 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.

As set forth in the director's August 20, 2008 denial, the issue in this case is whether the beneficiary possessed the required experience for the offered position as set forth in 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 (Acting Reg'l Comm'r 1977). Here, the labor certification application was accepted on August 3, 2004.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, counsel submitted a brief in support of appeal. Other relevant evidence in the record includes an employment experience letter from [REDACTED] dated July 2, 2004 and a letter from [REDACTED] dated March 31, 2008. The record does not contain any other evidence relevant to the beneficiary's qualifications.

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

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

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. at 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).

The required education, training, experience and special requirements for the offered position are set forth at Part A, Items 14 and 15, of Form ETA 750. In the instant case, the labor certification states that the position has the following minimum requirements:

Block 14:

Education: 8 years of Grade School, 4 years of High School

Training: 1 year of training
Type of Training: Scheduling

Experience: 3 years in the job offered.

Block 15: Nothing Listed

On the Form ETA 750B, signed by the beneficiary, the beneficiary represents that she has the following education.

Name of School	Field of Study	From	To	Degree
[REDACTED]	General	06/1972	09/1976	Primary Certificate

The beneficiary states that she attended [REDACTED] primary school in [REDACTED] from June, 1972 to September, 1976. According to the Form ETA 750B, the beneficiary was born on April 28, 1966. This means that she attended this institution from when she was six until she was ten. No other education is listed on the Form ETA 750B, nor is there any other evidence in the record to indicate that the beneficiary graduated from high school. Therefore, the AAO finds that the beneficiary lacks the requisite education for this position required in the Form ETA 750B.

The AAO further upholds the director's decision that the beneficiary also lacks the requisite training and experience for this position.² The regulation at 8 C.F.R. § 204.5(1)(3) provides:

² The petitioner must establish that the beneficiary had the required experience by the time of the priority date. 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. *See Matter of Wing's*

(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.

(C) *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

(D) *Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

With the Form ETA 750B, the beneficiary submitted the employment letter from the [REDACTED] [REDACTED] as evidence of the beneficiary's work experience.

In a request for evidence (RFE) dated February 25, 2008, the director requested that the petitioner "submit documentary evidence to establish that the beneficiary has the one year of training in scheduling also required by the job offer." The director also stated that "as evidence that the beneficiary has the three years of experience as Director of Logistics required by the job offer, you submitted a copy of a letter from a former employer. Please also submit a certified English translation of this foreign language document."

In response to the RFE, the petitioner submitted the letter from [REDACTED] [REDACTED] is the same person that signed the initial employment letter from [REDACTED] [REDACTED]. This letter was received on April 7, 2008, and was incorporated into the record.

The director denied the petition because, as “the petitioner has not demonstrated that the beneficiary met the minimum requirements at the time the request for certification was filed, she cannot be found to be qualified.” In support of the denial, the director found that the two letters contradicted each other. He stated that the experience described in both letters was not the same. He also stated that the first letter did not include any mention of the training period as described in the second letter. Therefore, he decided that, “the evidence submitted cannot be found to establish that the beneficiary has the required experience.”

Upon review of the record, the AAO finds that both letters submitted in July, 2004 and in April, 2008 are insufficient evidence to show that the beneficiary had the claimed qualifying experience. The letter dated July, 2004 does not contain the title of [REDACTED] in accordance with the regulation cited above at 8 C.F.R. § 204.5(l)(3), nor does it indicate the number of hours worked in a week. Further, this letter contradicts the Form ETA 750B. On Question 15 of the Form ETA 750B, signed by the beneficiary on October 3, 2005, the beneficiary stated that she worked for the [REDACTED] from October, 1999 to November, 2000. The letter from July, 2004 claims that the beneficiary worked at the [REDACTED] from January 10, 1997 to November 15, 2000. The second letter submitted in 2008 states that the beneficiary also worked for the company for an earlier period from December 4, 1995 until January 9, 1997 as the assistant to the Director of Logistics.³ Therefore, all three documents give three different start dates. The first letter also does not state that the beneficiary had a year of training as required by the Form ETA 750. However, the second letter does, which is also contradictory.

Further, the employment experience described in this letter is inconsistent with the Form ETA 750B. In the letter, [REDACTED] stated that the beneficiary was “working in various capacities in the production of tortilla [sic] and she has the knowledge of operating our machines.” The second letter stated that she “coordinated the incoming and outgoing shipments of processed food products to various states in the country; communicating likewise with sellers and shippers. In this letter there was no mention of working in the production of tortillas or using machines. The second letter attempted to reconcile the inconsistency of the work experience by expanding on the job functions of the beneficiary. It is closer to the work experience described in the Form ETA 750B, which under question 15(b), under the description for her work experience, states that the beneficiary “handled all inbound and outgoing traffic of goods and scheduled shipments.” However, the first letter and the ETA 750B have different job descriptions entirely.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa

³ This position seems as though it is for the same company. The AAO questions why this was not mentioned on the initial letter in 2004, and why the start date of this position would not be counted in the overall start date that the beneficiary worked for this company.

petition... 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 petitioner's failure to provide reliable figures concerning the beneficiary's employment history undermines its credibility with respect to the beneficiary's experience and the AAO's ability to correctly determine whether the beneficiary had the necessary experience required in the ETA 750. The dates listed in the work experience letter conflict with other evidence in the record and cast doubt on the veracity of the claimed experience.

Further, the second letter will not be given much weight or consideration. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. The AAO notes that this letter first appeared in 2008, after the DOL approved the labor certification and after the USCIS issued a request for evidence. Further, this letter is not objective independent evidence such as might reconcile the differences between the initial letter and the Form ETA 750B. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

On appeal, the petitioner argues that the director erred in his decision by arguing that the letter submitted in the original packet was a certified English translation. However, this translation did not comply with the terms of 8 C.F.R. § 103.2(b)(3):

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

In this case, the translation submitted by [REDACTED] did not state that he was competent to translate from Spanish into English. Therefore, the director was correct in stating that the petitioner did not submit a certified English translation.

The petitioner also argues that the two letters do not contradict each other, but rather the second letter simply expands on the duties of the first letter. While the petitioner tries to connect the dots and explain how the first and second letters are consistent in explaining the beneficiary's job functions, he fails to explain the inconsistency regarding the three different start dates of the beneficiary at the Tortilleria. Therefore, the letters still contradict each other and the Form ETA 750B and thus, along with the failure of the petitioner to submit letters in compliance with 8 C.F.R. § 204.5(l)(3), do not show that the beneficiary has the required experience in the job offer.

The record does not establish that the beneficiary meets the minimum requirements of the offered position as set forth in 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 appeal is dismissed.