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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

Date:

APR 09 2012

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,

Kevin S. Poulos for

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 home remodeling business. It seeks to employ the beneficiary permanently in the United States as an accountant. 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 met the minimum requirements for the position as set forth on DOL Form ETA 750. 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 April 7, 2009 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 as of the priority date, the beneficiary did not possess 16 years of training in the field of accounting, as required by the labor certification.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 December 20, 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 submits a brief in support of the appeal, a letter dated March 6, 2009 from the petitioner, and copies of items that were previously submitted. The record also includes several letters regarding the beneficiary's experience and one letter that mentions training received by the beneficiary.

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).

On appeal, counsel asserts that experience or training not listed on Form ETA 750 Part B should be considered as long as it is supported by reliable evidence. Counsel also states that the submitted letters documenting the beneficiary's work experience should be considered as alternative evidence of her training.

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.

(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.

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 (Comm'r 1986). *See also, Madany 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 6 years of grade school education, 4 years of high school education, 4 years of

college education, a B.S.C. Commerce in the field of accounting, 16 years of training in the job offered, and be able to speak English and perform duties.²

Counsel's assertion that the letters that detail the beneficiary's work experience should be considered as alternative evidence of her training is not persuasive. The petitioner set forth the minimum training and experience requirements for the position on Form ETA 750, Part A, Section 14. The petitioner stated that no experience was required and that 16 years of training in branch accounting was required. The instructions for Form ETA 750 state the following in regards to item 14: "Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U. S. workers." <http://www.foreignlaborcert.doleta.gov/750inst.cfm> (accessed February 24, 2012). The beneficiary's work experience cannot be considered as alternative evidence of her training; the two requirements are separate and distinct.

The beneficiary set forth her credentials on the labor certification and signed her name on November 18, 2004 under a declaration that the contents of the form are true and correct under the penalty of perjury. The instructions on Form ETA 750, Part B, Statement of Qualifications of the Alien, direct the beneficiary at Item 14 to "List Documents Attached Which are Submitted as Evidence that Alien Possesses the Education, Training, Experience and Abilities Represented." The response given is, "See Attached Documents." However, the record did not contain any evidence of training received by the beneficiary.

Form ETA 750, Part B, Item 15, instructs the beneficiary to "List all jobs held during the last three (3) years. Also, list any other jobs related to the occupation for which the alien is seeking certification as indicated in item 9." The beneficiary's work experience is represented as follows:

<u>Dates, Position and Evidence</u>	<u>Employer</u>
•October 2004 – Present Accountant	[REDACTED]
Evidence: July 17, 2007 letter from	[REDACTED]
•June 2001 – October 2004 Accountant	[REDACTED]
Evidence: July 25, 2007 affidavit from former co-worker	[REDACTED]
•October 1996 – January 2001	[REDACTED]

² The beneficiary was awarded a Bachelor of Science in Business Administration with a major in accounting by the [REDACTED] on January 6, 1988.

Branch Operation Officer

Evidence: June 13, 2007 affidavit from [redacted] stating that she supervised the beneficiary from August 1992 – January 2001.

The record also includes the following documents submitted with the initial filing that reference the following employment held by the beneficiary:

Dates, Position and Evidence

Employer

•July 1995 – September 1996
Support Staff

November 1992 – June 1995
Junior Teller

August 1992 – October 1992
Loan Processor

[redacted]

Evidence for all three of the [redacted] positions: June 13, 2007 affidavit from [redacted] stating that she supervised the beneficiary from August 1992 – January 2001.

•September 1990 – July 1992
Billing Clerk

[redacted]

Evidence: June 5, 2007 affidavit from [redacted] it is unclear from the affidavit how the affiant came to know of this employment.

•February 1988 – July 1990
Accounting clerk and accountant

[redacted]

Evidence: May 18, 2007 letter from [redacted] President/General Manager.

•April 1985 – October 1988
Accounting clerk (during 3rd & 4th years of college) [graduated January of 1988]

[redacted]

June 1983 – March 1985
Assistant Bookkeeper (during 1st & 2nd years of college)

[redacted]

Evidence for both of the [redacted] positions: July 13, 2007 affidavit from beneficiary's sister, [redacted]

The affidavits and letters listed above do not make any reference to training received by the beneficiary in branch accounting. However, in response to the director's January 29, 2009 Request for Evidence, the petitioner submitted a March 6, 2009 letter from the beneficiary's sister, [redacted] In

this new letter, [REDACTED] confirms the beneficiary's periods of employment and positions set forth in her previous affidavit. Additionally she states, "In preparation of her on going employment, I trained her in the following: 1. Accounts receivable and payable; 2. Assisted in recording, storing and analyzing accounting information; 3. Calculate, prepare, and issue bills, invoices, account statements, and other financial statements; 4. Checked figures and posting; 5. Compiled statistical, financial accounting and auditing reports and tables pertaining to cash receipts, profits and losses."

There is no explanation as to why this training received by the beneficiary was not mentioned in [REDACTED] 2007 affidavit.³ 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 petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Furthermore, according to [REDACTED] and the beneficiary's transcripts, the beneficiary was attending college during the period of time that she was employed by [REDACTED] thus, it is unclear how much time between June 1983 and October 1988 that the beneficiary spent training, working and/or attending school. Even if we assume that [REDACTED] trained the beneficiary full-time during her entire period of employment with [REDACTED] such training would have been for a maximum period of five years and three months, well short of the required 16 years of training in branch accounting.

The AAO affirms the director's decision that the preponderance of the evidence submitted into this record of proceeding does not demonstrate that prior to the priority date, the beneficiary had acquired 16 years of training in branch accounting. 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.

³ A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).