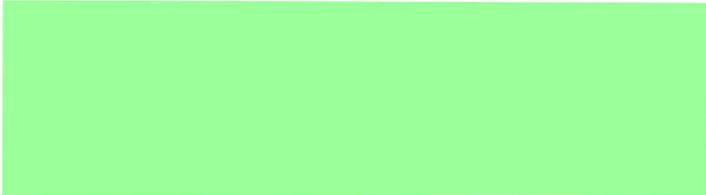


(b)(6)

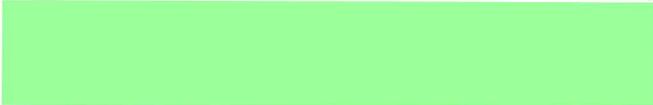
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Service  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



Date: **APR 23 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:

SELF-REPRESENTED

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 preference visa petition was initially approved by the Director, Nebraska Service Center. The director issued a Notice of Intent to Revoke (NOIR), and afforded the petitioner a chance to respond. Consequently, the petition was revoked. The petitioner, acting pro se, filed a motion to reopen the petition, stating that its counsel had not received a copy of the NOIR. The director denied motion because it did not meet the standard for a motion to reopen.<sup>1</sup> The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a steel fabrication company. It seeks to employ the beneficiary permanently in the United States as a welder. 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 is qualified to perform the duties of the proffered position with two years of qualifying employment experience. The director revoked 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 revocation, an 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 the petitioner had not established that the beneficiary was qualified for the proffered job.

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 January 22, 2007.

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.<sup>2</sup> In response to an October 20, 2007, Request for Evidence

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<sup>1</sup> We note that the motion to reopen was not timely filed with the director. Such motions must be filed within fifteen (15) days of the notice, plus three (3) days for mailing. *See* 8 C.F.R. § 205.2(d). The motion was not filed until the twenty-eighth (28) day.

<sup>2</sup> 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).

(RFE), the petitioner submitted an experience letter from [REDACTED] from [REDACTED], in Cuenca Ecuador. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that USCIS has all the evidence it needs to approve the petition.

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 24 months of experience in the job offered.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he has two years of experience, gained while self-employed. He does not provide any additional information concerning his employment background on that form.

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.

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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).

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience from the evidence submitted into this record of proceeding. We note at the outset, that the only experience claimed on the ETA Form 9089 was the beneficiary's "self-employment." Although self-employment can be used to establish a beneficiary's experience, such claims must be accompanied by affidavits from the beneficiary's customers and supporting evidence. No such evidence was provided in the record. The beneficiary provides a letter from an employer whom he did not list on the application for labor certification. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta 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 letter from [REDACTED] does not state whether the beneficiary was a full or part time employee, and what exactly was his training. The letter states that he performed soldering, however, the proffered job requires two years of welding experience and does not allow for experience in an alternate occupation. Thus, the experience letter does not show that the beneficiary is qualified for the proffered job.

We note that soldering and welding are different processes. According to the Bureau of Labor Statistics, the two processes are defined as follows:

*Soldering* uses metals with a melting point below 840 degrees Fahrenheit. Because soldering does not melt the pieces being joined, this process normally does not create the distortions or weaknesses in the pieces that can occur with welding. Soldering commonly is used to make electrical and electronic circuit boards, such as computer chips. Soldering workers tend to work with small pieces that must be precisely positioned.

*Welding* is the process, in which heat is applied to metal pieces, melting and fusing them to form a permanent bond. Because of its strength, welding is used in shipbuilding, automobile manufacturing and repair, aerospace applications, and thousands of other manufacturing activities. Welding also is used to join beams in the construction of buildings, bridges, and other structures and to join pipes in pipelines, powerplants, and refineries. *Welders* may work in a wide variety of industries, from car racing to manufacturing. The work done in the different industries and the equipment used may vary greatly. The most common and simplest type of welding today is arc welding, which uses electrical currents to create heat and bond metals together, but there are over 100 different processes that a welder can employ. The type of weld used is normally determined by the types of metals being joined and the conditions under which the welding is to take place. Steel, for instance, can be welded more easily than titanium. Some of these processes involve manually using a rod and heat to join metals, while others are semiautomatic, with a welding machine feeding wire to bond materials.

See <http://www.bls.gov/oco/ocos226.htm> (accessed March 13, 2012).

Additionally, the letter from [REDACTED] does not provide the dates that the beneficiary was employed, or if the beneficiary worked full or part time. Without this information, the exact amount of experience gained by the beneficiary cannot be gauged.

In the February 19, 2008, NOIR, the director specifically notified the petitioner of the deficiencies in the letter provided to demonstrate the beneficiary's experience. None of the issues raised in that NOIR were addressed in the petitioner's motion to reopen or appeal.<sup>3</sup> Rather, with its motion to reopen, the petitioner provided a copy of its request for an extension to file its 2007 federal income tax return, a copy of the same experience letter discussed herein, and paystubs issued to the beneficiary by the petitioner for November and December 2006.<sup>4</sup>

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.

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<sup>3</sup> On appeal, the petitioner asserts that its prior counsel moved and notified USCIS, but that the NOIR was never received. The record reflects that USCIS received notice of prior counsel's address change in September 2008. In the instant case, however, the NOIR was mailed to prior counsel on February 19, 2008, seven months before USCIS received any change of address for prior counsel. The petitioner cannot be excused for failing to update USCIS of its or its representative's correct address.

<sup>4</sup> We note that the petitioner's pay records show that the beneficiary had a social security number, yet when filing the Form I-140, in Part 3 of that form, the petitioner implied the beneficiary had no social security number. This is an inconsistency in the record which the petitioner must resolve through independent and objective evidence with any future filings. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).