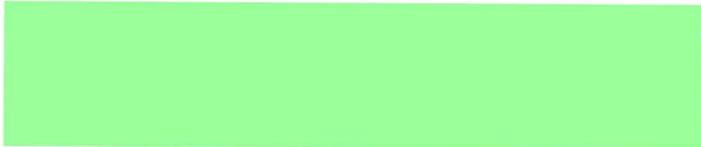


(b)(6)

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: FEB 04 2014 OFFICE: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center (the director), denied the immigrant visa petition and the matter was appealed to the Administrative Appeals Office (AAO). The AAO withdrew the director's decision and remanded the matter for further action. The matter is again before the AAO upon certification of the director's subsequent, adverse decision. The decision of the director will be affirmed and the petition will remain denied.

The petitioner is a boat manufacturing company. It seeks to employ the beneficiary permanently in the United States as a lamination supervisor. 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 priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 27, 2001. *See* 8 C.F.R. § 204.5(d).

The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

On appeal, the AAO found that the petitioner had established its continuing ability to pay the proffered wage, but remanded the matter to the director because the petitioner had failed to establish that the petition requires less than two years of training or experience such that the petition meets the requested classification as an unskilled worker, and that the beneficiary is qualified for the proffered position.

On remand, the director determined that the petitioner did not establish that the beneficiary possessed the minimum experience required to perform the offered position. The director again denied the petition and certified the adverse decision to the AAO. The petitioner failed to respond to the director's certification.<sup>1</sup> Therefore, the record is complete with the petitioner's last correspondence dated February 17, 2011 submitted in response to the director's Notice to Reopen/Reconsider (RFE).

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See 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).

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<sup>1</sup> The AAO issued a copy of the notice of certification to the last known address of the petitioner on October 17, 2013 and offered the petitioner another 30 days to submit a brief or other written statements. The AAO has, to this date, not received a response.

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate about the beneficiary’s qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

On Part 2.g. of the Form I-140, the petitioner indicated that it was filing the petition for “any other worker (requiring less than two years of training or experience).” In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: 8 years.

High School: 4 years.

College: Blank.

College Degree Required: Blank.

Major Field of Study: None.

TRAINING: Two (2) years in a technical school/job.

EXPERIENCE: Two (2) years in the job offered or Four (4) years in the related occupation of auto body work (fiberglass).

OTHER SPECIAL REQUIREMENTS: None.

The labor certification also states that the beneficiary qualifies for the offered position based on High School in Mexico (unspecified) and experience as a boat repairer with [REDACTED] Mexico, from September 1986 to March 1992; a boat detailer with [REDACTED] Mexico, from August 1992 to February 1996; a lamination worker with [REDACTED] Mexico, from March 1996 to January 2000; and a lamination supervisor with the petitioner from March 2000 to April 25, 2001, the date on which the labor certification was signed. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

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

- (4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

While the petitioner requested the unskilled worker classification on the Form I-140, the labor certification does not require less than two years of training or experience such that the beneficiary may be found qualified for classification as an unskilled worker. In response to the director's RFE, the petitioner stated:

I have reviewed the ETA 750 Application for Alien Employment Certification and cannot find on it anywhere where it says "skilled worker." I have also reviewed the Form I-140, Immigrant Petition for Alien Worker. In part 2, Petition Type, I do not see the options of "skilled worker" only "any other worker" which is what I checked off.

The AAO finds that the labor certification requires more than two years of training or experience and does not meet the requirements for classification as an unskilled worker pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii).

Furthermore, the beneficiary is not qualified for the proffered position. The petitioner has failed to establish that the beneficiary attended 8 years of Grade School and 4 years of High School. The record contains the beneficiary's Certificado de Educacion Secundaria issued on June 29, 1984.

The AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." See <http://www.aacrao.org/About-AACRAO.aspx>. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." See <http://edge.aacrao.org/info.php>. USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.<sup>2</sup>

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<sup>2</sup> In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc. v. USCIS*, 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

According to EDGE, a Certificado de Educacion Secundaria, or Certificate of lower-secondary education from Mexico, is awarded upon the completion of three years of lower secondary in a vocational track and is comparable to "less than completion of senior high school in the United States." Based on the conclusions of EDGE, the evidence in the record is not sufficient to establish that the beneficiary possesses the foreign equivalent of 4 years of high school as required by the labor certification.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

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.

The record does not contain any experience letters from qualifying employers.

The record contains a letter dated November 14, 2007, from the petitioner stating that the only evidence that it can provide that the beneficiary is qualified for the proffered position is the nine years of on-the-job training the beneficiary received with the petitioner. However, the letter does not state the title of the beneficiary's position(s) or specify the dates of employment. Further, the letter is inconsistent with the labor certification which stated that the beneficiary was not employed with the petitioner until March 2000, which would indicate only seven years of employment with the petitioner at the time the letter was signed. 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).

A second letter, dated February 17, 2011, from the petitioner states that the beneficiary did not attend any technical school for training and the petitioner is unable to contact former employers of the beneficiary. The petitioner states that the beneficiary began his employment with the petitioner as a helper in the lamination department and that he is currently employed in the proffered position. Again, the letter does not state the title of the beneficiary's position(s) or specify the dates of employment. Further, the letter is inconsistent with the labor certification, which stated that the beneficiary was only employed with the petitioner in the proffered position, and not as a "helper," as of March 2000. *Matter of Ho*, 19 I&N Dec. at 591-92

When determining whether a beneficiary has the required minimum experience for a position, experience gained by the beneficiary with the petitioner in the offered position cannot be considered. See 20 C.F.R. § 656.21(b)(5) [2004]. This position is supported by the Board of Alien Labor Certification Appeals (BALCA). See *Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA). *Delitizer* determined that 20 C.F.R. § 656.21(b)(6) does require that employers establish "the 'dissimilarity' of the position offered for certification from the position in which the alien gained the required experience." *Delitizer Corp. of Newton*, at 4. In its decision, BALCA stated that Certifying Officers should consider various factors to establish that the requirement of dissimilarity

under 20 C.F.R. § 656.21(b)(6) has been met, and that, while Certifying Officers must state the factors considered as a basis for their decisions, the employer bears the burden of proof in establishing that the positions are dissimilar. *Delitizer Corp. of Newton*, at 5.

In the instant case, the beneficiary did not represent on Form ETA 750, Part B that he had been employed with the petitioner in any position other than the proffered position. As discussed above, in order to utilize the experience gained with the employer, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. *Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA). Therefore, the AAO cannot consider the beneficiary's experience gained with the petitioner as qualifying experience to meet the requirements of the labor certification by the priority date. Furthermore, the experience must have been gained before the priority date which is April 27, 2001 in the instant case. Even if the AAO were to accept the beneficiary's experience with the petitioner, it would only account for little more than 1 year of experience in the proffered position, from March 2000 to April 27, 2001.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as an unskilled worker under section 203(b)(3) of the Act.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The director's decision is affirmed. The application remains denied.