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U.S. Department of Homeland Security

Citizenship and Immigration Services

Administrative Appeals Office
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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, DC 20536



File: WAC 00 140 53914

Office: CALIFORNIA SERVICE CENTER Date:

DEC 23 2003

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed the subsequent appeal, and the matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner is an automobile sales, service, parts, and body shop business. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The issue is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date. It is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date in this instance is March 4, 1997.

The petitioner initially submitted insufficient evidence that the

beneficiary met all of the requirements stated by the petitioner in block 14 of the labor certification as of the priority date. In a request for evidence (RFE), dated September 15, 2000, the director requested verification of the beneficiary's prior experience, as listed on Form ETA 750, Part A, blocks 14 and 15.

In response, the petitioner gave a statement of Al Zayani Trading Company, dated March 14, 1992 (Al Zayani), that the beneficiary was continuing to work there in a Daihatsu garage. Kuwait Automobile and Trading Company W.L.L. (KATC) produced an offer of a contract to the beneficiary, accepted November 12, 1988, for employment in a Leyland garage.

The beneficiary gave a self-serving declaration on December 12, 2000 (declaration). It claimed that he worked full-time at KATC from November 1988 through July 1990. The declaration further stated experience at Bader al Mulla & Bros. Company (Bader) full-time from October 1980 through November 1988.

The director determined that credible evidence did not establish the beneficiary's length of employment or duties, concluded that the record did not establish that the beneficiary met the experience requirements of Form ETA 750 had the ability to pay the proffered wage and denied the petition (the decision).

On appeal, counsel submitted Bader's offer of employment to the beneficiary dated June 28, 1986 (Appeal Exhibit 6). This exhibit did not state any duration of prior experience or describe duties. The record did not document even the experience with the petitioner before the priority date, said to be from March 1994.

The AAO considered that the evidence did not corroborate how long the beneficiary worked as an auto mechanic, concluded that the record did not establish prior experience as required by the Form ETA 750, and dismissed the appeal.

Counsel complained that the events were too remote in space and time and that, therefore, documents were unobtainable. On this motion to reopen/reconsider based on new evidence (MTR), however, such matters proved to be quite convenient. Counsel produced three (3) offers of new evidence in less than 30 days.

Mitsubishi Motors Philippines Corporation gave a certification that the beneficiary had experience as an auto mechanic/repairman, longer ago yet, from April 11, 1977 to September 19, 1980. See MTR exhibit 13. As quickly, Bader now stated that the beneficiary worked as a group leader in its garage from September 4, 1980 to September 4, 1988. See MTR exhibit 12. The petitioner stated

that it "currently employs the beneficiary as an auto mechanic from March 1994 through the present" in a full time position. See MTR exhibit 14.

The new evidence does not establish four (4) years of experience. Of the evidence, viewed in its totality, only MTR exhibit 14 is credible evidence of full time employment. It attests to only the period from March 1994 to the priority date, March 4, 1997, about three (3) years. Qualifying experience must be full time. 20 C.F.R. § 656.3 *Employment*.

Moreover, Form ETA 750, in block 15, exacts, in respect to experience that:

Experi[e]nce must include using diagnostic equipment.
References and verification of work history required.

Only MTR exhibit 14 provides credible evidence of these elements and only of three (3) years. In evaluating the beneficiary's qualifications, Citizenship and Immigration Services (CIS), formerly the Service or INS, must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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).

Counsel states in summation for the MTR that:

[CIS's] cursory review of the submitted documentation, by separately evaluating each piece of evidence, fails to fairly or adequately represent the Beneficiary's decade of experience gained prior to the submission of the labor certification.

Nonetheless, the evidence as currently submitted satisfies the appropriate proof of prior experience. . . . In the interest of fairness, justice, and equity, the Petitioner and Beneficiary should not be penalized by "having to start over", and lose the existing priority date.

On the contrary, the remedy for the petitioner's difficulties lay in the initial submission of verifiable proof of prior experience with the beneficiary's title, duties, dates of employment, and hours worked per week. See the RFE and 8 C.F.R. § 204.5(g)(1).

On this MTR, it is too late to submit the critical proof of prior experience, as stated in Form ETA 750.

8 C.F.R. § 103.2 (b) states in part:

Evidence and processing - (1) General. An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instruction on the form. Any evidence submitted is considered part of the relating application or petition.

When additional evidence is requested, 8 C.F.R. § 103.2(b)(8) prescribes:

In such cases, the applicant or petitioner shall be given 12 weeks to respond to a request for evidence. Additional time may not be granted. Within this period the applicant or petitioner may:

Submit all the requested initial or additional evidence;

Submit some or none of the requested additional evidence; or

Withdraw the application or petition.

The RFE specifically exacted the verification of four (4) years of prior full time experience, but the petitioner did not provide it within the time to respond, or even with the MTR. Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before CIS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). For this additional reason, the petition may not be approved.

Provisions of 8 C.F.R. § 103.2(b) mandate that:

(13) *Effect of failure to respond to a request for*

evidence or appearance. If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied.

Beyond the director's decision, the record does not document the petitioner's ability to pay the wage offered as of the priority date. The Immigrant Petition for Alien Worker (I-140) failed to complete Part 5 almost wholly. No prescribed evidence to support the I-140 appears in the record of proceedings before the AAO on this MTR. See 8 C.F.R. 204.5(g)(2). Although these defects cannot be the bases of this decision, they are additional reasons that the petition may not be approved.

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, and the previous decisions of the director and the AAO are affirmed. The petition is denied.