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U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]
LIN 03 064 51689

Office: NEBRASKA SERVICE CENTER

Date: APR 19 2005

IN RE:

Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: 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:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


Robert P. Wiemann, Director
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 beauty salon. It seeks to employ the beneficiary permanently in the United States as a hair stylist. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary met the job qualification requirements listed on the ETA 750 as of the priority date, and denied the petition accordingly.

The evidence indicates that the petitioner is structured as a sole proprietorship. In support of the petition, the petitioner submitted an approved Form ETA 750, labor certification application; and a Form G-28.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 26, 2001. The Form ETA 750 states that:

- The proffered wage is \$10 per hour, which amounts to \$20,800 annually;
- The minimum educational, training and experience for the proffered position calls for a six-year grade-school education, two-years experience as a beautician-stylist, and licensure as a hair stylist;
- In July 1994 the beneficiary had completed a one-year beauty school course from a Mexican beauty school;
- In January 2001 the beneficiary had completed two months, or 169.25-hours, of beauty college training in Denver, Colorado; and
- From February 1999 to the date she signed the Form ETA 750B, on April 16, 2001, the beneficiary has worked full time for the petitioner as a stylist and beautician.

On the petition, the petitioner claimed to have been established the beauty salon on November 1998; to have a gross annual income of \$120,000, and a net annual income of \$60,000; and to currently have six employees.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director on June 2, 2003, requested additional evidence pertinent to that ability, and further, to establish that the beneficiary meets the job requirements set forth on the ETA 750.

In response, the petitioner submitted:

- Two state cosmetology license certificates issued to the beneficiary, one issued on September 26, 2001, and valid for six months; and the other, issued on April 1, 2002, and valid for two years;
- A translated graduation certificate issued by the city of Valparaiso, Mexico, stating that the beneficiary had completed a beauty course of approximately 1,600 hours training and theory from a Mexican beauty college;
- A diploma dated July 10, 1994, carrying a photograph of the beneficiary; and

- A translated affidavit sworn to on October 8, 1999, stating that the beneficiary worked in a Valparaiso beauty salon from December 1994 to November 1997.

On November 24, 2003, the director determined that the evidence did not establish that the beneficiary was a licensed hair stylist on April 26, 2001, and denied the petition.

On appeal, counsel submits no brief and no further evidence.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The issue before this office is whether the record established that the beneficiary has met the requirements specified in boxes 14 and 15 of the Form ETA 750 as of the priority date.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the qualifications required 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 Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. 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. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

On appeal, counsel asserts that the director erred in that the record reveals the beneficiary to have been a licensed hair stylist in Mexico "fully certified in July 1994."

The issue is whether the beneficiary met all of the requirements stated in the labor certification as of the day it was filed with the Department of Labor. At part 15 of the labor certification application, under the category "Other Special Requirements," the petitioner listed "Licensed Hair Stylist Required." By giving the most obvious interpretation to the last phrase, the qualifying candidate must hold a license in the jurisdiction in which he or she intends to practice his or her trade. Because the petitioner's salon is based in Colorado, candidates for the proffered job must show Colorado licensure as of the priority date. The earliest date of licensure established is

September 26, 2001. Counsel's assertion that the beneficiary had – or has – a Mexican license fails to establish that the beneficiary has met the pertinent qualification for the job the petitioner has specified in the Form ETA 750.

The petitioner has not established that the beneficiary has a license to practice as a licensed hair stylist on April 26, 2001. Therefore, the petitioner has not overcome the director's decision.

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.