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U.S. Citizenship
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FILE:



Office: TEXAS SERVICE CENTER

Date: JUN 08 2005

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IN RE:

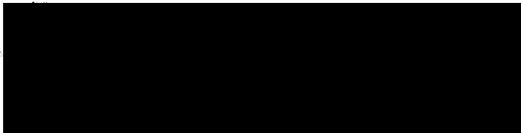
Petitioner:

Beneficiary:



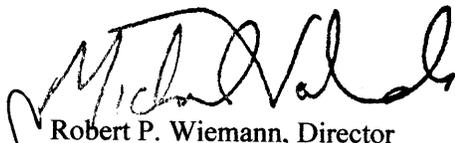
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:



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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on certification. The director's decision will be withdrawn and the petition will be sustained.

The petitioner is an information systems and software development company. It seeks to employ the beneficiary permanently in the United States as a systems analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies the petition. The director determined that the labor certification was invalid because there was no evidence that the beneficiary would be working in San Francisco, the place of intended employment¹, and denied the petition accordingly.

The petitioner provides no additional evidence on certification.

Section 203(b)(3)(A)(i) of 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.

The original ETA 750, with a priority date of April 6, 1999, listed the name of the alien as [REDACTED] and the name of the employer as [REDACTED] (Headquarters) with an address of [REDACTED]. At the time of filing the petition with CIS, October 5, 2000, the petitioner was listed as [REDACTED] and the name of the beneficiary had been substituted to [REDACTED]. Evidence in the record reflects a name change from [REDACTED] to [REDACTED] pursuant to the sale of Metamor on November 5, 1999. Evidence in the record also includes a statement that the prior beneficiary, [REDACTED] no longer works for [REDACTED] and that Comsys has never submitted a Form I-140, Immigrant Petition for Alien Worker, on behalf of [REDACTED]. The petitioner did not provide a new Form ETA 750A for the current beneficiary showing any change in his place of employment.

On April 21, 2001, the director issued a request for evidence (RFE) that stated the following:

A labor certification applies only to a specific job offer. *Matter of Harry Bailen Builders, Inc.*, 19 I&N Dec. 412. A labor certification involving a specific job offer is valid only for the particular job opportunity and for the area of intended employment stated on the labor certification form. *Matter of Sunoco Energy Development.*, 17 I&N Dec. 283.

Please submit another substitute ETA 750 for the beneficiary, showing the same area of intended employment as stated on the certified ETA 750, or

¹ It is noted that the Form ETA 750 lists the address where alien will work as AT&T, [REDACTED] with relocation to job sites throughout the United States.

Please submit another, certified ETA 750 for the beneficiary, showing the actual area of intended employment.

In response, the petitioner, through counsel, provides a new address for its offices and states:

In reply to your request for confirmation of the beneficiary's first place of employment:

- The Position in this Application is for a National Roving employee:
 - This permanent labor certification is sought in a multiple opening position with varying unanticipated job sites throughout the United States.
 - Per DOL instructions, the application was filed in Texas, as the state where the local Employment Service office having jurisdiction over the location of the company's main office.
 - See Field Memorandum No. 48-94 (DOL May 16, 1994) reprinted in AILA Monthly Mailing 544, 546 (July-Aug 1994).
 - Also see Technical Assistance Guide (DOL) p. 126 which supports the procedure in this type of application, where the job duties are equally divided, or, the work sites vary and cannot be determined, the application is to be filed at the office where the employer's main headquarters offices are located.
 - At the time of filing, the beneficiary was located at the name client site in San Francisco, CA, however, the text of labor certification does not assert that the beneficiary will be employed at this location.
 - The text in Part 7 of the ETA 9035 reads, "Client site: ... with relocation to other unanticipated locations throughout the United States."
 - Therefore, the labor certification does not assert that the beneficiary will be employed at any particular location in at [sic] a particular time or order.
- ❖ Conclusion: The text of the labor certification indicates that the beneficiary will be employed in one of these locations: (1) the named client site in San Francisco or (2) another unanticipated location in the US.

In the denial and certification, citing *Matter of Sunoco*, 17 I&N Dec. 283 (BIA 1979), the director asserted that a Form ETA 750 is valid only for a particular job opportunity and for the area of intended employment as stated on the ETA 750. The director asserted that, although the applicant was working for the same employer on the Form ETA 750, he was not employed in the area of intended employment,

which the director stated as New Jersey. The director concluded that the Form ETA 750 was no longer valid.

In the instant case, the job duties of the proffered position have remained the same, and, even though the AAO concurs with the director that the place of specific employment should not have included "with relocation to job sites throughout the United States", the Department of Labor certified the ETA 750 with that stipulation. Nevertheless, the term "relocation" does not suggest a temporary change of location, but rather indicates a long-term change of worksite. While counsel seems to concede that the employment will no longer take place in San Francisco, he asserts that employment elsewhere is consistent with the terms of the ETA-750, specifically that such a "relocation" has occurred in terms of the [REDACTED] corporate offices. Moreover, the nature of petitioner's business is that it is a nationwide IT consultant and services provider that services its clients by placing its employees at their worksites to provide IT support and IT project management. See the [REDACTED] website, [REDACTED] (accessed on May 4, 2005). This type of business, by its nature, necessitates the long-term placement of employees at unanticipated off-site locations throughout the United States. Such an organizational scheme is consistent with the terms set forth on the ETA-750, as certified by the Department of Labor, and the statements on the Form I-140 submitted by the petitioner.

The regulation at 20 C.F.R. § 656.30(a) states, "Except as provided in paragraph (d) of this section, a labor certification is valid indefinitely."

The regulation at 20 C.F.R. § 656.30(d) states:

After issuance labor certifications are subject to invalidation by the INS (CIS) or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application.

In evaluating the beneficiary's qualifications, CIS 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 *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).

In the present case, the labor certification stated, "with relocation to job sites throughout the United States" at the time the Department of Labor certified the Form ETA 750. There is no apparent evidence of fraud or willful misrepresentation on the part of the petitioner or the beneficiary. Therefore, CIS may not invalidate the labor certification. Absent fraud or willful misrepresentation the Department of Labor's decision as to the contents of a labor certification are not subject to CIS review. See *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983). The director has determined that the job offer as demonstrated by the initial ETA-750 is different than the job offer that forms the basis of the Form I-140. For the reasons stated above, the AAO does not agree with that determination. While the director is correct in stating that a material change in the terms of

the ETA-750 concerning the job offer, including a change in location, would require the support of a new labor certification matching the terms of the job offer, the AAO does not find that the job offer has changed as the petitioner has always maintained the location would vary on a long-term basis.

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 met that burden.

ORDER: The director's decision of January 18, 2002 is withdrawn and the petition is approved.