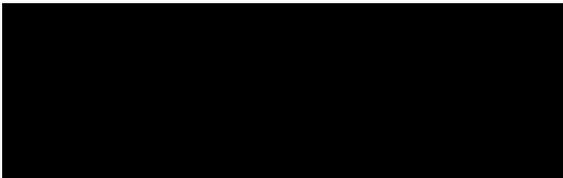


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FILE:

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Office: CALIFORNIA SERVICE CENTER

Date:

IN RE:

Petitioner:

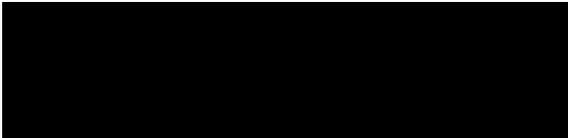
Beneficiary:



PETITION:

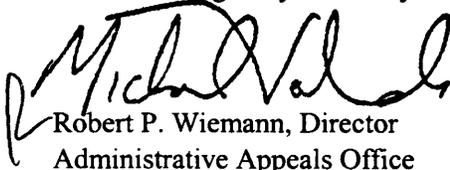
Immigrant petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The petition will be remanded for further investigation and entry of a new decision.

The petitioner is a tile and marble installation firm. It seeks to employ the beneficiary permanently in the United States as an apprentice tile setter. 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 failed to establish that the beneficiary had the requisite work experience or satisfied the terms of the offered position as set forth on the labor certification.

On appeal, the petitioner submits additional evidence and asserts that it establishes the beneficiary's eligibility for the position offered.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), 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.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is March 6, 2000. The visa petition, filed October 22, 2002, indicates that the petitioner was established 1990, employs three "subcontractors," and has a gross annual income of approximately \$255,000.

Part B of the ETA-750, signed by the beneficiary on February 3, 2000, does not reflect that the petitioner employed the beneficiary at that time. The beneficiary completed items 15a and 15b on the ETA 750B. From June 1990 until February 1994, he claims that he worked full-time at [REDACTED] in North Hollywood, California as a tile setter apprentice. In item 15a, the beneficiary claims that he has been unemployed from February 1997 until the present. However, those statements conflict with the biographic questionnaire (Form G-325A), signed by the beneficiary, that states that he worked for the petitioner since August 1997.

As noted on Part A, Item 14, the applicant must have three years of work experience in the job offered of tile setter apprentice.

The regulation at 8 C.F.R. § 204.5(g)(1) provides that "evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or 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.

The regulation at 8 C.F.R. § 204.5(l)(3) also provides in relevant part:

(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.

In support of the beneficiary's accrual of qualifying work experience, the petitioner initially submitted the beneficiary's affidavit, dated September 12, 2002. The beneficiary states that he worked at Rainbow Tile from June 1990 until February 1994, but could not obtain a letter from this employer. He affirms that he personally visited [REDACTED]'s previous location in North Hollywood but found that it was no longer located there. He states that he learned that the owner has moved back to his home country and left no forwarding address.

Because the record did not initially contain sufficient documentation in support of the beneficiary's qualifying employment experience, the director requested additional evidence on December 2, 2002. The director requested evidence establishing that the beneficiary possesses years of pertinent full-time experience as specified on the ETA 750A. The director advised the petitioner that the evidence should be provided in letter form from the relevant employer showing the title and name of the author, as well as the beneficiary's job title, duties, dates of employment and hours worked per week. The director also requested a statement explaining how he has afforded living expenses during his period of unemployment including the submission of copies of his individual income tax returns for 2000 and 2001, as well as copies of all of his Wage and Tax Statements (W-2s) for that period.

In response, counsel resubmitted a copy of the beneficiary's September 2002 affidavit along with a new declaration dated January 20, 2003. The beneficiary states that he is presently able to support himself by working at the petitioner's place of business. He adds that he can't supply any W-2s or tax returns because he doesn't have a social security number. The beneficiary does not offer any explanation as to when he began working for the petitioner.

Counsel also submitted a statement from the owner of the petitioning business. He states that he is able to pay the proffered wage to the beneficiary. He makes no direct reference to the past or current employment of the beneficiary.

Counsel's transmittal letter accompanying these submissions states that the beneficiary has exhausted all efforts to locate [REDACTED] and that his affidavit of his employment there should establish his qualifying work experience. Counsel further states that the petitioner is employing the beneficiary as a tile finisher and is compensating him on a cash basis because he does not have a social security number. Counsel asserts this as an explanation for the petitioner's failure to submit the beneficiary's W-2s.

The director denied the petition on April 30, 2003. While the director erroneously stated that no further evidence was submitted in response to his December 2002 request for additional documentation, the director noted the inconsistencies in the record including the beneficiary's conflicting statements of employment on the ETA 750B and the biographic questionnaire. The director further noted that the immigrant petition stated that the beneficiary's date of entry to the United States was 1993, but that his claimed employment with Rainbow Tile in California was alleged to be from 1990 to 1994. The director concluded that the evidence failed to demonstrate that the beneficiary had acquired the requisite work experience as of the priority date of March 6, 2000.

Counsel asserts on appeal that the petitioner would incur hardship if the preference petition is not approved allowing it to permanently hire the alien beneficiary. Counsel offers evidence of recruitment requirements underlying the DOL certification procedure in determining that there are no available U.S. workers that are eligible for the certified position. The AAO notes that the Department of Labor's function in determining whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers does not impact the jurisdiction of CIS to review whether a petitioner is making a realistic job offer by evaluating the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. *See Tongatapu Woodcraft Hawaii, Ltd. v. INS*, at 1302. Similarly, there are no statutory or regulatory provisions that allow consideration of a petitioner's hardship in determining the eligibility of an employment-based visa petition filed under section 203(b)(3) of the Act.

On appeal, counsel provides two additional new documents pertinent to the beneficiary's past qualifying experience. The first is a "certificate of employment." The notary signature indicates that it was executed on May 19, 2003. It purports to be from the owner of [REDACTED], however the author's signature is illegible and is not otherwise identified in the notarization. The statement affirms that the beneficiary worked as a full-time tile setter from June 1990 until February 1994 and "competently worked for this company for four (4) years until the time we ceased operations." It gives a contact telephone number for further questions.

Counsel also provides a certification of employment, dated May 23, 2003, from [REDACTED] identified as a vice-president of [REDACTED] and [REDACTED]. He states that the beneficiary worked as a full-time tile-setter from March 1994 to October 1996. It also gives a contact telephone number. It is noted that the ETA 750B requires an applicant to list "all jobs" held during the past three years and "any other jobs held related to the occupation for which the alien is seeking certification."

Counsel asserts on appeal that this evidence from previous employers satisfactorily directly establishes that the beneficiary has fulfilled the terms of the labor certification as requiring three years of experience in the job offered.

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, 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).

In this case, the AAO considers the letter submitted by the [REDACTED] owner, in particular, to be deserving of further examination and investigation, in view of the discrepancies in employment dates and entry dates presented in the record and as noted by the director. Counsel's assertions do not address the concerns raised in the director's decision and nothing has been submitted on appeal to further clarify these contradictions. Moreover, confirmation of the identification of the individual's name that submitted the [REDACTED] letter should be resolved in order to sufficiently document this experience. It is incumbent upon the petitioner to resolve inconsistencies by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The

petition is being remanded to the director to conduct further investigation and review as to whether, in view of the documents submitted on appeal, the beneficiary has accrued sufficient relevant experience as a tile setter to satisfy the terms of the labor certification.

In addition, the director should review and address the evidence submitted in support of the petitioner's ability to pay the proffered wage, pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). Although the petitioner also submitted federal tax return in response to the director's request for evidence related to the petitioner's ability to pay the proffered wage, it is unclear whether the petitioner's income or assets could cover the proffered wage of \$24.49 per hour as shown on these returns. It is also noted that at least part of the time, the petitioner was organized as a sole proprietorship. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In order to more accurately determine whether the support of a sole proprietor's household can be sustained, as well as support payment of the proffered wage, CIS should solicit a summary of living expenses during the relevant period and consider all relevant evidence to this issue.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.