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U.S. Citizenship  
and Immigration  
Services

FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

WAC-02-056-51710

IN RE:

Petitioner:

Beneficiary:



AUG 25 2006

PETITION: Immigrant 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:



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, Chief  
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 case will be remanded to the Service Center in accordance with below.

The petitioner is drywall and framing contractor and seeks to employ the beneficiary permanently in the United States as a carpenter, framer. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's December 21, 2004, denial, the case was denied based on the petitioner's failure to demonstrate that the beneficiary met the qualifications set forth in the certified labor certification.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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

In evaluating the beneficiary's qualifications, the U.S. Citizenship & Immigration Service (CIS) must look to the job offer portion of the alien 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 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> 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 Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date 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).

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(l)(3):

(ii) *Other documentation*—

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

(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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on February 26, 1999, and was subsequently approved on October 3, 2001. The proffered wage as stated on the Form ETA 750 is \$20.65 per hour, 40 hours per week, for an annual salary of \$42,952 per year.<sup>2</sup>

The petitioner filed the I-140 Petition on December 1, 2001. The Service Center issued a Request for Evidence ("RFE") on August 23, 2002, requesting that the petitioner provide proof of the petitioner's ability to pay for the year 2001, as well as requesting that the petitioner submit evidence to establish that the beneficiary had the experience required in the certified labor certification. The petitioner submitted its 2001 tax return in response. Another RFE was sent on April 30, 2003, requesting again that the petitioner submit evidence of the beneficiary's prior experience. In response, by letter dated June 23, 2003, counsel forwarded two letters to document the beneficiary's prior experience, and training in his country of origin, Mexico. On September 12, 2003, another RFE was sent requesting that the petitioner forward evidence of ability to pay for the year 2002, and "to submit proof of the beneficiary's foreign work experience including letters, contracts, and pay statements to verify that the beneficiary worked for the listed employer(s). Provide a name, address and telephone number at which the Service or other U.S. Government agency can contact ALL foreign employers. All foreign documents must be accompanied by a Certified English translation." In response, on December 8, 2003, the petitioner submitted its 2002 tax return, and resubmitted the two experience letters previously submitted in response to the April 30 RFE.

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<sup>2</sup> A petitioner must demonstrate its ability to pay in accordance with the regulation 8 C.F.R. § 204.5(g)(2) which provides 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

We note that the petitioner's tax returns submitted for the years 1999, 2000, 2001, and 2002 show either a positive net income, or positive net current assets in an amount sufficient to pay the beneficiary's proffered wage of \$42,952 per year, including \$188,833 net income in 1999, \$74,131, net income in 2000, \$299,432 net income in 2001, and \$415,074 net income in 2002.

On July 30, 2004, the Service Center issued a Notice of Intent to Deny (“NOID”), which noted that the certified position required four years of experience, and the petitioner had submitted one experience letter in response. However, as the NOID outlined: “A security officer from the Consulate in Guadalajara has conducted an investigation into the beneficiary’s alleged work experience. The conclusion of this investigation is that the beneficiary never worked for [REDACTED]. The petitioner was afforded thirty days to respond to the NOID. The petitioner submitted an additional letter dated August 25, 2004, from the former owner of Carpinteria Yambo. The petition was then denied on December 21, 2004.

On appeal, counsel contends that the NOID “was vague on it’s [sic] face with the vague statement that someone had conducted an investigation but never indicating what the investigation consisted of. No report was attached from the Security office or anything to indicate that in fact the investigation had taken place . . . there was no guidance from the Service as to what further information or proof would be acceptable to them but rather the “vague” statement that to “submit additional information, evidence or arguments . . . it was further pointed out that the beneficiary did not have proof of pay because he was paid cash at a time when he was very young. It is ridiculous to assume that a young person would carefully guard proof of payment of cash when there was none.” Counsel requests that the appeal be granted, or alternatively that the petition be remanded to back to the Service Center for clarification on what further evidence would be acceptable and a “clarification of the particulars and proof of the alleged investigation that supposedly took place in Mexico.”

First, we shall review the evidence submitted related to the beneficiary’s qualifications. On the Form ETA 750A, the “job offer” states that the position requires four years of experience in the job offered, as a carpenter, framer, with job duties including: “the occupant of this position will construct, erect, install and repair various types of framework for both residential and commercial structures using carpenter’s had tools and power tools conforming to local building codes.” The petitioner did not list that the position required any education in Section 14. Further, the petitioner did not list any required training, or other special requirements for the position in Section 15.

On the Form ETA 750B, signed by the beneficiary on January 1, 1998, the beneficiary listed prior experience in box 15.a. only as “Carpenter, Framer.” The forms did not list dates of employment, and did not list an employer’s name or address. By letter of August 27, 1998, counsel sent a clarifying letter to the local California State Workforce Agency, the Employment Development Department. The letter, signed by the beneficiary, served as an amendment to the ETA 750B, which specified the beneficiary’s work experience as:

Employer: [REDACTED]

Dates of work: February 20, 1991 to May 1994, full time;

Title: Carpenter/Framer.

No other prior experience was listed on either the Form ETA 750B, or in the letter to amend the beneficiary’s experience. The letter amendment further notes that the beneficiary had been unemployed from “January 1995 to the present” (which would have been August 27, 1998, the date of the letter).

As evidence to document the beneficiary’s qualifications, the petitioner submitted a letter from the owner of [REDACTED]. The letter indicated that the beneficiary worked as a “Carpenter Framer, complying with hours of 40 hours a week in the period of February 20, 1990 to May 1994, his duties consisted in constructing, installing and repairing various types of framework.” The petitioner also submitted a second

[REDACTED] is the employer that verified the beneficiary’s work experience.

letter from the owner of [REDACTED]. The second letter provided that the beneficiary was “trained in this carpentry for one year from January 5, 1989 to February 20, 1990 performing very good in his training.”

In the third letter submitted in response to the NOID, the same individual, the former owner of [REDACTED] verified that the beneficiary had worked for the company from 1990 to 1994. Further, the owner notes “I am informing you that I did not receive a telephone call that supposingly [sic] was done regarding exterior relationships in the city of Guadalajara Jalisco, may be the telephone was incorrect. Presently I am not the proprietor if [sic] this company, but if you would like to know any reference about [REDACTED] you can call at the number [REDACTED].”

Counsel additionally submitted a joint statement from an individual that resided near Carpenteria Yambo, which stated: “I witness that approximately from 1990 to 1994, [REDACTED] worked at the carpentry that belongs to [REDACTED], which is located in front of my house where I live. [The carpentry is] on [REDACTED] in the town of Valle de Guadalupe, Jalisco, Mexico.” [REDACTED] then verified that the beneficiary worked for him, and that “until today I have not received any phone call from the immigration authorities of the United States of America to make sure if it is true that [REDACTED] worked in my carpentry.” The letter was signed by each individual and dated January 10, 2005.

We note that there is a conflict between the dates on the ETA 750 letter amendment, and the letters to verify the beneficiary’s employment experience. In the letter amendment submitted to DOL, the beneficiary’s work experience is listed as beginning on February 20, 1991 and ending in May 1994, which would result in three years, and approximately three months of employment experience, instead of four years. The experience letters provided list that the beneficiary started in February 1990. The petitioner should address this conflict in evidence.

The conflict in the letter amendment compared to the documented work experience, in and of itself raises significant doubts. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), which states: “Doubt raised on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.” Further, “It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies will not suffice.” *Matter of Ho*, 19 I&N Dec. at 591-592. Regardless of counsel’s concerns regarding the foreign investigation, the AAO notes that the inconsistency in the beneficiary’s listed work experience and letters to verify that experience, would warrant, competent, independent evidence from the petitioner to prove the beneficiary’s experience.

Next, we will discuss the consular investigation report. While we find the Consulate investigation compelling, the petitioner should be afforded greater notice of the investigation’s details, to the extent possible, so that the petitioner can more clearly address the points of contention in the investigation. If on remand, the director chooses to disregard the investigative report, the director should still seek such evidence of the beneficiary’s employment history that would resolve the inconsistencies noted above. If the director does wish to rely on the report, to the extent possible, and to ensure the overseas investigative integrity, the reliance must be in accordance with 8 C.F.R. Section 103.2(b)(16)(i).

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issue stated above. The director should provide greater notice to the petitioner regarding the investigation to the extent possible. 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.