

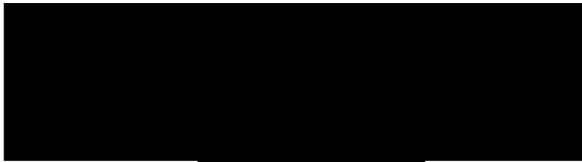


U.S. Citizenship
and Immigration
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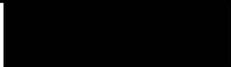
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BK



FILE:



Office: VERMONT SERVICE CENTER

Date:

JUL 25 2006

EAC-04-035-51370

IN RE:

Petitioner:

Beneficiary:



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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Center Director (Director), Vermont Service Center. After a complete review of the record of proceeding, including a motion to reopen subsequently filed, the director affirmed the previous decision and denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an electrical engineering firm. It seeks to employ the beneficiary permanently in the United States as an electrical engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director denied the petition because the evidence submitted indicated that the beneficiary possessed eighteen months of experience, therefore, the petitioner had not established that the beneficiary was qualified for the proffered position requiring two years of experience.

On appeal, the petitioner's counsel contends that the petitioner does not need to establish the beneficiary's qualification for the proffered professional position with two years of experience as long as he holds a Bachelor's degree. Counsel also argues that a new experience letter submitted on motion to reopen established that the beneficiary possesses two years of experience, therefore, the petitioner established the beneficiary's qualifications.

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 hold baccalaureate degrees and are members of the professions.

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). The priority date in the instant petition is April 30, 2001.

Citizenship and Immigration Services (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).

The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of electrical engineer. In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education
 - Grade School
 - High School
 - College 4
 - College Degree Required B.E.E.
 - Major Field of Study Electrical Eng.
 - Training
 - No. Yrs.
 - No. Mos.
 - Experience
 - Job Offered
 - No. Yrs. 2
 - No. Mos.
 - Related Occupation
 - No. Yrs.
 - No. Mos.

The certified Form ETA 750 in the instant case states that the position of electrical engineer requires a Bachelor's Degree in Electrical Engineering and two (2) years of experience in the job offered. Regardless of category the petition was submitted under, the petitioner must demonstrate that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the petition's priority date. Counsel's assertion on appeal that "to classify a beneficiary as a professional worker under Section 203(b)(3)(ii) two years of experience is not mandatory if the beneficiary meets the educational requirements" is misplaced.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) states the following:

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 of 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.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

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.

The instant I-140 petition was submitted on November 13, 2003¹ without any documentation concerning the beneficiary's qualifications as required by the above regulation. In response to the director's request for additional evidence (RFE) dated January 28, 2004 relevant to the beneficiary's qualifications, the petitioner submitted a credential evaluation with a diploma and transcripts, and an experience letter for the beneficiary.

The credential evaluation drafted by [REDACTED] of Forensic Education Consultant was submitted in the response to the RFE and stated the following:

This is an evaluation solely of educational equivalents of a program requiring high school graduation for admission. The credentials of [the beneficiary] indicate that in my judgment, this person has achieved the equivalent in level, scope, and intent of a Bachelor of Engineering in Electrical Engineering Degree at a regionally accredited university in the United States. My reference source is the **Pier World Education Series New Independent States and the Baltic Republics, May 1995**. My judgment is based on the following documentation:

-- Photocopy of a translated diploma, with supporting documents, dated March 1, 1990 from the **Kramatorskiy Technological College (also known as the Kramatorsk Technological College and also as Kramators'k Industrial Institute)**, Ukraine, indicating the completion of four years of study from 1986 to 1990 culminating in a Bachelor of Electrical Engineer Qualification Degree.

(Emphasis in original.)

With this credential evaluation the petitioner established the beneficiary's educational qualification required by the labor certification. In the response to the RFE, the petitioner also submitted a letter from a previous employer. This experience letter is a faxed copy dated December 16, 2001, on a company's letterhead named [REDACTED] with contact information, such as address, telephone number, fax number and e-mail address. The letter was signed by [REDACTED] Chief Electrical Engineer, and [REDACTED] Project Manager. However, the experience letter states in pertinent part that: "[p]lease, be advised that [the beneficiary] started working for [REDACTED] as an electrical engineer, from August 1995 and dismissed in February 1997." The letter established that the beneficiary had eighteen (18) months or one and a half years of experience as an electrical engineer prior to the priority date, therefore, the petitioner failed to demonstrate that the beneficiary possessed all required education and experience qualifications, including two years of qualifying employment experience, for the proffered position prior to the priority date. On June 18, 2004, the director denied the petition accordingly.

¹ A time and date stamp marked November 13, 2004 on the petition but was apparently a clerical error.

On July 1, 2004, the petitioner filed a Motion to Reopen with an experience letter. The director granted the motion to reopen. However, after a complete review, the director found that both the experience letter submitted on motion and the one originally submitted are fraudulent. Therefore, the previous denial decision was affirmed.

On February 5, 2005, counsel filed an appeal on behalf of the petitioner, asserting that the director's finding that the documents submitted are fraudulent is without merit. She states that the fact that the letters appear to have been faxed on the same date is not evidence that they are fraudulent because fax machines often have erroneous dates on them. As the director correctly pointed out in her decision on the motion to reopen, the experience letter submitted on motion is virtually identical to the one originally submitted. The two letters are exactly the same except that the employment ending date has been changed from February 1997 to August 1997. It appears that someone whited out February and typed in August for the ending month. However, the second letter does not show any evidence that the change is from the original writers. Both letters are dated December 16, 2001, and were faxed from "PLC" with phone number: [REDACTED] at 7:11 pm on November 15, 2001. The second letter does not contain any new signatures from the authors, nor does it come with any initials for correction or an explanation letter for the change or correction of the ending month. The AAO finds that at least the second experience letter from [REDACTED] for the beneficiary is fraudulent, therefore, the letter cannot be accepted and considered as a primary evidence that the beneficiary possessed the requisite two years of experience set forth on the Form ETA 750.

On appeal counsel submits a letter from [REDACTED] attesting to the beneficiary's work experience at [REDACTED]. Per the letter, the writer was working with [REDACTED] in Moscow as an independent broker. Mr. [REDACTED] letter is therefore not from a former employer nor trainer of the beneficiary. He was not in a position to provide a regulatory-prescribed letter on the beneficiary's behalf. Therefore, Mr. [REDACTED]'s letter cannot be accepted and considered as evidence that the beneficiary held the requisite two years of experience on the Form ETA 750. Furthermore, Mr. [REDACTED] verifies that both writers of the original experience letter, Mr. [REDACTED] and Mr. [REDACTED] worked for [REDACTED] p. from 1995 until 1998. The experience letter from Mr. [REDACTED] and Mr. [REDACTED] was dated December 16, 2001. According to Mr. [REDACTED] at that time Mr. [REDACTED] and Mr. [REDACTED] were no longer working for [REDACTED]. Counsel did not explain how two persons no longer working at [REDACTED] could still sign a letter on behalf of the company using the same titles as they had when they were working for the company. If Mr. [REDACTED] statement is true, it is most likely that even the first experience letter initially submitted is also fraudulent.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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.