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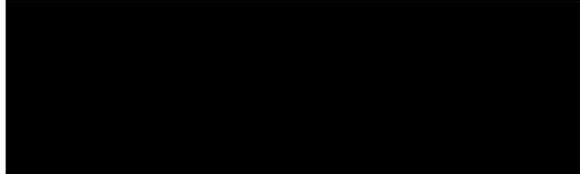
U.S. Department of Homeland Security
20 Mass, N.W., A3000
Washington, DC 20529



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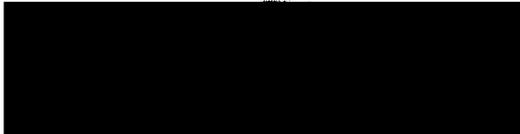
FILE: WAC 03 225 54577 Office: CALIFORNIA SERVICE CENTER Date: JUL 25 2006

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.

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 on appeal. The appeal will be remanded.

The petitioner is a jewelry manufacturing company. It seeks to employ the beneficiary permanently in the United States as a jeweler/sample maker. 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 petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition and denied the petition accordingly.

On appeal, the counsel submits a brief and additional evidence.

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 unavailable in the United States.

8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(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.

Eligibility in this matter hinges on the petitioner demonstrating that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on September 11, 2001. The labor certification states that the position requires two years experience.

With the petition, counsel submitted:

- An original certified ETA 750; and,
- A translated letter from the beneficiary's previous employer dated August 20, 2001, certifying that the beneficiary worked for Pizant Graphic Jewelry Manufacturing as a jeweler/sample maker.

On May 12, 2004, the director issued a Request For Evidence (RFE) seeking pertinent evidence. Consistent with the requirements of 8 C.F.R. 204.5 § (l)(3)(ii), the director specifically requested, among other things, that the evidence include the beneficiary's experience be in the form of 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, including the number of hours worked per week, the beneficiary's title and duties.

In response, counsel submitted, among other things:

- The beneficiary's July 29, 2004 affidavit stating that he tried to contact Pizant Graphic in Moscow, Russia, but learned that the company had previously gone out of business three years earlier. The beneficiary declared that he had worked full time at the company from November 1996 until August 1999.

On October 13, 2004, the director issued another RFE, again asking the petitioner to submit a letter from the beneficiary's previous employer that states the number of hours worked per week and the job's title and duties.

In response, counsel submitted two translated letters written verifying the beneficiary's prior work experience with Pizant Graphic.:

- The October 23, 2004 letter from the manager of the Moscow firm Trio, verifying that the beneficiary had worked for Pizant from 1996 to 1999.
- The undated letter of a former co-worker of the beneficiary verifying that the beneficiary had worked for Pizant from 1996 to 1999 "40 hours a week" and, like all workers there, was paid on a cash basis.

On February 2, 2005, the director denied the petition, finding that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient, full-time work experience. The director stated, "A review of the evidence provided suggests it is insufficient to determine the beneficiary's eligibility for the proffered position." The decision also cites 8 C.F.R. § 204.5(l)(3)(ii), (A) and (B), as set forth above.

On appeal, counsel asserts that the director's erred in denying the petition based on the lack of credible evidence of the beneficiary's qualifications, citing *Singh v. Ashcroft*, 301 F. 3d 1109 (9th Cir.-2002); *Shah v. INS*, 220 F. 3rd 1062, 1067 (9th Cir.-2000); and *Mosa v. Rogers*, 89 F 3d 601, 604 (9th Cir-1996).

At the outset, we note that the three cases cited by counsel concern the required evidence needed to support a denial of asylum and are inapplicable in the instant case.

8 C.F.R. § 204.5(g)(1) provides:

(1) Initial Evidence – General. Specific requirements for initial supporting documents for the various employment-based immigrant classifications are set forth in this section. In general, ordinary legible photocopies of such documents (except for labor certifications from the Department of Labor) will be acceptable for initial filing and approval. However, at the discretion of the director, original documents may be required in individual cases. 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. [Bold lettering added]

The director did not address the petitioner's claim in terms of unavailable evidence, but instead considered the petitioner unresponsive to his request for proof of hours worked each week and duties performed. The issue is whether, under the circumstances, the director should have accepted the two submitted letters as "other documentation" concerning the beneficiary's training and experience.

The regulation at 8 C.F.R. § 103.2 states in pertinent part:

(b) Evidence and processing—

(2) Submitting secondary evidence and affidavits--

(i) General. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

The record contains two letters by coworkers of the beneficiary concerning his work at Pizant Graphic, which are secondary evidence pertinent to the beneficiary's work experience. The letter from the manager of Trio verifies that the beneficiary worked as a jeweler. While silent on the beneficiary's work hours, the letter notes only that he had worked for three years at Pizant Graphic, it does serve to describe his duties there as those of a jeweler who also made design models for creating new jewelry. The second letter, from the former co-worker, expressly states that both its author and the beneficiary had worked 40 hours a week for Pizant Graphic.

Accordingly, we find that evidence sufficient to demonstrate that the beneficiary had more than the minimum two years of full time work comparable to that of the proffered position, as specified in the ETA 750.

The evidence submitted credibly demonstrates that the beneficiary has the requisite two years of experience. Therefore, the petitioner has established that the beneficiary is eligible for the proffered position.

Beyond the decision of the director, we note that the record does not establish that the petitioner has the ability to pay the proffered wage of \$17 per hour (\$35,360 per year). Thus, the petitioner's Form 1065 for the year 2001 states net income of only \$17,000, and for 2002 it states net income of only \$30,325. The petitioner's Form 1065 for the year 2003 shows the petitioner had \$89,420 net income, making 2003 the only year in which the petitioner established that it had the ability to pay the proffered wage. Further, the petitioner has listed no assets on the Schedule Ls from the returns for any of these years, which precludes finding the petitioner had sufficient net current assets to establish its ability to pay the proffered wage. The record also includes bank statements; however, bank statements are not among the three types of evidence enumerated in 8 C.F.R. § 204.5(g)(2) as acceptable to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

Accordingly, the record does not show that the petitioner has the ability to pay the proffered wage as of the priority date.

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 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.