

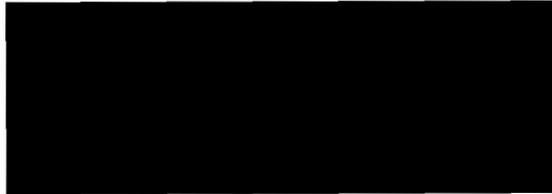
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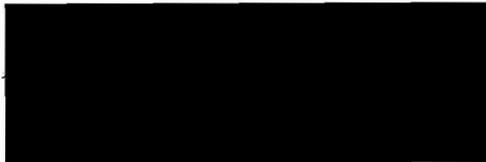
JUL 26 2006

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 Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further investigation and entry of new decision.

The petitioner is a residential construction firm. It seeks to employ the beneficiary permanently in the United States as a cement mason. As required by statute, Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to establish that the beneficiary possessed the requisite work experience specified on the labor certification and denied the petition accordingly.

On appeal, counsel submits additional evidence and contends that the petitioner has demonstrated that the beneficiary qualifies for the certified position.

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.

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

(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.

(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.

The petitioner must also show that a beneficiary has the necessary education and experience specified on the labor certification as of the priority 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). Here, Form ETA 750 was accepted for processing on April 30, 2001. The required work experience for the certified position of cement mason is two years in the job offered or two years in a related occupation identified as "construction worker."

On Part 5 of the petition, the petitioner claims to have been established in 1986, have a gross annual income of \$5,962,656 and a net annual income of -\$30,443.

On Form ETA 750B, signed by the beneficiary on January 9, 2004, the beneficiary does not claim to have worked for the petitioner. Rather, the beneficiary claims that he has been unemployed since January 2003.

The only other job listed by the beneficiary on the ETA 750B is employment with ██████████ ██████████ in Braga, Portugal, as an assistant mason. The beneficiary indicates that he worked for ██████████ this capacity from September 9, 2000 to December 12, 2002.

In support of the beneficiary's prior employment experience, a letter, dated October 10, 2003, signed by Mr. ██████████ was provided with the petition, affirming the beneficiary's employment as an assistant mason from September 2000 until December 2002.

On August 4, 2004, the director denied the petition, on the grounds that the petitioner had failed to demonstrate that the beneficiary had obtained the requisite two years of qualifying experience in the certified position by the priority date of April 30, 2001 as required. The director determined that the evidence showed only that the beneficiary's job with ██████████ that he had accrued about seven months of experience by April 30, 2001.

On appeal, counsel suggests that the ETA 750B only requires a beneficiary to provide 3 years of employment history and that the beneficiary actually possesses the necessary experience. Counsel subsequently submits a letter from another employer. This letter, dated November 4, 2004, is from ██████████ of Vila Verde. He claims that he employed the beneficiary as an assistant mason from February 2, 1994 until March 2, 1996, and details some of the beneficiary's duties.

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).¹

It is noted that the instructions at item 15 at the top of the ETA 750B are not limited to "all jobs held during the last three (3) years." It also states that an applicant should "list any other jobs related to the occupation for which the alien is seeking certification as indicated in item 9." Nevertheless, the letter from ██████████ will be accepted as part of the evidence showing that the beneficiary had accrued at least two years of qualifying work experience by the priority date.

The case will be remanded in order to allow the director to make a finding as to the petitioner's ability to pay the proffered wage of \$15.11 per hour, or \$31,428.80 per year. It is noted that the petitioner initially provided

¹In cases where the required experience must be determined from prior jobs, it is appropriate for CIS to look to job duties of previous employment, not just job titles. *See Matter of Maple Derby, Inc.*, 89-INA-185 (BALCA 1991) (*en banc*).

financial documentation related only to 2001. The petitioner's obligation to show a *continuing* ability to pay the certified wage is set forth in the regulation at 8 C.F.R. § 204.5(g)(2). This obligation covers all beneficiaries that the petitioner may be sponsoring.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the regulatory requirements relating to the petitioner's continuing ability to pay the proffered wage and any other pertinent matters. 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 consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.