



U.S. Citizenship
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FILE: [Redacted]
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Office: NEBRASKA SERVICE CENTER

Date: **MAR 29 2006**

IN RE: Petitioner: [Redacted]
 Beneficiary: [Redacted]

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:

[Redacted]

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a jeweler. It seeks to employ the beneficiary permanently in the United States as a diamond selector.¹ As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director denied the petition because he determined that the petitioner failed to provide sufficient evidence that the beneficiary is qualified for the proffered position. The director concluded that the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On appeal, counsel states that the petitioner submitted two letters of work verification previously that establish the beneficiary's qualifications, and resubmits the letters to the record. Counsel submits further documentation.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

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(l)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

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.

Regardless of whether the petitioner is seeking to classify the petition under 203(b)(3)(A)(i) or (ii) of the Act, however; to be eligible for approval, a beneficiary must also have the education and experience specified on the labor certification as of the petition's filing date. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm.

¹ DOL identified the proffered position as Diamond Selector on the Final Determination cover letter sent to the petitioner with the certified Form ETA 750.

1977). The filing date of the petition is the initial receipt in the Department of Labor's employment service system. 8 C.F.R. § 204.5(d). In this case, that date is April 30, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 diamond selector. In the instant case, item 14 describes the requirements of the proffered position. The petitioner did not indicate any required educational level, but rather left the minimum education or training sections parts of Section 14 blank.

The petitioner specified that any applicants have two years of work experience in the job offered. The petitioner did not specify any years of experience in any related occupation. Under Item 15, the petitioner also set forth additional special requirements as follows: "Must be willing to demonstrate ability to perform duties required." The job offered lists the following duties on Item 13: "Receives all types of jewelry for repairs; examines defective or damaged jewelry [sic] using hand tools and bench machines. Estimates costs of repairs using knowledge of repairs and cost charts; may reshape jewelry through soldering or drilling."

The beneficiary did not set forth his credentials on Form ETA-750B. Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), is blank. The beneficiary provides no further information concerning his educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

On Part 15, eliciting information concerning the beneficiary's past employment experience in the three past years, the beneficiary also did not indicate any employment experience. The petitioner submitted a jointly filed I-140 and I-485. Although the I-140 materials submitted initially do not appear to contain any letter of employment verification, the I-485 materials contain a copy of the beneficiary's school leaving certificate form Fr. Agnel Technical High School, Bandstand, Bandra(West) , Mumbai, India. This document states the beneficiary completed high school May 31, 1974. the I-485 materials also contain a letter of work verification signed by [REDACTED] Diwakar Bag, Diamond Jewellery Manufacturers, Pophal Wadi, Mumbai, India. This letter is dated October 27, 1999, and states the following:

This is to certify that [the beneficiary] is an Expert Jewellers. [sic] He was with our firm from 1995 to 1999 in charge of manufacturing Department. During his tenure he was expert in making & remaking of Jewellery of any kind. Apart from Manufacturing he was expert in repair work also. We wish him Best of luck & Better Prospects.

Because the evidence was insufficient, the director requested additional evidence on April 7, 2004, specifically requesting proof that the beneficiary possessed the required two years of work experience stipulated on the Form ETA 750. The director noted that "[e]vidence of experience must be in the form of letter(s) from current or former employer(s) giving the name, address, and title of the employer and a description of the experience of the alien, including specific dates of the employment and specific duties.

In response to the director's request for evidence, the petitioner submitted a letter from Diwakar Bag, Diamond Jewellers, Mumbai, India. This letter is dated April 30, 2004, and states that the beneficiary was employed by Diwakar Bag as manager from May 19, 1997 to January 12, 1999. The letter also states that the beneficiary worked as a senior technician-selector from June 4, 1995 to May 18, 1997. The proprietor described the following job duties:

As a manager, [the beneficiary] was responsible for the jewellery design and production with emphasis on the graphic design/illustration, client co-ordination during commissioning of jewellery, coordinating the activities of the manufacturing department.

As the Senior technician-selector [the beneficiary's] duties included selection of diamonds according to type and size, for use in cutting tools and ring mountings. Assessment of grade, quality, color(skin), and physical structure of rough or finished diamonds, sorting stones according to quality and type. [The beneficiary] was also involved in the production of technical plans, drawings and models.

The director denied the petition on August 16, 2004, finding that the positions of manager and diamond selector described in the letter dated April 30, 2004 were not comparable to the proffered position. The director stated that neither position demonstrated that the beneficiary performed the same job duties as those stipulated in the Form ETA 750, namely, receive jewelry for repairs, examine defective or damaged jewelry using hand tools and bench machines, estimate costs of repairs, and reshape jewelry through soldering or drilling. The director noted that the beneficiary's job duties at Diwakar Bag could arguably be comparable to the duties listed on the Form ETA-750, and that the duties described could be said to presume experience in jewelry repair. However, the director then noted that the petitioner had not specified on Form ETA 750 that it was willing to accept experience gained in a comparable occupation, but rather had specified it required experience in the job offered. The director then determined that the petitioner had not established that the beneficiary had completed two years of work experience as a jewelry repair worker.

On appeal, counsel asserts that the beneficiary has the required work experience based on the two letters of work verification submitted by the petitioner. Counsel resubmits both letters and notes that the first letter described his the beneficiary's duties as jewelry making, and repair. Counsel notes that the second letter from Diwakar Bag described three and a half years of jewelry design, production and repair, with other responsibilities in the selection of diamonds. Counsel states that the fact the beneficiary is experienced in jewelry selection and design as well as jewelry repair does not make him ineligible for the position offered. Counsel also noted that the actual final determination of the labor certification was certified for the occupation of "diamond selector", although the duties, job title and job description of the ETA 750, Part A, all state the position is for jewelry repair. Counsel asserts that the beneficiary is qualified for both positions, if there is a distinction to be made between the two occupations.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

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.

Thus, for petitioners seeking to qualify a beneficiary for the third preference “skilled worker” category, the petitioner must produce evidence that the beneficiary meets the “educational, training or experience, and any other requirements of the individual labor certification” as clearly directed by the plain meaning of the regulatory provision.

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 the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes two years of work experience in the job.

Upon review of the record, the DOL certification of the Form ETA 750 is confused, in that multiple job titles are found in the document. The petitioner provided a job title of jewelery (sic) repair, while the DOL final determination certification letter identifies the proffered position as a diamond selector. The record is not clear as to the relationship between the petitioner’s job description and the DOL classification of the position as a diamond selector. Furthermore, the DOL adjudicating officer, previously identified the proffered position on the bottom part of Part A, as “jeweler”, while using the occupational code of 770.281.010, which according to the DOL Dictionary of Occupational Titles (DOT) online version is “diamond selector,” with an associated code of 51.9071.06 “Gem and Diamond Workers”.² The petitioner in turn then described the proffered position on the I-140 petition as “diamond selector.” Notwithstanding the confusion over the name of the proffered position; however, there are specific duties listed for the proffered position. While noting these differing elements of the Form ETA 750, the AAO has no authority to correct the contents of the DOL document. As previously stated, CIS may not ignore a term of the labor certification or impose additional requirements. The labor certification clearly indicates that the only requirement for the job is two years of work experience in the job offered, and that the applicant be willing to demonstrate ability to perform the required duties.

The record is not clear as to whether the director examined the petitioner’s first letter of work experience submitted from Diwakar Bag. As stated previously, it was contained in documentation for the beneficiary’s I-485 petition. However, no mention is made of this document in the director’s request for further evidence, or in his denial. As stated previously, the beneficiary also did not identify any work experience on Part B of the Form ETA 750, an omission that was not corrected by DOL in its consideration of the document.

The AAO will examine both letters in its proceedings. While the letter from Diwakar Bag dated 1999 lacks details as to the beneficiary’s specific duties over an employment period of up to four years, the identity of the employer and the dates of employment are consistent with the information contained in the second letter from Diwakar Bag dated 2004. The only remaining question is whether the contents of these two letters are sufficient to establish that the beneficiary had two years of the required work experience. While the AAO acknowledges that the initial two years of work experience described by the beneficiary’s former employer are more that of a diamond selector and gem worker, the latter two years appear to involve working with customers, some design work, and production and repair of jewelry. Since both letters of work employment appear credible and both mention jewelry repair as well as diamond and jewellery work, the AAO would view these documents as sufficient to establish the beneficiary’s qualifications with regard to the requisite two years of work experience in the job consistent with the required duties.

² See O*Net Online at <http://online.onetcenter.org/>.

Thus, the AAO finds that the petitioner has established that the beneficiary is qualified to perform the duties of the position. 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.