



U.S. Citizenship
and Immigration
Services

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[REDACTED]

BC

FILE:

SRC 04 137 51707

Office: TEXAS SERVICE CENTER

Date:

MAY 15 2006

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center denied the employment-based immigrant visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a meat market and restaurant. It seeks to employ the beneficiary permanently in the United States as a meat cutter. 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 met the requirements of the labor certification as of the priority date, June 5, 2001. The director noted that the beneficiary was not authorized to obtain employment during the years he claimed to be employed, and, therefore, he was not eligible for the benefit sought.

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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 15, 2004 denial, the single issue in this case is whether or not the beneficiary meets the requirements of the labor certification as of the priority date.

Section 203(b)(3)(A)(i) of 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.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

(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 occupational designation. The minimum requirements for this classification are at least two years of training or experience.

On appeal, counsel asserts:

[Citizenship and Immigration Services (CIS)] claims that the beneficiary entered the United States without inspection (EWI) in 1995 and that aliens who enter without inspection are not authorized for employment. Please note that the beneficiary has, in fact, been working within the United States without any legal status under the INA.

Please further note that § 245(i) of the INA was created by the U.S. Congress to provide relief for individuals such as the beneficiary. Further, [CIS] claims that the petitioner did not provide any evidence of the beneficiary's employment and has ignored the letter the petitioner submitted on behalf of the beneficiary attesting to the beneficiary's work experience in the United States.

The key to determining the job qualifications specified in the labor certification is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties.

Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification, as filled in by the petitioner, reflects the following requirements:

Block 14:

Experience: Two years in the job offered or two years in the related occupation of apprentice butcher.

Block 15 ("Other Special Requirements") does not contain any information. To determine whether a beneficiary is eligible for a preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. 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, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Additionally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, CIS must examine "the language of the labor certification job requirements" in order to determine what the beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer exactly as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). CIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying the plain language of the [labor certification application form]." *Id.* at 834 (emphasis added). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse-engineering of the labor certification.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is June 5, 2001.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of meat cutter must have two years of experience as a meat cutter or two years as an apprentice butcher.

On appeal, counsel provides a copy of the petitioner's previously submitted letter stating that the petitioner employed the beneficiary from June 1995 through February 1999 and affidavits from two of the beneficiary's co-workers. Counsel claims that the director ignored the experience letter from the petitioner and that the beneficiary did meet the requirements of the labor certification, even though he worked while not in legal status under the INA.

The AAO is in agreement with counsel. The fact that the petitioner employed the beneficiary when he was not in legal status is not material to the case at hand. Throughout these proceedings, the petitioner has been clear that the beneficiary was not authorized to accept employment. Thus, there is no apparent inconsistency, as suggested by the director. To suggest that working without authorization is an inconsistency to an alien's employment claim ignores the fact that many aliens who intend to utilize section 245(i) of the Act do so due to the fact of their unauthorized employment. The petitioner has submitted a letter documenting the beneficiary's employment from June 1995 through February 1999 as an apprentice butcher. The AAO finds no reason to doubt the integrity of the letter submitted from the petitioner as evidence of the beneficiary's work experience. The letter is consistent with the beneficiary's employment history listed on the Form ETA 750B. If the director deems it necessary, he may request additional evidence or an investigation before the Form I-485, Application to Register Permanent Resident or Adjust Status, is adjudicated. According to the record of proceeding, the petitioner has established that the beneficiary met the requirements of the labor certification before the priority date of June 5, 2001.

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 sustained that burden.

ORDER: The appeal is sustained.