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



U.S. Citizenship
and Immigration
Services



26

FILE:

SRC 02 228 52968

Office: TEXAS SERVICE CENTER

Date:

001 11 2306

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:



PHOTOCOPY

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 approval was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a corporation that operates a wholesale-prepaid phone card business. It seeks to employ the beneficiary permanently in the United States as a marketing representative. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary has the requisite experience two years of experience as stated on the labor certification petition and that the petitioner had not established that it has a business with a physical presence in the United States. The director denied the petition accordingly.

On appeal, the counsel submits legal briefs 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 not available in the United States.

The regulation at 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.

The petitioner must demonstrate 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).

Here, the Form ETA 750 was accepted on April 19, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$51,950.00 per year. The Form ETA 750 states that the position requires two years experience.

¹ It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, and, copies of documentation concerning the petitioner and its finances.

Relative to the beneficiary's qualifications and personal information, counsel submitted copies of the following documents: a letter from Moontac Hardware Services (1996) LTD, Nairobi, Kenya stating that the beneficiary was employed there as a marketing representative from January 1997 to September 1999; and, a complete copy of the beneficiary's Kenyan passport.

The director requested on April 15, 2003, *inter alia*, the beneficiary's personal information including the biographic pages from the beneficiary's passport, and, the beneficiary's personal tax returns including W-2 Wage and Tax statements and 1099-MISC statements.

The director also requested the petitioner's business lease agreement.

In response to the above requests, counsel provided an explanatory letter and copies of the following documents: the petitioner's U.S. federal corporate tax returns for years 2000, 2001 and 2003; the petitioner's "Employers Quarterly Federal Tax Form" (Form-941) for tax year 2001; a commercial lease to Sky Telecom Inc., as lessee, with Tenant Acceptance Forms;² and, the beneficiary's passport information.

The director determined that that the petitioner had not established that it has a business with a physical presence in the United States, and, further, that the petitioner had not established that the beneficiary has the requisite experience two years of experience as stated on the labor certification petition.

On appeal counsel asserts that the director's decision to deny the petition is due to "misunderstandings, which are correctable."

A brief was filed in this matter on March 22, 2004. Counsel sets forth the two issues in the case according to the findings of the director, and he asserts additionally that there is an issue whether the petitioner has a valid telephone number. The petitioner's telephone number is not at issue in this case.

On appeal, counsel on March 22, 2004, submits copies of the following additional evidence:³ the petitioner's U.S. federal corporate tax returns for the years 2000, 2001 and 2002; a commercial lease agreement, commencing March 15, 2001, by [REDACTED] doing business as Sky Tel Communications as tenants for leasehold space (i.e. #101) in the Reedy Plaza Shopping Center (i.e. 10375 [sic] Colonial Drive), Orlando, Florida with a lease extension to April 30, 2007; a "Memorandum of Marriage" stating that [REDACTED] was married on January 19, 1993; a letter dated June 17, 2003, from the president of the petitioner stating that the petitioner utilized Sky Tel Communications' lease space in that shopping center; an annual business report to the Florida Secretary of State filed April 16, 2001, that the principal place of business of the petitioner was [REDACTED] letter from VN Property Management LLC

² According to counsel, Sky Telecom Inc. and the petitioner are commonly owned corporations and the petitioner's has occupied and shared Sky Telecom Inc. leased premises. The president of the petitioner provided a letter dated June 17, 2003 confirming the above statement. He stated that the petitioner occupied the lease premises in Orlando, Florida since May 11, 1999, and, that date was also the date the petitioner was incorporated.

³ Counsel's exhibit schedule in the brief does not coincide to the actual documentary exhibits submitted. The enumeration of the exhibits submitted with counsel's brief are listed as found in his submittal.

dated February 16, 2004, stating that the space leased by [REDACTED] is now designated #135 and submitting a floor plan; approximately 29 documents that are bills, business space occupational licenses, invoices, checking account transaction statements, utility and tax bills addressed from or to the petitioner at [REDACTED] for various dates in 2001, 2002 and 2003; 12 photocopies of photos of the office space at [REDACTED] a letter dated February 18, 2004, from the petitioner explaining that the petitioner's telephone number changed from that stated on the petition and labor certification; a computer printout from an Internet based information search engine stating address information for the petitioner dated March 17 7, 2004; vendor invoices to the petitioner at the [REDACTED] address in 2002 and 2003; telephone charges and numbers called and received from petitioner's business found in approximately ten invoices dated in 2002 and 2003; several classified ads for the petitioner; a profile of the company found at the Internet site [REDACTED] an application for fictitious name for Blue Sky Telecom filed with the Florida Secretary of State filed April 17, 2003; an inquiry listing information from the Florida Secretary of State web site stating that Sky Telecom is located at [REDACTED] with the owner indicated as the petitioner; the labor certification; the original letter from Moontac Hardware Services (1996) LTD, Nairobi, Kenya dated February 17, 2004; and, a print-out of a web page stating in pertinent part that the official language of the Republic of Kenya is English.

A second brief was filed in this matter on July 5, 2005. Counsel sets forth the two issues in the case according to the findings of the director and he asserts additionally, " ... The evidence established the Petitioner ... is able to pay the proffered wage." The petitioner's ability to pay the proffered wage is not at issue in this case.

On appeal, counsel on June 16, 2005, submits copies of the following additional evidence: the petitioner's U.S. federal corporate tax returns for the years 2000, 2001, 2002 and 2003; "distributor information samples;" an statement for a "Past Auctions" held at [REDACTED] on February 12, 2005; a computer printout of a "Newhopeforkids" organization web page with a thrift shop location address highlighted for [REDACTED] a "Memorandum of Marriage" stating that [REDACTED] was married on January 19, 1993; a computer printout from the Florida Secretary of State dated June 6, 2005 stating that the petitioner's "Principal Address" and "mailing address" is [REDACTED] with a filing receipt for the corporation's Articles of Incorporation as well as other documentary information; BellSouth and Sprint telephone companies telephone listings referencing the petitioner's telephone number and address as [REDACTED] a computer printout dated June 8, 2005, from an Internet based information search engine stating address information for the petitioner and "Sky Telecom;" a computer printout dated June 7, 2005, of the petitioner's web site pages; the labor certification; letters from Moontac Hardware Services (1996) LTD, Nairobi, Kenya dated June 24, 2002 and February 17, 2004, stating that the beneficiary was employed there as a marketing representative from January 1997 to September 1999; a computer printout of pages of the Republic of Kenya's website pages introduced to state that English is the official language of that country; and, various state sales tax licensing statements for various named corporations (one of the statements is a State of Georgia "Certificate of Registration" for "The Phone Card Warehouse," All American Stores Inc., Norcross Georgia).

From a review of the record of proceeding the director utilized the address and telephone number given by the petitioner that were incorrect or stale. Further, the fact that the business premises given for a business address was leased by a separate, although affiliated corporation, further prevented an identification of the petitioner's

⁴ According to the documents filed of record with the Florida Secretary of State, the petitioner's original stated business address was at [REDACTED] Also, the present address is noted as [REDACTED] on or about November 12, 2002.

business address in the State of Florida. By the evidence presented on appeal as above enumerated, we find that the petitioner has established that it has a business with a physical presence in the United States.

The second issue to be determined is whether or not the petitioner had established that the beneficiary has the requisite experience as stated on the labor certification petition.

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, which is April 19, 2001. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 Application for Alien Employment Certification, Form ETA-750A, item 14 sets forth the minimum education, training, and experience that an applicant must have for the position of marketing representative. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	<u>n/a</u>
	High School	<u>n/a</u>
	College	<u>n/a</u>
	College Degree Required	<u>n/a</u>
	Major Field of Study	<u>n/a</u>
	Training	
	No. Yrs.	<u>n/a</u>
	No. Mos.	<u>n/a</u>
	Type of Training	<u>n/a</u>
	Experience	
	No. Yrs.	<u>2</u>
	No. Mos.	<u>0</u>
	Related Occupation	
	Related Occupation (specify)	<u>n/a</u>
	No. Yrs.	<u>0</u>
	No. Mos.	<u>0</u>

In the instant case, the Application for Alien Employment Certification, Form ETA-750 B, item 15, set forth work experience that an applicant listed for the position of marketing representative.

15 (a.) WORK EXPERIENCE

NAME AND ADDRESS OF EMPLOYER

The Phonocard Warehouse [REDACTED]

NAME OF JOB

Marketing Representative

DATE STARTED

Month – Oct. Year - 1999

DATE LEFT

Month – Present [i.e. April 17, 2001]

KIND OF BUSINESS

Wholesales prepaid phone cards

DESCRIBE IN DETAIL DUTIES...

Research, evaluate market quotas through networking telemarketing & prospecting; provide customer support; primary contact for account infield order processing; follow up support and detention education & providing new information on products and services; attend weekly meetings, review/understand company, industry management/clients.

NO. OF HOURS PER WEEK

40

b. NAME AND ADDRESS OF EMPLOYER

Moontac Hardware Services (1996) LTD, [REDACTED]

Naiobi Kenya

NAME OF JOB

Marketing Representative

DATE STARTED

Month – Jan Year - 1997

DATE LEFT

Month – Sept Year 1999

KIND OF BUSINESS

Dealer General Hardware/Industrial spares

DESCRIBE IN DETAIL DUTIES...

Managed inbound & outbound customer sales, provided technical assistance & application support, inventory control. Prepared & evaluated marketing reports, tools and equipment during and after marketing; educated & provided information of new products and services manufactured or imported.

NO. OF HOURS PER WEEK

40

We find based upon the evidence submitted that the petitioner had established that the beneficiary has the requisite two years of experience as a Marketing Representative as stated on the labor certification petition. Two letters were provided by a prior employer, Moontac Hardware Services LTD of Naiobi, Kenya, that according to the regulation at 8 CFR § 204.5(1)(3)(ii) gave the name, address, and title of the Kenyan employer, and a description of the training received or the experience of the alien as a marketing representative.

By the evidence presented on appeal, we find that the petitioner has established that it has a business with a physical presence in the United States.

⁵ This is the address stated on the labor certification. The address stated on the I-140 petition was [REDACTED]. Neither address was accurate.

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.⁶

ORDER: The appeal is sustained.

⁶ The U.S. Department of Labor's (USDOL) regulation at 20 C.F.R. § 656.21, *et seq.*, regarding Applications for Alien Employment (Form ETA 750 A/B) required in pertinent part that that the petitioner (employer/applicants therein) submit "Two copies of the employment contract, each signed and dated by both the employer and the alien (not their agent) ...", that a duplicate contract be furnished to the alien, and, any other "agreement or conditions not specified " ...on the *Application for Alien Employment Certification* form" There is no such employment contract in the record of proceeding. It is advisable to have available the employment contract with a copy given to the beneficiary.