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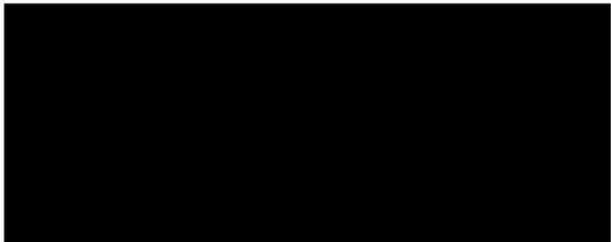
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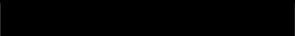
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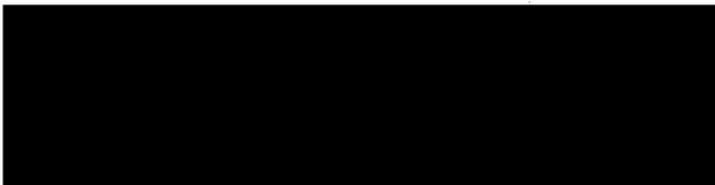
Petitioner:



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. After granting a motion to reconsider, the director affirmed the denial of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a carpenter. 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 training and experience as stated on the labor certification petition. The director denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.¹

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.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 30, 2001.

Citizenship and Immigration Services (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).

The certified Form ETA 750 in the instant case states that the position of carpenter requires two (2) years of training and two (2) years of experience in the job offered. On the Form ETA 750B, signed by the beneficiary on April 20, 2001, he set forth his work experience. He listed his experience as "Construction/Carpentry" at [REDACTED] in Greenwich from 1999 to 2000, and "Construction" at Unity Remodeling (Frank Sporol) from 1996 to June 1999. He provided no further information concerning his training and experience on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of 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.

The instant I-140 petition was submitted on May 14, 2003 without any evidence pertinent to the beneficiary's training and experience as required by the above regulation. The director issued a request for additional evidence (RFE) on July 22, 2004 requesting the petitioner to submit evidence to establish that the beneficiary possessed the required two years of training as a carpenter and two years of experience in the job offered as of April 30, 2001, the date of filing. The director's RFE described the evidentiary requirements of 8 C.F.R. § 204.5(g)(1). In response to the director's RFE, counsel submitted a letter from ██████████ M ██████████ an alleged former employer of the beneficiary, verifying that the beneficiary worked for him for about 10 years on landscape construction and planting of large trees and shrubs. On November 25, 2004, the director denied the petition finding that the letter failed to establish that the beneficiary possessed the required two years of training and two years of experience in carpentry, and also exposed inconsistencies in information represented on the Form ETA 750B.

On December 20, 2004 the petitioner filed a motion to reconsider through its counsel. Counsel submitted a supplemental letter from Mr. ██████████ and asserted that the letter specifies that the beneficiary received two years of training and had two years of experience as a carpenter. The director noted that the motion has failed to address the concern for the failure to disclose the purported employment with Mr. ██████████ and that absent historical documentation, such as cancelled checks, the director is not persuaded by the conflicting experience letters and information provided on the labor certification. On January 31, 2005 the director affirmed the decision of denial.

On appeal counsel submits a third letter from Mr. ██████████ to establish the beneficiary's training and experience with that employer. Counsel also submits documentation on a complaint filed by the beneficiary against his former employer with Connecticut's Wage and Workplace Standards Division and argues that this documentation clearly establishes an employer-employee relationship between the beneficiary and his former employer, thereby demonstrating his previous work experience as a carpenter.

The first issue in the instant case is whether the petitioner has established the beneficiary's requisite two years of training and two years of experience with Mr. ██████████ under the requirements set forth at 8 C.F.R. § 204.5(g)(1). The record of proceeding contains three letters from Mr. Socci regarding the requisite training and experience. The first letter was submitted in response to the director's RFE. Mr. ██████████'s first letter states in pertinent part that:

[The beneficiary] worked for me for a period of about 10 years. He started as a laborer and became a crew chief. He ran a crew of 4-5 and their duties were based on Landscape Construction and planting of large trees and shrubs.

This letter was not dated. It is on letterhead of ██████████ obviously not a company's letterhead, with a post office box address instead of a street address. ██████████ did not indicate his title in the business or the business' name, address, or type of business. The letter verifies that the beneficiary worked as a laborer and a

crew chief, and does not include a detail job description. Therefore, this letter cannot be considered as primary evidence as required by the regulation to establish that the beneficiary possessed two years of training and two years of experience as a carpenter prior to the priority date in the instant case.

The second letter was submitted on motion to reconsider. The second letter is on the same letterhead as the first one and is a faxed copy without an original signature or date. Again Mr. [REDACTED] did not indicate his title in the business or the business' name, address, or type of business. Mr. [REDACTED] second letter states in pertinent part that:

Although [the beneficiary] began his employment with me as a landscaper and mason, I began training him as a carpenter in May 1990 until June 1992. [The beneficiary] then worked as a carpenter for me from July 1992 until his employment concluded in November 1998.

The second letter does not include a specific description of the duties performed by the beneficiary and of the training received as required by the regulation. This letter also provides inconsistencies that cause doubt on the reliability of this letter. Mr. [REDACTED] stated in his first letter that the beneficiary started as a laborer and became a crew chief but in his second letter he said the beneficiary began as a landscaper and mason. Moreover, the contents of both letters are not supported by the Form ETA 750B. As the director correctly noted, the beneficiary did not list his ten years of experience with Mr. [REDACTED], instead the Form ETA 750B indicates that the beneficiary worked on a full time basis (40 hours a week) for Unity Remodeling from 1996 to 1999. The beneficiary signed the Form ETA 750B under a declaration under penalty of perjury that the information was true and correct. Counsel did not explain how the beneficiary could have had two full time jobs during the period from 1996 to 1998 if the letter of Mr. [REDACTED] had stated the truth.

Although the third letter from Mr. [REDACTED] submitted on appeal indicates his company's name and trade name, and provides more detailed information on the beneficiary's training and experience as a carpenter with Mr. [REDACTED], it has still not resolved the inconsistencies. The third letter says that the beneficiary worked on a part time basis from late 1995 to November 1998 to resolve the inconsistency about how the beneficiary could have two full time jobs from 1996 to 1998. However, the three letters are inconsistent. The first two letters said that the beneficiary worked for the employer for 10 years until 1998, but the third letter indicates that the beneficiary worked for 8 years beginning in 1990. Contrary to the statement in his second letter that the beneficiary began as a landscaper and mason, in his third letter Mr. [REDACTED] switched back to his first letter saying that the beneficiary initially started in landscape construction. Mr. [REDACTED] continues that his company trained the beneficiary in carpentry for a period of two years from 1990 to 1992 (per his second letter that should be from May 1990 to June 1992). However, Mr. [REDACTED] did not explain why his company hired the beneficiary in a position of a laborer, landscaper or mason and then immediately trained him in carpentry instead.

"Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. at 591-592. Because of these defects, the letters of Mr. [REDACTED] will be given little weight in these proceedings. These letters alone, without corroborating independent evidence, cannot be considered as primary regulatory-prescribed evidence to establish the beneficiary's training and experience. Therefore, the petitioner failed to

establish the beneficiary's requisite two years of training and two years of experience with Leonilde Socci Inc.

The second issue is whether the petitioner established the beneficiary's requisite two years of training and two years of experience with Unity Remodeling under the requirements set forth at 8 C.F.R. § 204.5(g)(1).

The regulation requires such evidence must be in the form of a letter from a current or former employer or trainer. The record does not contain any training and experience letter from Unity Remodeling. The petitioner did not establish the beneficiary's training and experience with Unity Remodeling in the form of letter from a former employer. On appeal counsel asserts that a dispute existed between the beneficiary and the former employer, Unity Remodeling pertinent to non-payment of wages, and therefore, the beneficiary was unable to obtain a letter of previous work experience from this former employer. Counsel also submits documentation about the complaint filed by the beneficiary against his former employer, Unity Remodeling, and contends that the documentation clearly establishes an employer-employee relationship between Unity Remodeling and the beneficiary, and thereby demonstrates his previous work experience as a carpenter. The regulation allows consideration of other documentation in [REDACTED] experience or training if the evidence in the form of letter from a current or former employer or trainer is unavailable. See 8 C.F.R. § 204.5(g)(1).

The record contains documentation regarding the dispute between the beneficiary and Unity Remodeling sent by the Connecticut Labor Department pursuant to counsel's request under the Freedom of Information Act. The record contains a copy of a paycheck issued by [REDACTED] to the beneficiary on October 21, 2000 with check number [REDACTED] for the pay period of 10/08/2000 – 10/21/2000, Paystub Detail for the pay period 09/24/2000 – 10/07/2000 and the beneficiary's job sheets for weeks ending September 25, 2000 and October 2, 2000. These items show that the beneficiary worked forty hours a week in carpentry and was paid by [REDACTED] at the level of \$15.00 per hour for a total of \$25,500 as of October 21, 2000 for that year. It is established that the beneficiary worked on full time basis in carpentry for Unity Remodeling for 42 weeks as of October 21, 2000. However, the record does not contain further evidence to demonstrate the beneficiary's additional 62 weeks of work experience as a carpenter and 2 years of training. Therefore, the petitioner failed to establish the beneficiary's requisite two years of training and two years of experience with Unity Remodeling.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

Beyond the decision of the director, the AAO will discuss whether the petitioner established its ability to pay the proffered wage under the regulation. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That provision further provides: "In a case where the prospective United States employer employs **100 or more** workers, the director **may** accept a

² The record contains the results of an investigation conducted by the Connecticut Department of Labor concluding that Connecticut Leasing Group, Inc. is the same entity as Unity Remodeling.

statement from a financial officer of the organization which establish the prospective employer's ability to pay the proffered wage." (Emphasis added.)

With the petition the petitioner submitted a letter from [REDACTED], Financial Controller of the petitioner to establish its ability to pay the proffered wage. The letter states impertinent part that:

[The petitioner] employs over one hundred (100) employees full time and grosses over \$15,000,000.00 in sales per year.

Established in 1986, [the petitioner] has a number of construction contracts. We do not foresee any difficulty paying the prevailing wage outlined by the US Department of Labor.

Given the record as a whole and the petitioner's history of filing petitions, we find that CIS need not exercise its discretion to accept the letter from [REDACTED]. CIS records indicate that the petitioner has filed seven (7) additional Form I-140 petitions with the Vermont Service Center in 2002, and the Vermont Service Center routinely approved these petitions.³ However, CIS should have also taken into account the petitioner's ability to pay the proffered wages in the context of its multiple sponsorships and wage obligations. The petitioner filed and obtained approval of all labor certifications, all with the priority date of April 30, 2001, and presumably on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ from 2001. If we examine only the salary requirements relating to the I-140 petitions, the petitioner would be need to establish that it has the ability to pay combined salaries of \$346,944 assuming all the other beneficiaries were offered the same salary as the instant beneficiary. Given that the number of immigrant petitions reflects an increase of almost ten percent of the petitioner's workforce, we cannot rely on a letter from the Financial Controller referencing the ability to pay a single unnamed beneficiary. The record does not contain any evidence to persuade CIS to rely on the credibility of the information contained in the Controller's statement such as personnel records or payroll records to proof the number of employees and salaries and wages paid, or financial information. We also note that the letter is dated August 19, 2002, almost nine months prior to the filing of the instant petition, and does not reference the beneficiary by name.

As we decline to rely on the controller's letter, any additional proceedings in this matter would need to address these issues and include the submission of regulatory-prescribed evidence of the petitioner's ability to pay the proffered wage into the record of proceeding.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

³ They were EAC-02-282-51500 filed on August 28, 2002 with the priority date of April 30, 2001 and approved on June 11, 2003; EAC-02-276-54432 filed on September 4, 2002 with the priority date of April 30, 2001 and approved on September 3, 2004; EAC-02-280-52955 filed on September 9, 2002 with the priority date of April 30, 2001 and approved on September 26, 2004; EAC-02-294-50718 filed on September 19, 2002 and approved on February 26, 2003; EAC-02-296-52252 filed on September 23, 2002 with the priority date of April 30, 2001 and approved on December 9, 2003; EAC-03-022-53692 filed on October 25, 2002 with the priority date of April 30, 2001 and approved on September 2, 2004; and EAC-03-077-50025 filed on December 2, 2002 with the priority date of April 30, 2001 and approved on October 23, 2003.

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ORDER: The appeal is dismissed.