



U.S. Citizenship
and Immigration
Services

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BU

FILE: [REDACTED]
WAC 04 144 51076

Office: CALIFORNIA SERVICE CENTER

Date: FEB 27 2007

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:

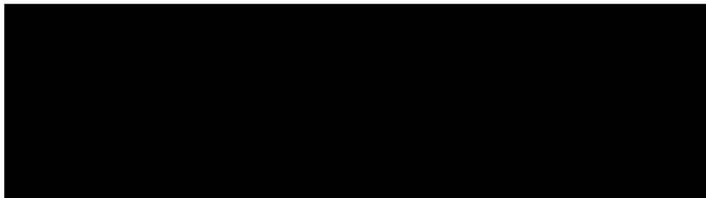
SELF-REPRESENTED

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

CC: [REDACTED]



DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates a factory. It is organized as corporation. It seeks to employ the beneficiary permanently in the United States as a machine operator. 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 meets the minimum requirements listed on the labor certification for the skilled worker classification requiring at least two years of training or experience, and, therefore, the beneficiary does not qualify for the position of machine operator. The director denied the petition accordingly.

The petitioner had selected check box under Part 2 of the petition I-140 that states "A skilled worker (requiring at least two years of specialized training or experience) or professional" According to the petition when filed, the company was established in 1991, and, it employed 45 individuals.

The record shows that the appeal is properly filed and 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 the decision. Further elaboration of the procedural history will be made only as necessary.

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 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 August 30, 2000.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and 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).

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).

Here, the Form ETA 750 was accepted on August 30, 2000. The proffered wage as stated on the Form ETA 750 is \$7.50 per hour (\$15,600.00 per year).² In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 13, 14 and 15, set forth the job description, minimum education, training, and experience that an applicant must have for the position of machine operator as follows:

13. Describe Fully the Job to be Performed (*Duties*)

Assembles pants, skirts, blouses and shirts for men and women, needing for this a tailor's knowledge.

14. State in detail the MINIMUM education, training, and experience for a worker to perform satisfactorily the job duties described in item 13:

Education (enter number of years)	
Grade School	6
High School	Blank
College	Blank
College Degree Required	Blank
Major Field of Study	Blank
Training	Blank
Experience	
Job Offered	
Number -Years / Mos.	Blank
Related Occupation	
Number -Years / Mos.	Blank
Related Occupation	
Specify	Blank
15. Other Special Requirements	Blank

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience the beneficiary stated the following on October 20, 2000:

15. a. WORK EXPERIENCE

NAME AND ADDRESS OF EMPLOYER



NAME OF JOB

Machine Operator

DATE STARTED

Month - 03 [March]Year - 95 [1995]

² It has been approximately seven 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."

DATE LEFT

Month – 07 [July] Year – 95 [1995]

KIND OF BUSINESS

Factory

DESCRIBE IN DETAIL DUTIES...

Assembles pants, skirts, blouses and shirts for men and women, needing for this a tailor's knowledge.

NO. OF HOURS PER WEEK

40

b. WORK EXPERIENCE

NAME AND ADDRESS OF EMPLOYER

[REDACTED]

NAME OF JOB

Machine Operator

DATE STARTED

Month – 11 [November] Year – 94 [1994]

DATE LEFT

Month – 12 [December] Year – 94 [1994]

KIND OF BUSINESS

Factory

DESCRIBE IN DETAIL DUTIES...

Assembles pants, skirts, blouses and shirts for men and women, needing for this a tailor's knowledge.

NO. OF HOURS PER WEEK

40

c. WORK EXPERIENCE

NAME AND ADDRESS OF EMPLOYER

[REDACTED]

NAME OF JOB

Machine Operator

DATE STARTED

Month – 08 [August] Year – 97 [1997]

DATE LEFT

Month – 18 [August] Year – 00 [2000]

KIND OF BUSINESS

Factory

DESCRIBE IN DETAIL DUTIES...

Assembles pants, skirts, blouses and shirts for men and women, needing for this a tailor's knowledge.

NO. OF HOURS PER WEEK

40

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8

C.F.R. § 204.5(g)(2), the director requested on December 16, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested, *inter alia*, evidence in the form of copies of annual reports, U.S. federal tax returns with signatures, or audited financial statements from the year 2000 to present.

Consistent with 8 C.F.R. § 204.5(l)(3) on that same date the director requested, *inter alia*, evidence in the form of copies of job verification(s) with name, address and title of the writer, from prior employer(s) with the beneficiary's job title, duties, dates of employment and number of hours worked. The regulation at 8 C.F.R. § 204.5(l)(3) provides 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 occupation designation. The minimum requirements for this classification are at least two years of training or experience.

* * *

(D) *Other Workers*. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

In response to the above, the petitioner submitted copies of the following documentation: a letter from the beneficiary dated March 10, 2005; four pay statements from [REDACTED] of Los Angeles, California for the pay periods November 8, 1994 through December 13, 1994; the beneficiary's Social Security Administration "Earnings Record Information" dated September 29, 2004; and the petitioner's U.S. federal tax returns Form 1120 for the years 2001 and 2002.

The director denied the petition on March 31, 2005, finding that the petitioner had not established that the beneficiary meets the minimum requirements listed on the labor certification for the skilled worker classification requiring at least two years of training or experience, and, therefore, the beneficiary does not qualify for the position of machine operator.

On appeal filed May 2, 2005, the petitioner in his legal statement filed in support of the appeal, states that he is filing an amended I-140 petition,³ this time, selecting in Part 2 of the I-140 petition "Any other worker" that he contends coincides with the labor certification that has no experience requirement. Further, the petitioner

³ The petition is only permitted to be amended up and until the director issues the decision in the matter, not on appeal.

contends that on the date of acceptance of the Form ETA 750 application, which was August 30, 2000, the beneficiary had accumulated three years of job experience with [REDACTED]

On appeal the petitioner submitted copies of the following documentation: a legal statement; a CIS Form G-28 for the beneficiary; a copy of the first page of the original I-140 petition; another I-40 petition dated October 29, 2003, marked "Amended" selecting check box "g." under Part 2 of the petition. That selection states "Any other worker (requiring less than two years of training or experience);" a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor with correspondence.

The Labor Certification's Minimum Requirements for the Job, "Job Experience"

In determining the respective jurisdictions of the U.S. Department of Labor and the CIS, one may turn to the entire body of recent court proceedings interpreting the interplay of the agencies and strictly confining the final determination made by the Department of Labor. See *Stewart Infra-Red Commissary, Etc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981); *Denver Tofu Company v. District Director, Etc.*, 525 F. Supp. 254 (D. Colo. 1981); and, *Joseph v. Landon*, 679 F.2d 113 (7th Cir. 1982).

These cases recognize the labor certification process and the authority of the Department of Labor in this process stem from section 212(a)(14) of the Act, 8 U.S.C. § 1182(a)(14). In labor certification proceedings, the Secretary of Labor's determination is limited to analysis of the relevant job market conditions and the effect, which the grant of a visa would have on the employment situation. The CIS, through the statutorily imposed requirement found in section 204 of the Act, 8 U.S.C. 1154, must investigate the facts in each case and, after consultation with the Department of Labor, determine if the material facts in the petition including the certification are true.

Although the advisory opinions of other Government agencies are given considerable weight, CIS has authority to make the final decision about a beneficiary's eligibility for occupational preference classification. The Department of Labor is responsible for decisions about the availability of United States workers and the effect of a prospective employee's employment on wages and working conditions. The Department of Labor's decisions concerning these factors, however, do not limit the CIS's authority regarding eligibility for occupational preference classification. Therefore, the issuance of a labor certification does not necessarily mean a visa petition will be approved.

However, although the director found that two years of experience were required under the labor certification (and not under the requirements of the job, machine operator) a plain reading of the labor certification discloses that there is no experience requirement.⁴

CIS is bound by the regulations and above-cited case law to require the petitioner and beneficiary to meet the requirements specified on the ETA-750.

Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor

⁴ Counsel further contends that since the beneficiary was employed by the petitioner since August 1997, and the priority date is August 30, 2000, the beneficiary has three years job experience as a machine operator who assembles pants, skirts, blouses and shirts for men and women should this be found to be a job requirement.

See 8 C.F.R. § 204.5 (1)(4).

We find that the labor certification does not require two years of experience, and, following the above regulation, the petitioner's job requirements must prevail in this matter that will allow the job to be considered under the unskilled also known as "other worker" category. However, as has already been discussed, the petitioner filed in the wrong category, meaning that to qualify under the skilled worker classification, the labor certification must require at a minimum, two years of job experience. Since the petition was filed in the wrong preference category, it cannot be approved. The instant decision is without prejudice to the refiling in the correct category, or the requesting of a different labor certification.

The Labor Certification's Minimum Requirements for the Job, a "Grade School Education"

Also, beyond the decision of the director, the subject Form ETA 750 Part A requires the completion of six years of grade school studies. There is no information in the record of proceeding concerning the beneficiary's primary school education. The petitioner asserts that if CIS would follow its intention to seek classification for an other worker category instead of skilled worker, the beneficiary would be qualified under that other worker category. However, under either category, the occupation according to the certified alien employment certificate still requires six years of grade school studies. The ETA 750 Part B, Item 11 that requests education attainments is blank on the labor certification. Proof is required that the beneficiary has completed of six years of grade school studies. The evidence submitted does not demonstrate credibly that the beneficiary had the requisite six years of grade school education required by the labor certification. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

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).

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.

ORDER: The appeal is dismissed.