



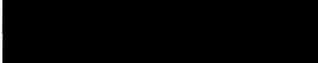
U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: **MAY 25 2007**

EAC-03-134-53318

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:



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. Wieman, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a bakery and café. It seeks to employ the beneficiary permanently in the United States as a baker. 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 denied the petition on the basis that the petition does not qualify as a skilled worker because the proffered position only required one year of experience, that the petitioner failed to establish that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and that the petitioner also failed to establish that the beneficiary is qualified to perform the duties of the proffered position. The AAO affirmed the director's decision, noting that the letter from [REDACTED] fails to conform to the regulatory requirements because the letter does not describe the beneficiary's training or experience received at that business.

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).

In the instant case, 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 baker. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|--------------------|--------|
| 14. | Experience | |
| | Job Offered | 1 year |
| | Related Occupation | Blank |

The duties are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

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.

On motion, counsel submits a new experience letter from [REDACTED] the owner of [REDACTED] verifying that the beneficiary "was employed by [REDACTED] as a Baker Prep from June 1996 through April 1998" with a description of the duties the beneficiary performed and training received. Thus the motion qualifies as a motion to reopen according to 8 C.F.R. § 103.5(a)(2). The new experience letter appears to meet the regulatory requirements at 8 C.F.R. § 204.5(g)(1), however, the petitioner still failed to demonstrate with this letter that the beneficiary possessed the requisite one year experience as set forth on the Form ETA

750A because the proffered position requires one year experience in the job offered, i.e. as a baker, but the new experience letter verifies that the beneficiary worked as a baker prep. Further, the petitioner also still failed to establish that the proffered position qualifies under the skilled worker category as the petition seeks.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also 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 February 5, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour (\$39,291.20 per year). On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of April 1998. The AAO concurred that the petition was properly denied for the petitioner's failure to establish its continuing ability to pay the proffered wage beginning on the priority date.

On motion, counsel does not address this ground of denial but submits the beneficiary's W-2 form for 2005 as "proof of current salary." The W-2 form shows that the petitioner paid the beneficiary \$37,600 in 2005 which is \$1,691.20 less than the proffered wage that year. The petitioner failed to demonstrate that it paid the full proffered wage to the beneficiary in 2005, and thus failed to establish its ability to pay the proffered wage in 2005 through the examination of wages paid to the beneficiary. Furthermore, even if the petitioner had established its ability to pay the full proffered wage in 2005, the petitioner would fail to establish its continuing ability to pay the proffered wage beginning on the priority date. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage *beginning* on the priority date. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is February 5, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in 2005, when counsel claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2001 through 2004. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. The record does not contain any new evidence to establish the petitioner's ability to pay the proffered wage in 2001 through 2004. Therefore, the petitioner failed to establish its continuing ability to pay the proffered wage from the year of the priority date to 2005.

Counsel's assertions on motion cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day

the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. The evidence submitted on motion does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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 not met that burden.

ORDER: The motion is granted. The previous decision of the AAO, dated December 21, 2005, is affirmed. The petition is denied.