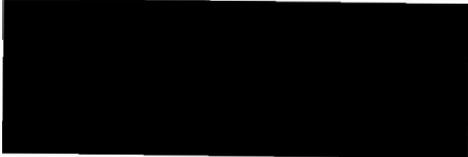




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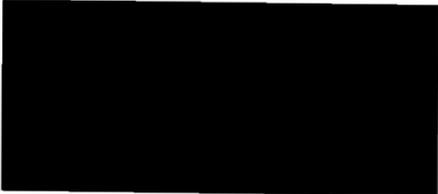
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File: WAC-04-209-51688 Office: CALIFORNIA SERVICE CENTER Date: **OCT 18 2007**

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. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The appeal will be dismissed.

The petitioner operates a wholesale diamond business, and seeks to employ the beneficiary permanently in the United States as a jeweler, precious stone and metal worker (“Diamond Selector”). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director’s June 10, 2006 decision, the petition was denied based on the petitioner’s failure to demonstrate that the beneficiary had the experience required by the certified ETA 750 as of the priority date.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).<sup>1</sup>

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

The petitioner has filed to obtain an immigrant visa and classify the beneficiary as a skilled worker. 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 establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

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

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<sup>1</sup> 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).

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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on December 24, 2001. The proffered wage as stated on Form ETA 750 is \$3,000 per month for an annual salary of \$36,000 per year. The labor certification was approved on June 12, 2004, and the petitioner filed the I-140 Petition on the beneficiary's behalf on July 21, 2004. The petitioner listed the following information on the I-140 Petition: established: March 19, 1991; gross annual income: \$3,699,184; net annual income: \$74,537; and current number of employees: 2.

On February 24, 2005, the director issued a Request for Evidence ("RFE") for the petitioner to provide: evidence of its ability to pay for the years 2001 through 2003; Quarterly Wage Reports filed with the California Employment Development Department; copies of the petitioner's current and valid business licenses for city, county, state, and federal; and to submit evidence that the beneficiary had the required two years of prior experience obtained before the priority date.

On May 27, 2005, the director issued a second RFE and requested that the petitioner provide evidence of the petitioner's ability to pay, including signed federal tax returns for the years 2001, 2002, and 2003, as well as 2004; Forms W-3 payroll summaries for 2004; an expanded description of the beneficiary's prior work experience, along with additional proof of the beneficiary's prior work experience. The petitioner responded.

On August 27, 2005, the director issued a third RFE for the petitioner to submit evidence that the business was currently registered as an active corporation; to submit business licenses; a seller's permit; and to submit photographs of the business premises. The petitioner responded.

On April 17, 2006, the director issued a Notice of Intent to Deny ("NOID"). The petitioner had submitted a letter, which initially listed the beneficiary before the text of the letter in the reference line, but the letter referred to a separate individual in the text of the letter. Based on the conflict in names, it was not clear that the letter referred to the beneficiary's prior experience, and was not instead drafted for the individual referenced in the letter's text. The director had requested additional documentation related to the beneficiary's prior foreign experience to clarify this issue. Further, the U.S. Consulate conducted an overseas investigation of the beneficiary's claimed experience. The manager of Niraj Enterprise, where the beneficiary had worked, confirmed that the beneficiary had been employed with Niraj for the last two or three years. As the manager confirmed this experience in February 2006, the beneficiary would not have obtained the required experience by the time of the priority date, December 24, 2001. The beneficiary, accordingly, would not have met the certified ETA 750 experience requirements. The petitioner responded to this issue presented in the NOID.

On June 10, 2006, the director denied the petition on the basis that the petitioner failed to overcome the findings of the NOID and establish that the beneficiary had the required experience. The petitioner appealed and the matter is now before the AAO.

In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien 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 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red*

*Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981). 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).

On the Form ETA 750A, the "job offer" position description provides:

Selects diamonds according to type, shape and size, for use in cutting tools and ring mountings; studies grade, quality, color (skin) and physical structure of rough or finished diamonds. Sorts stones according to quality and type, using magnifying glass or loupe. Determines size of stone, using measuring gauge or sizing plate, and sorts diamonds of same size into containers and verifies weight.

The job offered listed that the position required prior experience of: 2 years in the job offered, Diamond Selector. The petitioner did not list any other special requirements.

On the Form ETA 750B, the beneficiary listed his relevant experience as: Niraj Enterprise, Mumbai, India, from November 1998 to the present (date of signature, November 30, 2001), position: Diamond Selector.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3), which provides:

(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.

To document the beneficiary's experience, the petitioner submitted the following letter:

Letter from [REDACTED] Partner, Niraj Enterprises, undated;

Position title: **Diamond Selector**;

Dates of employment: "We hereby inform that [REDACTED] has been working in this company since November 1, 1998 through the date of the application. December 24, 2001 and up to the present time;"

Description of duties: "assortment as per client's order."

As the letter referenced [REDACTED]'s" employment, and not the beneficiary, the director sought additional evidence to document the beneficiary's prior experience, and that the beneficiary did begin his employment with Niraj in 1998 as stated on his Form ETA 750.

The petitioner submitted additional evidence:

Letter from [REDACTED] Niraj Enterprises, July 25, 2005;

Position title: Diamond Selector;

Dates of employment: "We hereby inform that [REDACTED] has been working in this company since November 1, 1998 through the date of the application. December 24, 2001 and up to the present time;"

Description of duties: "assortment as per client's order. Selects diamonds according to type shape and size use in cutting tools and ring mountings, studies grade quality, color (skin) and physical structure of rough or diamonds."

The petitioner additionally submitted a copy of an employment contract:

Signed by [REDACTED] Partner, Niraj Enterprises, and by the beneficiary, dated November 1, 1998;

Position title: [REDACTED]

Dates of employment: November 1998;

Description of duties: "assortment as per client's order. Selects diamonds according to type shape and size use in cutting tools and ring mountings, studies grade quality, color (skin) and physical structure of rough or diamonds."

The petitioner also submitted a contract renewing the beneficiary's services:

Signed by [REDACTED] Partner, Niraj Enterprises, and by the beneficiary, dated October 30, 2003;

Position title: Diamond Selector;

Dates of employment: November 1, 1998 to present. "December 24, 2001 and up to the present time;"

Description of duties: "assortment as per client's order. Selects diamonds according to type shape and size use in cutting tools and ring mountings, studies grade quality, color (skin) and physical structure of rough or diamonds."

As provided in the NOID, the overseas investigation confirmed that the beneficiary had worked for the employer abroad. However, the manager stated that the beneficiary was employed for two or three years prior to 2006. Accordingly, if the beneficiary only gained the experience in 2003, the experience would have been obtained after the priority date of December 24, 2001. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The priority date in the present matter is December 24, 2001. 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 as noted above, February 13, 2003. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In response to the NOID, the petitioner provided the following letter:

Letter from [REDACTED] General Manager, Niraj Enterprises, dated April 27, 2006, which stated:

On February 2006 an overseas investigation group came to our shop to verify employment, and since the owner [REDACTED] was not there I had to take care of them myself, the investigation was in regards to [the beneficiary] and in which I misunderstood and thought that they were referring to one of our other employees which name sound alike, also my English in [sic] not fluent and so I misunderstood and gave wrong answers about length of employments [sic], marital status, and other information. I am very sorry that this lead to a problem, therefore I apologize.

The director then issued his decision, which provided that the petitioner failed to overcome the conflict in the results of the overseas investigation, and the experience that the beneficiary listed on Form ETA 750. 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. 582, 591-592 (BIA 1988). As the petitioner failed to resolve conflicts in the evidence, the director found that the petitioner had not demonstrated that the beneficiary had the required two years of experience before the priority date as required.

On appeal, counsel provides that the manager at [REDACTED] explained the conflict in the overseas investigation, that he had confused the beneficiary with another individual, and that his English was not that good. The petitioner submitted additional verifications in support, which were all notarized on August 1, 2006:

Notarized statement from [REDACTED] Niraj Enterprises on letterhead, undated;  
"This is to certify that [the beneficiary] is working with us as an Assorter. We have paid him salary and Bonus for the period 22.07.1998 to 31.03.1999 amounting to RS.15,000 (Rupees Fifteen Thousand only) in cash."

Notarized statement from [REDACTED] Niraj Enterprises on letterhead, undated;  
"This is to certify that [the beneficiary] is working with us as an Assorter. We have paid him salary and Bonus for the period 01.04.1999 to 31.03.2000 amounting to RS.17,500 (Rupees Seventeen Thousand Five Hundred only) in cash."

Notarized statement from [REDACTED] Niraj Enterprises on letterhead, undated;  
"This is to certify that [the beneficiary] is working with us as an Assorter. We have paid him salary and Bonus for the period 01.04.2000 to 31.03.2001 amounting to RS.20,000 (Rupees Twenty Thousand only) in cash."

Notarized statement from [REDACTED] Niraj Enterprises on letterhead, undated;  
"This is to certify that [the beneficiary] is working with us as an Assorter. We have paid him salary and Bonus for the period 01.04.2001 to 31.03.2002 amounting to RS.22,500 (Rupees Twenty Two Thousand Five Hundred only) in cash."

Notarized statement from [REDACTED] Niraj Enterprises on letterhead, undated;  
"This is to certify that [the beneficiary] is working with us as an Assorter. We have paid him salary and Bonus for the period 01.04.2002 to 31.03.2003 amounting to RS.35,500 (Rupees Thirty Five Thousand Five Hundred only) in cash."

Notarized statement from [REDACTED] Enterprises on letterhead, undated;  
“This is to certify that [the beneficiary] is working with us as an Assorter. We have paid him salary and Bonus for the period 01.04.2003 to 31.03.2004 amounting to RS.37,500 (Rupees Thirty Seven Thousand Five Hundred only) in cash.”

Notarized statement from [REDACTED] Enterprises on letterhead, undated;  
“This is to certify that [the beneficiary] is working with us as an Assorter. We have paid him salary and Bonus for the period 01.04.2004 to 31.03.2005 amounting to RS.40,000 (Rupees Forty Thousand only) in cash.”

Notarized statement from [REDACTED] Enterprises on letterhead, undated;  
“This is to certify that [the beneficiary] is working with us as an Assorter. We have paid him salary and Bonus for the period 01.04.2005 to 31.03.2006 amounting to RS.42,000 (Rupees Forty Two Thousand only) in cash.”

The petitioner additionally submitted a Memorandum of Understanding dated August 29, 2003, which provided the terms and conditions of employment, including pay terms for the beneficiary, and bonus terms. The document was signed by both [REDACTED] Enterprises, and by the beneficiary, and witnessed by two additional parties. The document was additionally notarized and on paper, which read “India non Judicial, one hundred rupees.” The petitioner also submitted an earlier Memorandum of Understanding dated July 22, 1998, which provided the pay terms for the beneficiary, and bonus terms. The document was signed by both [REDACTED], Niraj Enterprises, and by the beneficiary, and witnessed. The document was similarly notarized and on paper, which read “India non Judicial, one hundred rupees.”

CIS records do reflect that the petitioner has also filed for and employed an individual with the same surname as the beneficiary and the first name of [REDACTED] and that the petitioner filed an H-1B petition on his behalf for the dates of June 9, 2003 to May 18, 2006. Records additionally reflect that H-1B petition’s approval was revoked.

We are not convinced by the documentation provided. While the general manager’s explanation for the confusion is plausible, the initial investigation combined with the revocation of the second petition’s approval filed on behalf of a second beneficiary, leads us to question the new evidence provided. CIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The general manager references that he confused the beneficiary’s marital status with that of the other employee. Documentation to show that the present beneficiary was or was not married, or when he or the other employee got married might provide more compelling evidence. Additionally, since there is a question of when the beneficiary was employed as compared to the other individual with a similar name, evidence to show when the other individual was employed, which could be compared against the beneficiary’s work record might be more compelling.

Further, we note that the Form ETA 750 job description reads exactly the same as the letters provided to document the beneficiary’s prior work experience, which were obtained before the labor certification was drafted or filed. Essentially, it would appear that the job duties were tailored or written to match the beneficiary’s prior work experience. 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. 582, 591-592 (BIA 1988).

Based on the foregoing, the petitioner has failed to establish that the beneficiary met the requirements of the certified ETA 750. Accordingly, the petition will be denied. 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.