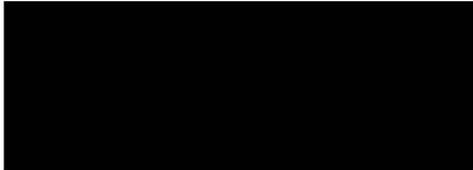


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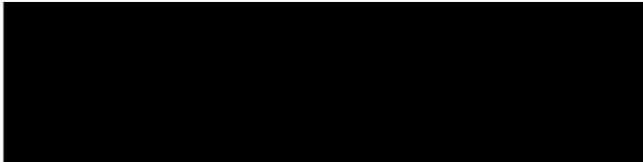
FILE: 
WAC 03 095 52562

Office: CALIFORNIA SERVICE CENTER Date:

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 employment based immigrant visa petition was initially approved by the Director, California Service Center. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. The director served the petitioner with notice of intent to revoke the approval of the preference visa petition. The director subsequently revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further review and investigation.

The petitioner is a landscaping contractor. It seeks to employ the beneficiary permanently in the United States as an irrigation technician. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor.

The record indicates that the Immigrant Petition for Alien Worker (I-140) was filed on January 31, 2003. It was initially approved on May 18, 2003. Following an interview at the district office for the beneficiary's adjustment of status to permanent resident application and referral to the service center director, the director concluded that the I-140 was approved in error and issued a notice of intent to revoke the petition on October 21, 2005. The director determined that the petitioner's claims as to the beneficiary's past employment experience appeared to be not credible. The petitioner was afforded thirty days to offer evidence or argument in opposition to the proposed revocation. The petition's approval was subsequently revoked on December 14, 2005, pursuant to section 205 of the Act, 8 U.S.C. § 1155.

On notice of appeal, the petitioner, through counsel, submits additional documentation in the form of Wage and Tax Statements (W-2s) and asserts that they should be determinative in establishing the beneficiary's requisite work experience.

Section 205 of the Act, states: "[t]he Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3) further 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.

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 25, 2001.¹ The ETA 750B, signed by the beneficiary on April 18, 2001, indicates that he worked for the petitioner "DLC Resources Inc. from April 1996 until March 1998 as an irrigation technician. It does not indicate how many hours per week or which months that he worked. The ETA 750B also reflects that the beneficiary claims that he worked for [REDACTED] as an irrigation technician, 40 hours per week, from February 1999 until the present (4/18/2001).

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must have. In this matter, item 14 states that two years of work experience in the job offered of irrigation technician or two years in a related landscaping position was sufficient to qualify an applicant for the certified job. In support of the beneficiary's two years of experience, two letters are contained in the record. Both are from "[REDACTED]" the president of "[REDACTED]". The first letter is dated August 15, 2001, and affirms that the beneficiary has been employed as an irrigation technician from February 1999 until the present (Aug. 15, 2001), working full-time, 40 hours per week. The letter also describes his duties. The other letter, dated April 24, 2003, states that the beneficiary was employed full-time as an irrigation technician from February 1999 until June 2002, working 40 hours per week. Additionally, the petitioner provided copies of W-2s from 1999 indicating that [REDACTED] paid the beneficiary \$19,396.45 and that the petitioner paid the beneficiary \$2,679 in that year. In 1998, a W-2 shows reflects that the petitioner paid the beneficiary \$19,096.17. A 2000 W-2 shows that [REDACTED] paid the beneficiary \$27,415.94 and a 2001 W-2 reflects that [REDACTED] paid the beneficiary \$29,318.04. Copies of the beneficiary's individual tax returns accompany the W-2s, however the social security number used on the tax returns is different than the one used on the W-2s.

There appears to be no first-hand record of the officer's notes or summation of the beneficiary's testimony at the district office interview on June 21, 2005 for adjustment of status. Therefore, a substantive review is impossible and this case would have been remanded in any case. According to the director, the alien's testimony at the district office on June 21, 2005, about his employment history with the petitioner, [REDACTED] contained contradictions in that he completely omitted mention of any other employer and stated that he had worked for the same firm, DLC Resources, Inc. with the same duties since May 1997.

¹ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

Apparently, this caused the district officer to deny the adjustment application and refer the underlying employment visa to the director for revocation. The director advised the petitioner of this in his notice of intent to revoke and afforded him thirty days to provide evidence in opposition to the proposed revocation.

In response, the petitioner, through counsel, provided the beneficiary's affidavit explaining that if he did misspeak at the adjustment interview that it was inadvertent and was due to his nervousness. The beneficiary states in his affidavit that he worked for [REDACTED] as an irrigation technician from April 1996 until March 1998. He then worked for [REDACTED] as an irrigation technician from February 1999 until approximately May 2001. Thereafter, the beneficiary states, he returned to work for [REDACTED] to the present (November 16, 2005). The beneficiary states that language difficulty may have contributed to the difficulty.

In his decision to revoke the petition's approval, the director notes that the beneficiary had stated that his employment ended with [REDACTED] in approximately May 2001, while [REDACTED] letter stated that his employment did not end until June 2002. The director concluded that the petitioner had not carried its burden to credibly establish that the beneficiary had acquired the requisite experience.

On appeal, counsel provides copies of a 1996 W-2 from the petitioner showing it paid \$292.50 to the beneficiary, a copy of a 1997 W-2 from the petitioner reflecting that it paid \$8,776.13 to the beneficiary, and a copy of the 1998 W-2 from the petitioner as mentioned above, along with 2002 W-2s from the petitioner and from [REDACTED] using the same business address, 2003 and 2004 W-2s from the petitioner to the beneficiary whose social security number appears to be different from the earlier one and the number used on his individual tax returns.

Counsel asserts that faulty memories as to one's employment history should not be the cause to revoke a visa's approval based on a perceived lack of the qualifying employment experience. It is noted in this case, that the beneficiary's recollection as to his employment with [REDACTED] reflects another inconsistency. On the G-325B biographic questionnaire submitted with his application for permanent residence status, which he signed on January 25, 2003, he claims that he was still working for [REDACTED].

The case will be remanded to include a further investigation as to the beneficiary's requisite two *full* years of employment experience as an irrigation technician or two years in a related landscaping job obtained as of the priority date of April 25, 2001. At the outset, it is suggested that this review include questions as to any business relationship that [REDACTED] and the petitioner may have or an explanation why their business address is the same on the beneficiary's 2002 W-2s. It is also recommended that the incorporation or organizational documents related to those businesses be examined and that the actual contemporaneous Internal Revenue Service (IRS) filing of any of the beneficiary's W-2s be obtained. It would also be instructive to find out why, if the beneficiary has a tax identification number, it isn't being used on the W-2s.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation consistent with this opinion and request any additional evidence from the petitioner pursuant to the requirements of section 203(b)(3)(A)(i) of the Act. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon

receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.