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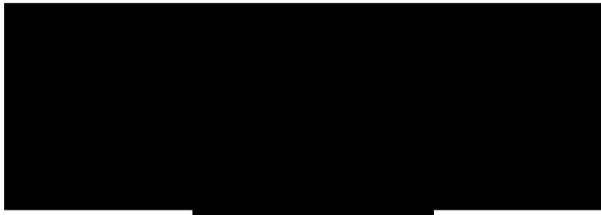
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



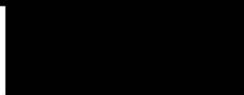
U.S. Citizenship
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Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: **AUG 13 2008**

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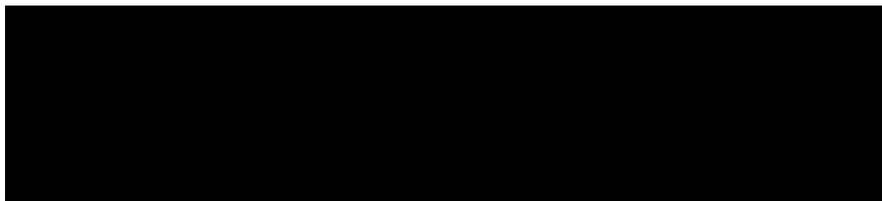
Petitioner:

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner is an international trader and supplier of chemicals and hi-tech components. It seeks to employ the beneficiary permanently in the United States as a buyer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL), accompanied the petition.

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.

Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, hold baccalaureate degrees and are members of the professions.

The preference visa petition was filed with Citizenship and Immigration Services (CIS) on May 15, 2004, with a priority date of April 30, 2001.

As the record of proceeding was incomplete at the time the petitioner filed the I-140 petition, the director issued a request for evidence (RFE) to the petitioner on November 15, 2004. Counsel claimed to have never received the RFE and requested that it be re-issued on February 10, 2005, June 14, 2005, and September 8, 2005. It should be noted, however, that the RFE was mailed to the petitioner, in care of counsel, at the address given by counsel on Form G-28, Notice of Entry of Appearance as Attorney or Representative, and on the letterhead from all of counsel's correspondence – [REDACTED] New York, NY 10016. The RFE was not returned to CIS as undeliverable.

On October 18, 2005, as the acting director had not received a response to the RFE from the petitioner or counsel, she considered the petition to have been abandoned pursuant to 8 C.F.R. § 103.2(b)(13) and denied the petition accordingly.

On November 16, 2005, counsel filed a motion to reopen and reconsider. On October 25, 2006, the acting director granted the motion to reopen and reconsider and requested additional evidence to support the petition. The petitioner was allotted twelve weeks within which to respond. As the director did not receive a response to the RFE, the director affirmed the previous decision and denied the visa petition.

On April 25, 2007, counsel filed an appeal of the acting director's decision. On the appeal form counsel indicated that a brief or additional evidence would be submitted within 30 days. The record does not contain the brief or any additional evidence. Subsequently, this office sent a fax to counsel on June 3, 2008, inquiring after the promised brief or evidence. Counsel did not respond to that fax.

The regulation at 8 C.F.R. § 103.2(b)(15) provides that:

A denial due to abandonment *may not be appealed* but an applicant or petitioner may file a motion to reopen under § 103.5. Withdrawal or denial due to abandonment does not preclude the filing of a new application or petition with a new fee. However, the priority or processing

date of a withdrawn or abandoned application or petition may not be applied to a later application [or] petition. Withdrawal or denial due to abandonment shall not itself affect the new proceeding; but the facts and circumstances surrounding the prior application or petition shall otherwise be material to the new application or petition. (Emphasis added.)

In this matter, the director's decision to deny the petition was based on the lack of response from the petitioner. As such the denial was based on the abandonment of the petition. As set forth above, a denial due to abandonment may not be appealed. Therefore, this office has no jurisdiction over the instant appeal and the appeal must be rejected.

It should be noted that even if the AAO did not reject the appeal due to abandonment, the record lacks evidence that must be considered before adjudication of the visa petition can be completed.

The first issue is whether or not the beneficiary meets the education requirements of the labor certification. The regulation at 8 C.F.R. § 204.5(l)(3) states, 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.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(B) states the following:

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 regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

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 April 30, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, 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 buyer. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	-
	High School	-
	College	4
	College Degree Required	Bachelor
	Major Field of Study	Economics/Int'l Trade

The applicant must also have three years of experience in the job offered, the duties of which 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 reflects that there are no other special requirements for the proffered position.

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 11, eliciting information about schools, colleges and universities attended, including trade or vocational training, the beneficiary represented that he attended Newport University, U.S.A. from 1991 to 1992 and received a Bachelor of Arts in Business Administration. The beneficiary also stated that he attended Tel-Aviv University, in Tel-Aviv, Israel from 1993 to 1996¹ and was awarded a Bachelor of Arts degree in Economics.² However, the petitioner has not submitted any evidence of the beneficiary's schooling or degrees. In addition, CIS records indicate that a prior visa petition was filed on behalf of the beneficiary as a rabbi. The record of proceeding does not include any evidence of the beneficiary's education as a rabbi. A beneficiary may be considered inadmissible under Section 212(a)(6)(C)(i) of the Act which states:

[Misrepresentation] IN GENERAL. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other

¹ On Form ETA 750B, it is noted that the beneficiary claims to have been employed as a buyer for the petitioner in the United States during this time. It is unclear how the beneficiary attended college in Israel while simultaneously working full-time for the petitioner as a buyer in the United States. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

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.

* * *

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.

² It is noted that white-out has been used on ETA 750B under field of study and degrees or certificates received.

documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The beneficiary also set forth his employment experience on Form ETA-750B. As signed by the beneficiary on April 27, 2001 under penalty of perjury, the beneficiary claims to have been employed by ██████████ of Companies, LTD. in Bat-Yam, Israel as an import/export director from 1987 through December 1992, and as a buyer for the petitioner in Roslyn Heights, NY from January 1993 through the present (April 27, 2001). The beneficiary did not indicate any additional employment experience on the Form ETA-750B.³

The petitioner submitted a letter, dated January 5, 1993, from ██████████ of Companies, LTD. as evidence of the beneficiary's work experience. That letter stated that ██████████ of Companies, LTD. had employed the beneficiary as an import and export director from September 1987 through December 1992.⁴ However, a review of public records at http://appsext8.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_INFORMATION?p (accessed on June 10, 2008) indicates that the petitioner was incorporated on March 11, 1992 and that the beneficiary was the Chairman or Chief Executive Officer (CEO) at that time. The petitioner has not explained why the beneficiary would be demoted to a buyer from the position of chairman or CEO. The petitioner has also failed to explain the inconsistencies in the dates of the beneficiary's claimed experience with the petitioner and his job title and duties. The beneficiary indicated he began employment with the petitioner in January 1993 as a buyer; however, the NY corporation records database indicates the beneficiary began employment with the petitioner in March 1992 as Chairman/CEO. The petitioner has not further explained how the beneficiary was employed full-time by the petitioner and ██████████ of Companies, LTD. from March 1992 through December 1992. Finally, the petitioner has not explained how the beneficiary attended school in the United States from 1991 through 1992, attended school in Israel from 1993 through 1996, and worked full-time in Israel from 1987 through 1992 and in the United States from 1993 onward. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

If the petitioner wishes to pursue this case further, the petitioner must address the above stated inconsistencies and establish the beneficiary's qualifications for the proffered position.

ORDER: The appeal is rejected.

³ The AAO notes that the beneficiary claimed on a prior Form G-325, Biographic Information, located in the record that he served as a rabbi in Israel from February 6, 1989 through October 5, 1990. The prior G-325 does not list the beneficiary's employment with ██████████. The prior G-325 also states a United States address for the beneficiary from October 5, 1990 through the date the beneficiary signed the G-325 (June 17, 1991). The petitioner has not resolved the inconsistencies in the record regarding the beneficiary's education and prior work experience. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

⁴ This employment coincides with the beneficiary's employment as a rabbi in Israel from February 1989 through October 1990.