

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

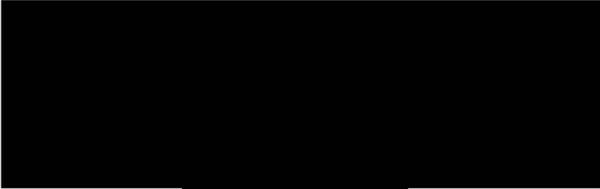
**PUBLIC COPY**

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



U.S. Citizenship  
and Immigration  
Services

B6



FILE:



SRC 06 162 54189

Office: TEXAS SERVICE CENTER

Date: NOV 03 2008

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is a construction/paving firm. It seeks to employ the beneficiary permanently in the United States as a mason. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director concluded that the petitioner had failed to demonstrate that the beneficiary possessed the requisite qualifying work experience as of the visa priority date, and denied the petition accordingly.

On appeal, the petitioner, through current counsel, maintains that the petitioner has demonstrated that the beneficiary's work experience meets the requirements of the approved labor certification.

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).

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 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 30, 2001.<sup>1</sup>

---

<sup>1</sup> 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

A previous Immigrant Petition for Alien Worker (I-140) was filed by this petitioner for the beneficiary on April 16, 2005 (EAC 05 141 50830) using the same labor certification. Following the submission of evidence related to the beneficiary's qualifying prior work experience, including employment verification letters and copies of the beneficiary's personal tax returns from 1999-2001, the director denied the petition on October 21, 2005. She determined that although the petitioner demonstrated that the beneficiary had acquired approximately 16 months of experience in the job offered, it had not established that the beneficiary had two years of full-time experience in the certified job as of the priority date of April 30, 2001. A notice of appeal was filed on December 6, 2005, by former counsel, asserting that the beneficiary's prior work experience had been misrepresented by the beneficiary's former representative, [REDACTED]. The appeal was found untimely by the director and accepted by the director as a motion to reopen and reconsider pursuant to 8 C.F.R. § 103.5(a)(2) and (3). The director determined that the beneficiary's prior work experience represented approximately 18 months but did not overcome the grounds for denial of the petition. This decision was not appealed.

Instead, the petitioner, through former counsel, filed another petitions on April 28, 2006. Part 5 of the petition indicates that the petitioner was established in 1992 and currently employs eight workers.

Item 14 of the Form ETA 750A describes the education, training and experience that an applicant for the certified position must have. In this matter, item 14 states that no formal education is required, but an applicant must have two years of work experience in the job offered as a mason.

Item 15 of the Form ETA 750B instructs the declarant to "list all jobs held during past three (3) years. Also, list any other jobs related to the occupation for which the alien is seeking certification as indicated in item 9." The Form ETA 750B was signed by the beneficiary on April 26, 2001. There is one job designated in item 15. It indicates that the beneficiary claims to have worked as a self-employed mason from 1999 to the present. Hours worked per week is not completed. The job duties are described as repairing walkways, erecting stone walls, patios, steps, etc.

Relevant to the employment experience gained in the certified position of a mason, with the petition and in response to the director's request for evidence issued on January 11, 2007, the petitioner, through former counsel, provided the following:

- 1) An affidavit from the beneficiary describing his employment in the United States, his employment with [REDACTED] who he describes as cousins of the petitioner's owners, and his involvement with an individual named [REDACTED] who prepared various immigration forms and advised him as to the amounts to declare on his 1999, 2000, and 2001 individual tax returns. Another affidavit, dated March 22, 2007, from the beneficiary describes his employment in 2000 and 2001 in which he states that around February 25, 2000, he went out on his own because he was informed that the [REDACTED] firm would not have a steady need for his services. He states that from that time to around December 1, 2000, he performed a little work for [REDACTED] and some work for other contractors like the petitioner, individual homeowners, and BMR Masonry. He stopped for a couple of months in the winter and resumed again at the end of February 2001.

---

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.

- 2) A copy of an August 30, 2004, transcript of proceedings from a Connecticut Superior Court affirming a stipulated disposition between the state disciplinary counsel's office and [REDACTED] in which the parties agreed that [REDACTED] may provide translation services but not practice law without a license or provide individual advice to customers as to immigration matters.
- 3) A letter, dated November 28, 2005, from the Connecticut disciplinary counsel's office to the chief state's attorney's office describing [REDACTED] unauthorized activities and mentioning that the beneficiary's former counsel had filed a complaint dated November 21, 2005 alleging that she had suborned perjury and the filing of false income taxes.
- 4) A letter, dated November 9, 2005, from [REDACTED], claiming that the beneficiary performed work for [REDACTED], but that the company is closed. She states that the beneficiary worked "as needed, but steadily, an average of 40 or more hours a week during three periods, July-November 1998, March-November 1999, and March-November 2000." She adds because the company is closed, there are limited records for the 1998-2000 period, but has given some records to the beneficiary that relate to jobs that he performed. Copies of six invoices issued in 2000 by [REDACTED] and some photographs accompany this letter. None mention the beneficiary. An additional supplemental letter, dated January 31, 2007, from [REDACTED]. She states that her best guess of the beneficiary's employment with her firm was from July 7-November 27, 1998, March 1-November 26, 1999 and March 6-December 1, 2000.
- 5) A letter, dated March 7, 2005, from homeowner [REDACTED] who states that the beneficiary performed "various masonry job at my private home" from "approximately" June 1999 until July 2000. No other detail is provided.
- 6) A letter, dated March 7, 2005, from homeowner [REDACTED], who states that the beneficiary did work at his home from May 1999 through September 2000. No other detail is provided.
- 7) A letter, dated February 27, 2006, from [REDACTED], the account manager from BMR Masonry LLC, who states that the beneficiary did masonry work for his firm in March and April 2001. Mr. [REDACTED] states that the beneficiary worked more than 40 hours a week and was paid as a subcontractor.
- 8) A letter, dated February 6, 2006, from a Brazilian company "Candelustres," signed by the owner [REDACTED], stating that the beneficiary worked as a mason for him during the period "between June of 1996 and November 1997."

The director denied the petition on April 20, 2007. She observed that the newest [REDACTED] letter indicates that the beneficiary has approximately one year and ten months of experience. The director ultimately determined that from 1999 to April 30, 2001, the petitioner had established that the beneficiary had nineteen and one half months of work experience, but as noted in the previous decision denying the petitioner's I-140 filed on behalf of the same beneficiary, the amounts claimed on the beneficiary's individual tax returns showing business income of \$2,500 in 1999, \$3,500 in 2000, and \$4,000 in 2001 did not corroborate that the beneficiary's employment was full-time during those respective years. The director also declined to accept the employment verification letter submitted from [REDACTED] as it was not claimed by the beneficiary on the Form ETA 750B.

On appeal, current counsel asserts that the director did not apply a preponderance of the evidence standard of proof to the documentation provided, but rather seemed to apply a higher "clear and convincing" or "beyond a reasonable doubt" standard that is inappropriate in the instant case, where the beneficiary's case was initially misrepresented by [REDACTED]. We do not concur. Nothing in the record of proceeding contains any type of notice from the director or any other CIS representative that would have misled counsel into his assertion that CIS requires "convincing" or "persuading" beyond what legal authority guides the agency in statute, regulatory

interpretation, precedent case law and administrative law and procedure. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

Counsel asserts that [redacted] letter establishes that the beneficiary had one year and ten months of work experience and that together with the letter from BMR Masonry LLC, which added another two months, the beneficiary's work experience equated to approximately twenty-five months and satisfied the requirements of the labor certification.

Counsel's assertions are not persuasive. While the BMR Masonry LLC letter is credible, it is noted that the [redacted] and [redacted] letters did not specify specific dates or hours worked by the beneficiary. Additionally, the [redacted] letter failed to specify hours worked or whether the employment was part-time or full-time, and, as noted by the director, had not been claimed as previous work experience by the beneficiary on the Form ETA 750B.<sup>2</sup> Further the [redacted] endorsement of the beneficiary's work experience is inconsistent with other evidence. Ms. [redacted]'s recollection of the beneficiary's employment is based on her "best guess," but her 2007 letter somehow provides exact dates. Moreover, her description of the beneficiary's employment for her company in 2000, which is stated to be from March 6 to December 1, 2000, and which she had previously stated to be "as needed, but steadily, an average of 40 or more hours a week," is not consistent with the beneficiary's own description of his employment as set forth in his March 22, 2007 affidavit, where he claimed that around February 25, 2000, he went out on his own because he was told by [redacted] that he would *not* be needed steadily and thereafter "did a little work for [redacted] (Emphasis added). 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Counsel also contends that the director should not have considered the individual tax returns filed by the beneficiary because [redacted] told him to understate his income in order to minimize his tax liability. We do not find this to be persuasive. As in the Form ETA 750B, the tax returns were signed under penalty of perjury. Moreover, CIS has no authority to amend the Form ETA 750B to reflect the beneficiary's additional foreign employment as requested by counsel on appeal. The Form ETA Part(s) A and B were submitted to and certified by the DOL pursuant to their authority under 8 U.S.C. § 1182(a)(5)(A)(i), including any amendments thereto.<sup>3</sup> It

---

<sup>2</sup>See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976)(decided on other grounds; court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.)

<sup>3</sup> DOL policy bars amendments of the approved labor certification except to correct mistakes made by the certifying officers, e.g., in spelling of the employer or alien's name. The only amendment to the substantive elements that may be made by a certifying officer is where the amendment was approved prior to the issuance of certification. *See* DOL Field Memorandum No. 47-92, dated May 7, 1992, published in 57 Fed. Reg. 31219 (1992). Additionally, 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 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

is also noted that there is no remedy available for a petitioner who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on its behalf. *See* 8 C.F.R. § 292.1. The AAO only considers complaints based upon ineffective assistance against accredited representatives. *Cf. Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988)(requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel).

Based upon our review of the record, we conclude that the director had sufficient cause to find that the petitioner failed to meet its burden of proof in demonstrating that the beneficiary had obtained two years of full-time qualifying experience as a mason as of the priority date of April 30, 2001.

The petitioner has not established that the beneficiary possessed the requisite qualifying work experience as of 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 appeal is dismissed.