U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

B-6

[redacted]

FILE: EAC-02-119-52500 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
Administrative Appeals Office

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

The petitioner is a nursery and landscaper. It seeks to employ the beneficiary permanently in the United States as an assistant foreman of the propagation department. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director denied the petition because he determined that the petitioner failed to establish the beneficiary's qualifications or that the petitioner had the ability to pay the proffered wage.

The first issue to be discussed in this case is whether or not the beneficiary is qualified for the proffered position. The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states the following concerning evidence which would establish a beneficiary's qualifications:

> 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.

In evaluating the beneficiary's qualifications, Citizenship & Immigration Services (CIS), formerly the Service or INS, 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).

In this case, the Form ETA 750 Part A specifies that the beneficiary have four (4) years experience as an assistant foreman. On the ETA 750 Part B the beneficiary indicates that he has been employed by the petitioner since 1993. The petitioner submitted a letter from Romel Flores, Human Resources Director for the petitioner, who asserts that the beneficiary was hired in 1993 and was promoted to Assistant Foreman in 1996.

There are certain safeguards built within the regulatory scheme of governing the alien labor certification process to facilitate that petitioning employers do not treat alien workers more favorably than a U.S. worker. Pursuant to 20 C.F.R. § 656.21(b)(5), a petitioning employer is required to document that its requirements for the proffered position are the minimum necessary for performance of the job and that it has not hired or that it is not feasible for the petitioner to hire workers with less training and/or experience. The regulation at 20 C.F.R. § 656.21(b)(5) addresses the situation of the petitioning employer requiring more stringent qualifications of a U.S. worker than it requires of the alien; the petitioner is not allowed to treat the beneficiary alien more favorably than it would a U.S. worker. *See ERF Inc., d/b/a Bayside Motor Inn,* 1989 INA 105 (Feb. 14, 1990).

A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *See Matter of Katigbak,* 14 INA Dec. 45, 49 (Comm. 1971). Thus, the petitioner must illustrate that the beneficiary alien met the requirements for the position at the time it filed the alien labor certification application. Additionally, the beneficiary alien must have obtained his or her qualifying

employment experience with an employer different than the petitioning employer. *See Salad Bowl Restaurant t/a Ayhan Brothers Food, Inc.*, 1990 INA 200 (May 23, 1991).

In this case, the petitioner indicates that the only experience the beneficiary has acquired was with the petitioner, having been employed there since 1993. Further, the employment verification letter indicates that the beneficiary was promoted to assistant foreman in 1996, but has subsequently been promoted to supervisor. Therefore, the question arises as to whether the requirement for an assistant foreman is still valid.

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. *See* 20 C.F.R. § 656.30(c)(2). It seems that the petitioner intends to employ the beneficiary as supervisor, which is outside the terms of the Form ETA 750. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (change of area of intended employment).

The petitioner has not established that the beneficiary was qualified for the proffered position at the time the petition was filed. Therefore, the petitioner has not overcome this portion of the director's objections.

The next issue to be addressed in these proceedings is whether the petitioner has had the ability to pay the proffered wage from the priority date and continuing.

The regulations at 8 C.F.R. § 204.5(g)(2) state 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

As noted above, eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the petition's priority date is March 7, 2001. The beneficiary's salary as stated on the labor certification is $647.60 per week or $36,675.20 per annum.

On appeal, counsel submitted the petitioner's audited financial report as of June 30, 2001. The report indicated that the petitioner had assets of $1,818,782, liabilities of $1,47,522, and current total assets of $348,260. The petitioner could pay the proffered wage of $36,675.20 from this amount.[1]

In this case, the petitioner has submitted the financial audit of the petitioning entity indicating the petitioner's ability to pay the proffered wage. The record does not contain any derogatory evidence which would persuade the Service to doubt the credibility of the information contained in the audit from the financial officer or the supporting documentation. Therefore, the petitioner has demonstrated its financial ability to pay the beneficiary's salary as of the petition's filing date and has overcome this portion of the director's objections.

A review of the record reveals that the beneficiary was not qualified for the proffered position at the time of the filing of the petition. For this reason the petition may not be approved.

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[1] CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage as they represent funds that are likely to become available during the year and have been balanced against the petitioner's current liabilities.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.