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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JAN 07 2008

EAC 04 145 52124

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Other Worker Pursuant to § 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, Chief
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 an asbestos demolition business. It seeks to employ the beneficiary permanently in the United States as an asbestos removal worker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary met the requirements of the labor certification as of the priority date of April 30, 2001. The director denied the petition accordingly.

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

As set forth in the director's original November 16, 2004, decision, the single issue in this case is whether or not the beneficiary met the experience requirements of the labor certification as of the priority date of April 30, 2001.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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) 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.
>
> *(D) Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

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. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 30, 2001.

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).

Citizenship and Immigration Services (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).

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 requires that the beneficiary must possess six years of grade school and one month of experience in the job offered as an asbestos removal worker. Block 15 requires that the beneficiary take a specialized training course to obtain and renew certification and license from the City of New York and Environmental Protection Agency. The beneficiary must also have an asbestos handling certificate.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of asbestos removal worker must have six years of grade school, one month of experience in the job offered as an asbestos removal worker, must take a specialized training course to obtain and renew certification and license from the City of New York and Environmental Protection Agency, and must have an asbestos handling certificate.

In the instant case, counsel provided a copy of the beneficiary's New York City asbestos certificate with an expiration date of December 19, 2003, a copy of the beneficiary's Department of Labor asbestos handling certificate, a document entitled *Local 12A Annuity Statement* for the beneficiary documenting his work history for dates beginning September 1, 2001 through November 9, 2003,[1] and a letter, dated May 26, 2004, from ABC Construction Contracting, Inc., signed by [redacted]c, president, which states:

> This letter is to verify that [the beneficiary] worked as an asbestos handler removing hazardous waste materials for this company during the months of February 2001 until March 2001.

The director determined that the evidence did not establish that the beneficiary met the one month experience requirement or had taken a specialized training course to obtain and renew his asbestos handling license and denied the visa petition on November 16, 2004.

On appeal, counsel submits a second letter from ABC Construction Contracting, Inc., signed by [redacted]c, president, stating that the beneficiary "was employed by us as an asbestos handler during the period from February 2001 through November 2002."

On appeal, counsel states:

- The date in the beneficiary's New York City Asbestos certificate is the date that the certificate was issued. The New York City renews the asbestos certificate every year and it only shows the date that the certificate was issued.
- The beneficiary does possesses [sic] the one month experience required. Due to a human error in the original application for Labor Certification form ETA750B the incorrect date

[1] The work history does not show any employment by ABC Construction Contracting, Inc. until May 1, 2002, and there is no work history shown before the priority date of April 30, 2001. In addition, no evidence was submitted that reflects specialized training by the beneficiary in order to obtain and renew his asbestos handling certification.

> of employment was entered. When the requested evidence was submitted, the company ABC Construction only follow the instructions to produce a letter of employment with one of experience without checking the records to give a correct account as to the date of employment. Now ABC Construction Contracting is issuing a second letter with the correct date of employment.

The regulations at 8 C.F.R. § 204.5(l)(3)(ii)(A) which state:

> 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.

While the letter from ABC Construction Contracting, Inc. meets the requirements of the above regulation, the beneficiary's work experience is not corroborated by the *Local 12A Annuity Statement,* and the letter does not indicate that the position with ABC Construction Contracting, Inc. was a full time position. In addition, the petitioner has not submitted any evidence that the beneficiary took any specialized training in order to obtain and renew his certification with the City of New York and the Environmental Protection Agency or the Department of Labor as an asbestos handler. Furthermore, the State of New York Department of Labor's *General Information for Asbestos Certificate Applicants* states:

> *Certificate Expiration and Renewal.* Your asbestos certificate will expire each year on the last day of the month in which you were born.
>
> * * *
>
> Prior to renewing an asbestos certificate, you are required to take the annual refresher course designated for the type of certificate(s) you hold and wish to renew; such refresher training must have been taken no more than one year from the date your (1) application is submitted or (2) certificate expires.

In the instant case, the beneficiary's birthday is December 19, 1979. Therefore, the beneficiary's asbestos certificate would have expired on December 31, 2003. Since the visa petition was filed with CIS on April 10, 2004, the beneficiary's certificate had expired. Again, there is no evidence in the record of proceeding that the beneficiary took a refresher course to renew his certificate.[2]

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[2] It is noted that the beneficiary appears to have obtained his asbestos handling certificate under a social security number that was issued to another person and that the petitioner (along with other businesses) hired the beneficiary as an asbestos handler while he used this other person's social security number. Misuse of another individual's social security number is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with Social Security number fraud and misuse:

• **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to

...willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. *See* the website at http://ssa-custhelp.ssa.gov (accessed on August 27, 2007).

• **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone
...knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

Title 26 USC § 7206(1) and (2) states:

> *Fraud and false statements*
>
> Any person who -
>
> (1) Declaration under penalties of perjury
>
> Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;
>
> (2) Aid or assistance
>
> Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; . . .
>
> - Shall be imprisoned not more than 3 years
> - Or fined not more than $250,000 for individuals ($500,000 for corporations)
> - Or both, together with cost of prosecution

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal does not overcome the decision of the director.

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.

If an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. 8 U.S.C.A. § 1324a(a)(2). Employers who violate the Immigration Reform and Control Act of 1986 (IRCA) are punished by civil fines, § 1324a(e)(4)(A), and may be subject to criminal prosecution, § 1324a(f)(1). IRCA also makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents. § 1324c(a). It thus prohibits aliens from using or attempting to use any forged, counterfeit, altered, or falsely made document or any document lawfully issued to or with respect to a person other than the possessor for purposes of obtaining employment in the United States. §§ 1324c(a)(1)-(3). Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. 18 U.S.C. § 1546(b).

Therefore, if the beneficiary did misuse a social security number and should file a Form I-485, Application to Register Permanent Residence or Adjust Status, he 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 documentation, or admission into the United States or other benefit provided under this Act is inadmissible.