



**U.S. Citizenship
and Immigration
Services**

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FILE:

EAC 05 018 54202

Office: VERMONT SERVICE CENTER

Date: **APR 03 2009**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom
Acting 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 a shoe repair company. It seeks to employ the beneficiary permanently in the United States as a shoe repairman. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not demonstrated that the beneficiary had the qualifications stated on the Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. 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 the decision. Further elaboration of the procedural history will be made only as necessary.

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.

In evaluating the beneficiary's qualifications, U.S. Citizenship and Immigration Services (USCIS) must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. USCIS 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on the Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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

In the instant case, the Form ETA 750 states that the position requires two years of experience in the job offered. On the Form ETA 750B the beneficiary indicated that he had been employed as a shoe repair/maker by [REDACTED] in Istanbul, Turkey, from April 1996 until May 1999.

With the petition, the petitioner submitted an English translation of a letter of recommendation which appears to be from the beneficiary's previous employer in Istanbul, Turkey. The letter states that the beneficiary was employed as a "shoemaker" from April 17, 1996 to May 5, 1999. The director found that the petitioner failed to submit the original foreign language version of the letter. The director also noted that the statement of experience fails to specifically describe the duties performed by the beneficiary.

On appeal, counsel states that the original letter was submitted with the I-140 petition and submitted again in response to a request for evidence from the director. Counsel also provided a copy of the original foreign language letter with the instant appeal. However, counsel did not provide a more specific statement of experience in response to the request for evidence or on appeal. Instead, counsel simply submitted the same translated letter.

Upon review, counsel's assertions are not persuasive.

The experience letter submitted by the petitioner fails to comply with the regulation at 8 C.F.R. §204.5(l)(3)(ii)(A) in that it fails to provide any description of the beneficiary's experience. Further, the English translation fails to meet the requirements for translated documents pursuant to 8 C.F.R. §103.2(b)(3) which states: "Any document containing a foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." Specifically, there is no certification from the translator stating that the translation is complete and accurate, and that the translator is competent to translate from the foreign language into English.

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 foreign language letter and English translation submitted by the petitioner are insufficient to establish the beneficiary's

qualifications for the proffered position. The petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position with two years of experience in the job offered.

Further, beyond the decision of the director, there is an inconsistency in the information provided by the petitioner which calls into question the petitioner's ability to pay the proffered wage. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

In this matter, the petitioner is a sole proprietor. In addition to the instant I-140 petition, the petitioner submitted an earlier I-140 petition on behalf of the same beneficiary (Receipt No. EAC 02 283 54064). In support of the instant I-140 petition, the petitioner submitted a copy of his Form 1040, U.S. Individual Income Tax Return, for 2002. The 2002 Form 1040 states that the petitioner's adjusted gross income for 2002 was \$73,760.00, which is well in excess of the proffered wage. The petitioner also submitted a copy of his 2002 Form 1040 with the previous petition. However, that tax return lists the petitioner's adjusted gross income as \$9,635.00. The petitioner has failed to explain why it provided two versions of its income tax return for 2002. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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."

Given the inconsistency in the income tax returns submitted by the petitioner, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.