



U.S. Citizenship
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[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 19 2005
WAC 03 156 54419

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 approval was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner¹ is a prototype and production-machining corporation. It seeks to employ the beneficiary permanently in the United States as a machinist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition approval accordingly.

On appeal, the counsel submits additional evidence.

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 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(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, 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 February 14, 2001. The proffered wage as stated on the Form ETA 750 is \$20.17 per hour (\$41,953.60 per year). The Form ETA 750 states that the position requires two years experience.

The issue to be discussed in this case is whether or not the petitioner had established that the beneficiary has the requisite experience as stated on the labor certification petition. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, U.S. Citizenship & Immigration Services (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

¹ The company changed its name. It is called [REDACTED] Inc, d/b/a [REDACTED]

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, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of a machinist.

In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education
 - Grade School 6
 - High School 4
 - College n/a²
 - College Degree Required n/a
 - Major Field of Study n/a
 - Training n/a
 - Experience
 - Job Offered
 - Years/Mos. 2 Yrs.
 - Related Occupation
 - Years/Mos. n/a

In the instant case, the Application for Alien Employment Certification, Form ETA-750B, item 15, set forth work experience that an applicant listed for the position of machinist.

15. WORK EXPERIENCE

a. NAME AND ADDRESS OF EMPLOYER

EL GENDY MACHINERY & ENGINEERING CO

NAME OF JOB

Machinist [sic]

DATE STARTED

Month - July Year - 1994

DATE LEFT

Month - August Year - 1998

KIND OF BUSINESS

Machinery & Engineering

DESCRIBE IN DETAIL DUTIES...

Set up and operate various machine tools fits and assemble parts, design tooling and parts, etc.

NO. OF HOURS PER WEEK

50

² Not applicable (n/a).

According to the remainder of Form ETA 750 Part B, 15, the alien was unemployed from August 1998 to the date of the declaration of the form, January 22, 2001.

Because the Director determined the evidence submitted with the petition was insufficient to demonstrate that, on the priority date the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification, the Director requested pertinent evidence of the beneficiary's qualifications consistent with 8 CFR § 204.5(I)(3)(ii). On August 1, 2003, the Director requested, among other information, information of the beneficiary's employment status since January 22, 2001, and W-2 Wage and Tax Statements if the petitioner ever employed the beneficiary. The director also requested employment verification from the beneficiary's prior employer on letterhead stating the beneficiary's title, duties, dates of employment experience and number of hours worked each week.

In response, the petitioner submitted documents evidencing its name change to [REDACTED] Inc, d/b/a [REDACTED] its articles of incorporation under the name [REDACTED] Inc.; its U.S. federal tax returns showing salary and wages paid of approximately \$100,000.00 for 2001 and 2002; a job verification letter from [REDACTED] and Sons stating that the beneficiary worked for that company from July 20, 1994 to August 4, 1998 as a machinist; a letter from the beneficiary's sister stating that she has been supporting her brother since September 6, 1998; a letter of correction from the beneficiary stating that his arrival date in the United States was September 6, 1998, not January 1998, with a copy of his I-94 Arrival/Departure record confirming that September 6, 1998 was the arrival date, as well as other documents.

The Director requested an investigation be made on January 29, 2004 of the beneficiary's work experience by the United States Embassy in Cairo, Egypt. On February 11, 2004, the investigation was concluded and it found that the beneficiary did work for [REDACTED] and Sons without "insurance" but that any other indicia such as workers' attendance logs were not in existence.

In a second request for evidence on March 11, 2004, the director requested pay statements, tax documents, social security records and other indicia that the beneficiary worked for the "Engineering Company for Mechanical Machine Work - [REDACTED] and Sons." In response the petitioner submitted a letter dated March 24, 2004, from the Egyptian employer that stated the beneficiary was paid in cash, and there was no payments to social security, as it does not exist in Egypt.

On July 15, 2004 the director denied the petition, finding that the evidence submitted did not demonstrate that the beneficiary had the minimum requirements at the time the request for Alien Employment Application certification was filed. Specifically, the director found that there was no corroborating evidence to show that the beneficiary was employed at Engineering Company for Mechanical Machine Work - [REDACTED] and Sons.

On appeal, counsel submits a brief and additional evidence. Counsel summarized the above record and asserted that the director's decision was unreasonable and unfair. Counsel introduces additional documents in support of the petition.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to

be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal. Nevertheless we will review the affidavits presented since, in this case, the narrowed issue is the corroboration of both the beneficiary's and Egyptian employer's verification of the requisite work experience as a machinist.

An affidavit submitted from [REDACTED] Printing Shop states that it did business with [REDACTED] and Sons. It stated that the beneficiary was "one of the employees responsible for work done in ... [the] company, and he "implemented what was done for us" between July 20, 1994 and August 14, 1998.

There is also a copy of a bill to "Mr [REDACTED] - [REDACTED] & SONS" dated March 25, 1997 from the [REDACTED] Mechanical Workshop marked "paid" for shutoff valves.

There is also submitted an affidavit dated July 28, 2004 from an Egyptian company that states:

TECHNICAL WORKSHOP FOR MACHINERY certifies that it did business with [REDACTED] & SONS COMPANY. [REDACTED] worked as a machinist, a draftsman, and a designer of work related to machinery. He was the person who performed the work to be done for us in the said company.

We find all three document submissions credible evidence of the beneficiary's work experience as a machinist during the period July 1994 to August 1998.

The AAO concurs with the director's determination that up to the date of these submissions there was no corroborating evidence that established that the beneficiary has two years of experience as a machinist. There is no pay stub contained in the record of proceeding that establishes that the beneficiary was employed for two years in an employment capacity with duties similar to the duties of the proffered position.

The consulate investigator's spoke to the manager of the Engineering Company for Mechanical Machine Work - [REDACTED] and Sons and, he said that the beneficiary worked there from the period stated in the certified Alien Employment Application. The above two affidavits and the paid invoice corroborate the beneficiary's employment and work experience.

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 established that the beneficiary has the requisite experience as stated on the labor certification petition. The petitioner has met that burden.

ORDER: The petition is sustained.