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U.S. Department of Homeland Security  
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Washington, DC 20529



**U.S. Citizenship  
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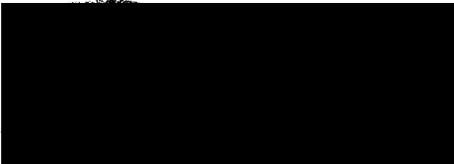
Office: NEBRASKA SERVICE CENTER

Date: FEB 01 2005

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:



**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, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a construction and remodeling company. It seeks to employ the beneficiary permanently in the United States as a tile setter. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition and denied the petition accordingly.

On appeal, counsel submits a brief.

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 or seasonal nature, for which qualified workers are unavailable in the United States.

The regulation at 8 C.F.R. § 204.5(1)(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.

Eligibility in this matter hinges on the petitioner demonstrating 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). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on April 30, 2001. The labor certification states that the position requires "two years of experience in Job Offered, and proof of legal authorization to work in the USA."

With the petition, counsel submitted no evidence that the beneficiary had the legal right to work in the United States on the priority date. Because the evidence submitted did not demonstrate that the beneficiary has the requisite right to work in the United States, the Nebraska Service Center, on June 4, 2003, requested pertinent evidence. In response counsel returned the Request for Evidence with the following handwritten notation pertinent to the requirement that the potential employee have the legal right to work:

This is standard recruitment language required by state ESD & USDOL. Labor Certification is a test of the market to see if there are U.S. workers. This language does not apply to the alien. See pages 69, 70, 71[.] Otherwise no alien will be able to receive a labor certification, even if their [sic] on H1B status. H1B status is authorization to work with one employer, not all employers.

Counsel provided no citation to show that the language pertinent to the requirement of the legal right to work in the United States is required by state law to appear on the Form ETA 750.

Counsel provided two pages of instructions pertinent to advertising a position for which a labor certification is sought. Those instructions state, "The following statement may be included (optional) in the ad and posting: 'Must have proof of legal authority to work in the United States.'"

[Emphasis in the original.]

Those instructions do not require the language used in the Form ETA 750 in the instant case pertinent to the requirement of the right to work in the United States. Further, those instructions pertain to an advertisement for a U.S. employee to fill the proffered position. They do not pertain to completing the Form ETA 750.

On September 15, 2003, the director denied the petition, finding that the evidence submitted did not demonstrate that the beneficiary had the requisite legal right to work in the United States as of the priority date.

On appeal, counsel again asserts that

The requirement listed in Part 15 of the labor certification (legal authorization to work in the USA) is a standard recruitment language [sic] required by the WA State ESD and USDOL," and "The labor certification is a test of the market in order to determine if there are US qualified workers to perform the job. THIS REQUIREMENT DO [sic] NOT APPLY TO THE ALIEN.

[Emphasis in the original.]

Counsel further stated, "The petitioner filed on the record the Application Filing Instructions for the Labor certification for the alien pages 69, 70, [and] 71. These instructions specify that the 'FOLLOWING STATEMENT MAY BE INCLUDED OPTIONAL [sic] ON THE AD AND POSTING') [sic]."

[Emphasis in the original.]

Finally, counsel stated:

These instructions corroborate the counsel's representations regarding the fact that the labor certification is a test of the market and that the legal authority to work is optional, otherwise

no alien will be able to receive a labor certification even if they have an H1B of [sic] TN status since this status gives the authorization to work with one employer and not all employers.

As was noted above, the instructions counsel submitted do not require the language pertinent to the right to work in the United States and, in any event, do not pertain to completing the Form ETA 750. Further, counsel has provided no citation to support the assertion that the language pertinent to the right to work in the United States is required by any state law to appear on the Form ETA 750. Further, a search of 20 C.F.R. § 656.20 General filing instructions [for labor certification] fails to demonstrate that the language is required.

In any event and, again, contrary to counsel's assertion, the requirements on the Form ETA 750 do, in fact, apply to the beneficiary, as is made clear by 8 C.F.R. § 204.5(l)(3)(ii)(B), set out above. The petitioner is obliged to demonstrate, pursuant to that section, that the beneficiary has all of the requirements listed on the Form ETA 750 as requisite for employment in the proffered position.

The petitioner was not obliged to state on the Form ETA 750 that the right to work in the United States is a prerequisite for the proffered position. Having so stated, though, the petitioner is obliged to show that the beneficiary is qualified for the proffered position pursuant to the terms of the labor certification. 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 Form ETA 750 states that the right to work in the United States is a requirement of the proffered position. To be eligible for approval, a beneficiary must have all the necessary training, education, and experience specified on the labor certification as of the date that the request for labor certification was accepted for processing by the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The record contains no indication that the beneficiary had the right to work in the United States on the priority date. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

An additional issue exists in this case that was not noted in the decision of denial.

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, April 30, 2001. *See* 8 CFR § 204.5(d). The proffered wage as stated on the Form ETA 750 is \$15.75 per hour, which equals \$32,760 per year.

On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since September 2000. If, since the priority date, the petitioner paid the beneficiary \$32,760 per year or more, that would demonstrate the ability to pay the proffered wage during those salient years. The record contains no evidence, however, of the wages the petitioner paid to the beneficiary.

The petitioner submitted a 1999 Form 1120S, U.S. Income Tax Returns for an S Corporation. That return shows that the petitioner declared a loss of \$92,755 as its ordinary income during that year and ended the year with net current assets.

The petitioner submitted a 2000 Form 1120S, U.S. Income Tax Returns for an S Corporation. That return shows that the petitioner declared a loss of \$86,863 as its ordinary income during that year and ended the year with net current assets.

Those returns do not demonstrate that, if obliged to do so, the petitioner would have been able to pay the proffered wage out of its income or net current assets during those years. Because the priority date is April 30, 2001, however, evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The record, however, contains no evidence pertinent to the petitioner's finances during 2001 or subsequent years. The Service Center did not request additional evidence of the petitioner's ability to pay the proffered wage. Such evidence might have included subsequent tax returns or Federal Form W-2 Wage and Tax Statements showing that the petitioner paid the beneficiary an amount greater than the proffered wage during each of the salient years. Such evidence might easily have overcome the paucity of evidence in the file. Because the petitioner was not accorded the opportunity to submit additional evidence pertinent to this issue, the issue forms no part of the basis of today's decision. This office notes, however, that the evidence in the record, as presently constituted, is insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on 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.