

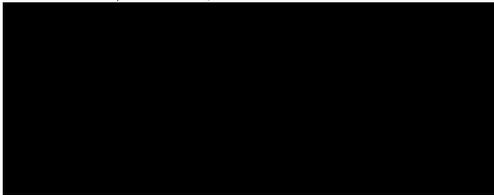
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6



FILE: WAC 02 216 51321 Office: CALIFORNIA SERVICE CENTER Date: JAN 13 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: SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a domestic employee. 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 a valid job offer, had not demonstrated the ability of the intending employer to pay the proffered wage, and had not demonstrated that the beneficiary had, as of the priority date, the requisite employment experience listed on the Form ETA 750.

On appeal, a statement was submitted, as is detailed below.

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 granting 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 unavailable.

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 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.

(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.

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 Department of Labor. The petitioner must also 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 for processing on June 22, 1998. The proffered wage as stated on the Form ETA 750

is \$350 per week, which equals \$18,200 per year. The Form ETA 750 states that the position requires three months of experience in the job offered.

On the Form ETA 750B, signed by the beneficiary on June 16, 1998, the beneficiary did not claim to have worked for the petitioner. The beneficiary claimed to have worked for an individual [REDACTED] as a domestic employee/child care worker from January 1995 to March 1999. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Gardena, California.

The Form I-140 petition submitted in this matter states that the petitioner's name is [REDACTED]. However, that petition also lists the company name [REDACTED] Incorporated. That information might arguably be unclear about whether the petitioner and prospective employer is that individual or that company. Part 5 of the petition, however, states that the employer is a construction company, employs eight workers, was established in 1995, and enjoys a gross annual income of over \$1.5 million. Those statements dispel that possible ambiguity.

Further, the ETA 750 states quite clearly that the petitioner is [REDACTED] Inc. As the Form ETA 750 labor certification was issued to [REDACTED] only that company may pursue an alien petition based on that labor certification. Generally, no other company or individual may utilize that labor certification.¹

With the petition, the petitioner provided no evidence of its ability to pay the proffered wage and no evidence in support of the beneficiary's claimed employment history. Therefore, on October 24, 2002, the California Service Center requested evidence pertinent to those two issues. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it has had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested copies of the petitioner's California Form DE-6 Quarterly Wage Reports for the previous three quarters.

In response the petitioner submitted its Form DE-6 wage reports for the first three quarters of 2002. Those reports show that the petitioner employed from five to seven workers during those quarters, but that it did not employ the beneficiary.

The petitioner also submitted its 1999, 2000, and 2001 Form 1120 U.S. Corporation Income Tax Returns and a 2002 Form 7004 Application for Automatic Extension of Time to File Corporation Income Tax Return. The tax returns submitted show that the petitioner reports taxes based on the calendar year. The Form 7004 shows that the petitioner applied for an automatic extension until September 15, 2002 to file its 2002 return. For reasons that will be detailed below, the figures shown on those income tax returns are not relevant to the ability of the intending employer in this case to pay the proffered wage.

Finally, the petitioner submitted an employment verification letter, dated November 10, 2003, from [REDACTED] [REDACTED] stating that the beneficiary worked for her from April 15, 1999 through December 10, 2001 as a

¹ An exception to that general rule exists in cases where a substituted petitioner demonstrates that it is the original petitioner's successor-at-interest within the meaning of *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981). That exception, however, has no relevance to the instant case. A petition by any other petitioner based on that Form ETA 750 would be denied as not being supported by a valid labor petition.

domestic employee and baby sitter. No explanation was given for the failure to document the original claim of employment made on the Form ETA 750, Part B.

On February 14, 2003, the California Service Center issued another Request for Evidence in this matter. The Service Center requested, *inter alia*, the petitioner's 1998 income tax returns. The Service Center requested that, if the petitioner produces an annual report it submit a copy, and if it does not produce annual reports, that it so state. Finally, the Service Center requested copies of the petitioner's most recent audited financial statements.

In response the petitioner provided a copy of its 1998 Form 1120 U.S. Corporation Income Tax Return. Again, for reasons to be detailed below, the figures on that form are not relevant to the ability of the intending employer to pay the proffered wage. The petitioner did not provide the requested annual reports or audited financial statements, and did not comment on its failure to provide them.

On July 25, 2003 the Director, California Service Center issued a Notice of Intent to Deny in this matter. The director noted that the job description and the job duties provided with the petition appear to indicate that the prospective employer is a private individual seeking to employ a domestic at a private residence, rather than the construction company listed on the petition and the Form ETA 750 labor certification. The director observed that, in that event, the petitioning company has not demonstrated that its offer of employment to the beneficiary is *bona fide*. The director also observed that, although the record contains evidence of the ability of the petitioning corporation to pay the proffered wage, the record contains no evidence of the ability of the individual, the actual intended employer, to pay the proffered wage. Finally, the director observed that insufficient evidence had been submitted to demonstrate that, as of the priority date, the beneficiary had the requisite three months of experience required by the Form ETA 750.

In response, the petitioner submitted a letter dated August 19, 2003. In that letter, the petitioner stated that the issuance of the Form ETA 750 labor certification indicates that the beneficiary met all of the salient requirements. The petitioner also stated that it was enclosing evidence in support of the beneficiary's claimed employment history. No such evidence was enclosed.

The director found that because the corporate petitioner had not established that it is the actual intending employer, the job offer is invalid. Further, the director found that the petitioner had not established that the beneficiary had the requisite experience on the priority date. Finally, the director found that the actual intending employer has not demonstrated the ability to pay the proffered wage. On September 4, 2003 the director denied the petition.

On appeal, the petitioner stated,

After receiving your Notice of Decision, I am very disappointed, due to the fact that you have treated my prospective employee as she was going to work for the [REDACTED] [sic] which that was never requested to be. [sic] Since the beginning I gave her an Offer of Employment as a Domestic Employee, because I am an executive for the [REDACTED], I need to have a Domestic Employee at home. Now you are denying this case because what she does is not related to the [REDACTED] please. [sic]

The appeal was not submitted by the petitioner, but by a private individual. That private individual is not permitted to file an appeal in this matter and the appeal might be rejected on that ground. *c.f.* 8 C.F.R. § 103.3(a)(1)(iii) and 8 C.F.R. § 103.3(a)(2)(v). However, in the interests of reaching the substance of this case, this office will consider the appeal.

The appeal states that an individual, rather than the petitioning corporation, would employ the beneficiary. This confirms that the Form ETA 750 labor certification issued in this matter is invalid, as it was issued to the corporation, which is not the intending employer. Further, since all of the evidence relevant to the employer's ability to pay the proffered wage pertains to the corporation's finances, the ability to pay the proffered wage was not demonstrated by the intending employer. For both of those reasons the petition may not be approved.

Further, the only evidence in support of the beneficiary's claim of qualifying employment experience pertains to the period from April 15, 1999 to December 10, 2001. The priority date is June 22, 1998. The beneficiary cannot demonstrate that she had the requisite experience on the priority date by submitting evidence of employment during a later period. The evidence does not establish that the beneficiary was eligible for the proffered position on the priority date.

For a petition to be approvable, the petitioner must establish eligibility on the filing date. A petition will not be approved because the petitioner or beneficiary subsequently became eligible. 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). Education and experience gained subsequent to the priority date may not be considered in support of the petition, since to do so would result in according the beneficiary a priority date for visa issuance at a time when he is not qualified to perform the duties sought by the petitioner. *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971).

The petitioner argues that the issuance of the Form ETA 750 labor certification indicates that the beneficiary was found to be qualified. As is noted above, however, the petition in this matter must be filed with evidence that the beneficiary had the requisite employment experience on the priority date. Because the petitioner failed to submit any such evidence, the petition must be denied on that ground as well.

This decision issued without prejudice toward the ability of the intending employer to file another petition. In the event that the intending employer opts to file another petition, however, it must be accompanied by a labor certification issued to the intending employer, rather than to some other individual or entity. It must be accompanied by evidence that the intending employer, rather than some other individual or entity, has the ability to pay the proffered wage. It must also be accompanied by evidence that the beneficiary is qualified for the proffered position according to the terms of the labor certification. In order to be approvable, any future petition must conform in all respects to the statutes and regulations governing the pertinent visa classification.

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

ORDER: The appeal is dismissed.