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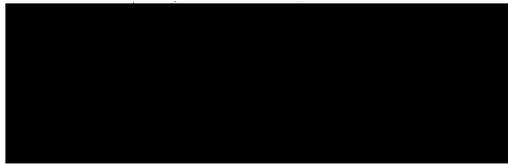


U.S. Citizenship
and Immigration
Services

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JUN 15 2005



FILE: [REDACTED]
EAC 02 255 53957

Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

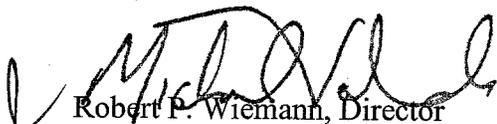
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is an auto body repair company. It seeks to employ the beneficiary permanently in the United States as an auto body repairman. 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 petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

On appeal, the counsel submits a brief and 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 8 C.F.R § 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 9, 2001. The proffered wage as stated on the Form ETA 750 is \$19.64 per hour (\$40,851.20 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, copies of documentation concerning the beneficiary's qualifications, copies of the petitioner's federal income tax returns for 2000 and 2001 as well as Form W-3 Transmittal of Wage and Tax Statements.

Because the Director determined the evidence submitted was insufficient to show that the beneficiary had the requisite two years work experience, the Vermont Service Center on January 2, 2003, requested evidence pertinent to that issue.

Consistent with the requirements of Regulation 8 C.F.R. 204.5 § (1)(3)(ii), the Service Center specifically requested:

“Submit additional documentation that the beneficiary qualifies for the job specified in your Application for Labor Certification (Form ETA 750A). This documentation should show that the beneficiary has the required experience, training, education and/or special requirements as of the time of filing this position.

- a) If eligibility is based on experience or training, letter(s) from current or former employer(s) or Trainer(s) should be submitted. The letter(s) shall contain the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary or of the training received. If such evidence is shown to be unavailable, other documentation relating to the beneficiary’s experience will be considered.
- b) If eligibility is based on education, copies of the transcripts of the beneficiary’s school records should be submitted.”

In response to the above Request for Evidence concerning the beneficiary’s prior employment, and, the requisite two years work experience as an auto body repairman, counsel submitted two letters from the beneficiary’s prior employers in the United States. Each letter stated the same time period of employment that is from June 1996 to August 1996. The third letter was from a former employer in Ecuador stating a work period from November 1994 through January 1996.

The director denied the petition on July 10, 2003, finding that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient work experience.

Specifically the director stated:

“In response, ... [the petitioner] submitted three letters. However, only one of these letters is signed by the owner of the company, and this letter shows that the beneficiary had only 1 year and 10 months experience. Persons who can speak to the beneficiary’s experience and training did not sign the other two letters. Further the two letters have the beneficiary working for two auto repairs shops in two different towns at the same time ...”

On appeal of the director’s decision, counsel explains the discrepancy:

“There was a typographical error on [the] second affidavit of prior experience signed by the prior employer ... which typographical error was brought to the attention of ... [petitioner’s attorney] office by both the alien and [the prior employer], but which was not corrected prior to submission to BCIS.”

As counsel’s brief recounts, there were other serious document discrepancies present in the record. Counsel admits in her brief that, “Two of the first set of affidavits of Prior Employer, submitted by the petitioner, for the prior employers ... were signed by a friend of the family of the alien. “ Those affidavits are entitled “Affidavit By Aliens’ Former or Present Employer” family friend and neighbor from Ecuador now living in the United States, in Danbury, Connecticut. Counsel offers no explanation why these defective affidavits were submitted to the Service in support of the petition, or why affidavits could not have been received from prior employers.

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.

Counsel is not denying that the director did not error in his decision or that the director did not commit an error of law or application of Service policy. Rather counsel is admitting that she made mistakes to the detriment of her client that resulted in the denial of the petition.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

Counsel has submitted an affidavit from a paralegal employed by counsel admitting that she committed an error in the content of the affidavits, and she referred to a communication concerning the error received by counsel's receptionist that went unheeded, but there is not a concomitant affidavit from counsel.

Counsel is now submitting upon an appeal a third set of affidavits properly signed and attested from the beneficiary's prior employers. The affidavits from [REDACTED] attesting to employment from August 1996 through December 1998, from Mécánica Automotiva, Azogues, Ecuador attesting to employment from November 1982 to November 1983 are acceptable to substantiate the beneficiary's qualifications.

Counsel has explained on appeal that her sole basis for appeal is errors made by her office on the second set of affidavits above mentioned that were in large part, the reason the Service Center denied the petition for inconsistent statements of prior job experience. The third set of affidavits affirms the beneficiary's statements in Form ETA 750B. Counsel is forthrightly admitting her error through her statements in the record and by affidavit, and, now moving to rectify the error before this office.

Therefore, upon review of the third set of affidavits and counsel's representations, we find that the petitioner has demonstrated 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.

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 met that burden.

ORDER: The appeal is sustained.