



U.S. Citizenship  
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Services

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FILE: [Redacted]  
EAC 02-224-50742

Office: VERMONT SERVICE CENTER

Date: APR 04 2006

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.

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 a moving and storage company. It seeks to employ the beneficiary permanently in the United States as an educational video director. 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 it required the services of a full time video director. 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 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 U.S. 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 on October 22, 1997. The proffered wage as stated on the Form ETA 750 is \$53,940.00 per year. The Form ETA 750 states that the position requires five 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, a copy of petitioner's Form 1120S U.S. Corporation Income Tax Return for 1997, and, copies of documentation concerning the beneficiary's qualifications.

The Service Center issued a Request for Evidence on April 10, 2003:

[CIS] ... is not persuaded that an educational video director is consistent with a company of your size, type and description. Therefore, please provide additional evidence that would convince the Bureau that your company has the need and requirement for an educational video director.

Petitioner provided a letter from the president of petitioner in response to the Service Center's request. In the letter the petitioner stated that it was established in 1983 as a moving company, employs 45 and it has gross revenues of \$10 million dollars annually. The president stated:

[The petitioner] as opposed to other companies in the moving market, is a modern company that takes advantage of new technologies and mediums. We are the first to establish an E-commerce based moving company called [REDACTED] is an E-commerce B2B [business to business] company that will allow the [petitioner] to extend its dominant position in the industry in the 21<sup>st</sup> century. [The petitioner] ... apart from his proven qualifications as a Video Director is also a published expert in E-commerce.

The Service Center issued a second Request for Evidence on December 3, 2002:

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

- 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 include 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 beneficiary's school records should be submitted.

Petitioner provided affidavits that beneficiary worked in Israel on film, entertainment, and media positions, that the beneficiary has a B.F.A. degree in Arts from the University of Tel Aviv, Israel, and in the United States, the beneficiary worked as a video director in cable television, film documentary production as well as the print media.

The director denied the petition on October 24, 2003, finding that the evidence submitted did not establish that the petitioner had had not established that it required the services of a full time video director.

On appeal, counsel asserts:

"The Decision is arbitrary and capricious and shows the Director had a preconceived intent to deny the application... The Director erred in the determination that a letter signed by the president of the corporation has no evidentiary value. The legitimate business need for an Educational Video Director has been positively proven to the satisfaction of the U.S. Department of Labor...."

Counsel also offered, "...In the alternative and without minimizing the validity of the above arguments, we [petitioner] attach ample evidence to prove that other similar companies in our industry employ a Director."

Petitioner, without further, explanation submitted the following:

- [REDACTED] Moving Guide
- [REDACTED] Rates change advisory
- [REDACTED] Mini-Storage Rate Card
- [REDACTED] Moving Testimonials
- A VHS format video tape<sup>1</sup>
- FHWA Form 800 Rev. 1/03
- Web page of [REDACTED]
- Web page of Office Moving Resource Center
- Web page of Canada Moving
- Web page of On Line Safety Training
- Cover of New York magazine, March 6, 2000

Counsel, in the brief submitted along with the appeal in this matter states:

The decision [of the director] is arbitrary, capricious and shows the director had a preconceived intent to deny the application ... The director abused his discretion in determining that the company had no need for a director of educational video ... A letter from the president of the company has a positive evidentiary value to prove what the company needs ... If anyone is qualified to determine business necessity except for the president of the business it is the U.S. Department of Labor. They have already done so in the labor certification process.

The employer, who is the petitioner here, has prepared the above ETA 750 A as an essential part of the labor certification process used to support preference visa petitions that are employment based. An employer who desires to employ an alien in the United States must undertake a multiple step process as directed by the United States Department of Labor (USDOL) which, once approved, certifies the Alien Employment Application for the occupation based upon the above criteria specified by the employer although the USDOL may cause the employer to modify the Form ETA 750 as submitted to bring the application into compliance with its regulations as a condition to certification.

The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv). Among the appellate authorities are appeals from denials of petitions for immigrant visa classification based on employment, "except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under

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<sup>1</sup> The videotape contents are a collection of television investigative reporting segments concerning moving companies.

section 212(a)(5)(A) of the Act.” 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.). Authority to invalidate labor certifications is delegated to CIS by DHS Delegation Number 0150.1(X), *supra*.

In determining the respective jurisdictions of the Department of Labor and this Service, one may turn to the entire body of recent court proceedings interpreting the interplay of the agencies and strictly confining the final determination made by the Department of Labor. See *Stewart Infra-Red Commissary, Etc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981); *Denver Tofu Company v. District Director, Etc.*, 525 F. Supp. 254 (D. Colo. 1981); and *Joseph v. Landon*, 679 F.2d 113 (7th Cir. 1982).

These cases recognize the labor certification process and the authority of the Department of Labor in this process stem from section 214(a)(14) of the Act, 8 U.S.C. 1182(a)(14). In labor certification proceedings, the Secretary of Labor's determination is limited to analysis of the relevant job market conditions and the effect which the grant of a visa would have on the employment situation. CIS through the statutorily imposed requirement found in section 204 of the Act, 8 U.S.C. 1154, must investigate the facts in each case and, after consultation with the Department of Labor, determine if the material facts in the petition including the certification are true. CIS is charged with verifying the *bona fides* of the job offer.

Although the advisory opinions of other Government agencies are given considerable weight, the Service has authority to make the final decision about a beneficiary's eligibility for occupational preference classification. The Department of Labor is responsible for decisions about the availability of United States workers and the effect of a prospective employee's employment on wages and working conditions. The Department of Labor's decisions concerning these factors, however, do not limit the Service's authority regarding eligibility for occupational preference classification. Therefore, the issuance of a labor certification does not necessarily mean a visa petition will be approved.

The regulation at 20 C.F.R § 656.30 (d) entitled “Validity and invalidation of labor certificates.” states in pertinent part:

After issuance labor certifications are subject to invalidation by the INS [now CIS] or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application ...

After a review of the record of proceeding, there is no evidence that the labor certification was secured by fraud or willful misrepresentation. There is no finding by the director in this regard of fraud or willful misrepresentation. The AAO finds that the determination of the “the need and requirement for an educational video director” is within the business discretion of the petitioner. The petitioner has been consistent with its statements of its intentions as found in the record of proceeding, and, the evidence submitted upon appeal demonstrates the use of video media in the petitioner's industry. The evidence in the record of proceeding does demonstrate that the U.S. Department of Labor investigated this same issue and it found that this job was a full time position.

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.