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U.S. Citizenship  
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BE

FILE: EAC 04 247 52169 Office: VERMONT SERVICE CENTER

Date: **AUG 29 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, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition approval 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 military dry goods wholesaler corporation. It seeks to employ the beneficiary permanently in the United States as a manager-export shipping. 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 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$28.53 per hour (\$59,342.40 per year). The Form ETA 750 states that the position requires three 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, income tax return of petitioner<sup>1</sup> and W-2 statements;<sup>2</sup> and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

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<sup>1</sup> In 2001, the petitioner's IRS Form 1120S stated taxable income of \$3,623,806.00.

<sup>2</sup> W-2 Wage and Tax statements issued to the beneficiary by the petitioner stated wages paid of \$27,753.03, \$26,674.81, and \$31,203.03 for tax years 2001, 2002 and 2003 respectively.

Consistent with the regulation at 8 CFR § 204.5(l)(3)(ii), the director requested evidence that the beneficiary possessed an additional year and two months of experience as a manager in export shipping before April 30, 2001.

Counsel submitted a letter from the petitioner dated November 2, 2004, in response to the director’s request.

The petitioner appealed the director’s decision of December 8, 2004, to deny the petition that found that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition.

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, 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 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 manager-export shipping.

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

- 14. Education .....
- Grade School                      Blank
- High School                      Blank
- College                              Blank
- College Degree Required        Blank
- Major Field of Study            Blank
- Training                            Blank
- Experience .....
- Training .....
- Years                                  3

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 manager-export shipping.

- 15. WORK EXPERIENCE
  - a. NAME AND ADDRESS OF EMPLOYER

[REDACTED] P.O. Box 986, 25 Ranick Rd., Smithtown  
NY 11787  
NAME OF JOB  
Manager-export shipping  
DATE STARTED  
Month – 07 [July] Year – 99 [1999]  
DATE LEFT  
Month – Present [April 27, 2001]  
KIND OF BUSINESS  
Military dry goods wholesaler  
DESCRIBE IN DETAIL DUTIES...  
Supervise a staff of seven in preparing orders for large military clothing wholesalers utilizing  
knowledge of FAA shipping requirements ...  
NO. OF HOURS PER WEEK  
40

15. WORK EXPERIENCE

b. NAME AND ADDRESS OF EMPLOYER

[REDACTED] P.O. Box 986, 25 Ranick Rd., Smithtown  
NY 11787  
NAME OF JOB  
Order Filler  
DATE STARTED  
Month – 06 [June] Year – 97 [1997]  
DATE LEFT  
Month – 03 [March] Year – 99 [1999]  
KIND OF BUSINESS  
Military dry goods wholesaler  
DESCRIBE IN DETAIL DUTIES...  
Fill customer's orders by selecting the appropriate merchandise from warehouse stock and  
packing for shipping ...  
NO. OF HOURS PER WEEK  
40

In this case the job verification statement that the petitioner submitted with the petition to prove the beneficiary's work experience as a military dry goods wholesaler is consistent with the experience listed on the Form ETA 750 Part B.

The letter from the petitioner dated August 17, 2004 accompanying the petition states in pertinent part:

We provided ... [the beneficiary] with training to take over the manager position for the Shipping department in July, 1999 ...

The letter from the petitioner dated November 2, 2004 accompanying the petition states in pertinent part:

While we can pinpoint the date of July 1999 as being when ... [the beneficiary] had to take over as supervisor in Mr. [REDACTED] absence ... [of a malady that ended in his death] his training and

assumption of job duties had been in process long before that time... [The beneficiary was trained] in many tasks while he was still an order filler ...

Counsel contends on appeal that due to business necessity, the beneficiary, as well as other employees were moved into positions, while different in degree from their prior responsibilities, encompassed the same skill sets and job duties that they had previously performed, and like other companies, the petitioner had already provided its employees overlapping upward training that in the beneficiary's case was providential with the unanticipated loss of a key supervisory employee.

*Matter of Ho*, 19 I&N Dec. at 591-592 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." In this case, there are no such inconsistencies as counsel has forthrightly presented the situation that confronted the petitioner with the loss of a key employee as above mentioned.

The petitioner, as employer, has submitted several letters contained in the record of proceeding that establishes that the beneficiary was employed for three years in an employment capacity with duties similar to the duties of the proffered position. The certified Alien Employment Application states that the beneficiary was employed as a manager-export shipping for only 22 months, but the beneficiary was in training and performing the duties of manager-export shipping prior to that experience. According to the record of proceeding the cumulative total was over three years in the position of manager-export shipping.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner had 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.