

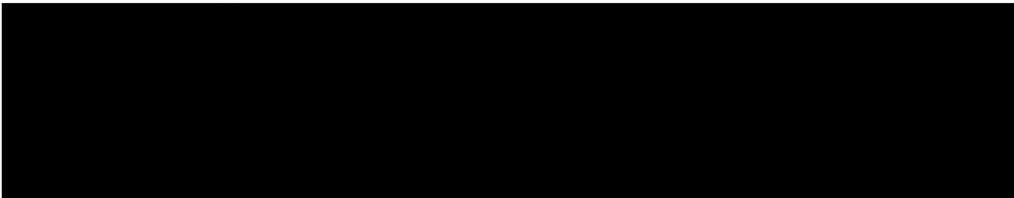
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**U.S. Citizenship
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FILE: WAC-04-121-50657 Office: CALIFORNIA SERVICE CENTER Date: JUL 25 2006

IN RE: Petitioner:
Beneficiary:



PETITION: 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 was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a general building contractor. It seeks to employ the beneficiary permanently in the United States as a plasterer. 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 that the beneficiary had the experience required in the ETA 750 as of the priority date and denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 14, 2005 decision denying the petition, the issue in this case is whether the evidence establishes that the beneficiary had the experience required on the ETA 750 as of the priority date.

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 not available in the United States.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 20, 2001. On the Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary did not claim to have worked for the petitioner. The ETA 750 was certified by the Department of Labor on July 23, 2003.

The AAO reviews appeals on a *de novo* basis. See *Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits no brief and submits additional evidence. The evidence submitted on appeal consists of an employment certificate dated September 14, 2001 by a former employer of the beneficiary in the Philippines. Other relevant evidence in the record includes copies of letters from other former employers of the beneficiary in the Philippines, copies of Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner for 2001, 2002 and 2003, copies of unaudited financial reports of the petitioner, and copies of construction contracts of the petitioner.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of the document newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On appeal, counsel states that the employment certificate letter submitted on appeal establishes that the beneficiary has been employed as a plasterer since July 1998. Counsel states that that experience satisfies the requirement of two years of training or experience in the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B).

The I-140 petition was submitted on March 24, 2004. With the petition, the petitioner submitted supporting evidence, including documents relevant to the petitioner's ability to pay the proffered wage and one document relevant to the beneficiary's work experience. The document relevant to the beneficiary's work experience was a copy of a letter dated January 30, 2000 from the owner of Timbol Son's Construction & Trading Company Inc., Angeles City, Philippines. That letter states that the beneficiary had been employed with the company from August 1999 to January 2000 as a plasterer.

In a request for evidence (RFE) dated July 17, 2004, the director requested additional evidence relevant to the petitioner's ability to pay the proffered wage and additional evidence relevant to the beneficiary's work experience. The director specifically stated as follows:

Evidence of Experience: Submit proof of the beneficiary's employment history. Provide letters, contacts, and pay statements to verify that the beneficiary worked for the listed employer(s). . . . Experience earned should be submitted in letterform on the employer's letterhead showing the name, address, phone number and title of the person verifying this information. This verification should state the beneficiary's title, duties, and dates of employment/experience and number of hours worked per week.

Note: Experience letter submitted was insufficient. It failed to indicate the duties and hours worked per week of the beneficiary. If the letters are a translation of an original, the original must be submitted also.

(RFE, July 17, 2004)

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on September 27, 2004. The documents relevant to the beneficiary's experience included a copy of a letter dated August 18, 2004 from the owner of Timbol Son's Construction & Trading Company, Inc. The letter states that the beneficiary was employed with that company from August 1999 to January 2000 as a plasterer, for 40 hours per week. With that letter the petitioner also submitted copies of pay slips for the beneficiary issued by that company for pay dates of December 31, 1999 and January 15, 2000.

Also submitted in response to the RFE was a copy of a letter dated August 13, 2004 from the personnel officer of Supreme Strategic Construction Systems and Services, of Binan, Laguna, Philippines. The letter states that the beneficiary is currently employed at that company and has been working since August 1999 to the present as a plasterer, for 40 hours per week. With that letter the petitioner also submitted copies of time records for the beneficiary with that company for pay periods ending August 13, 2004 and August 27, 2004.

The director issued a notice of intent to deny (ITD) dated October 5, 2004. The director stated that the evidence failed to establish the petitioner's ability to pay the proffered wage and failed to establish that the beneficiary had the experience required on the ETA 750.

In response to the ITD, the petitioner submitted additional evidence, which was received by the director on November 4, 2004. The evidence relevant to the beneficiary's experience included another copy of the letter dated August 18, 2004 from the owner of Timbol Son's Construction & Trading Company, Inc.

The submissions in response to the ITD also included a copy of a second letter dated August 13, 2004 from the personnel officer of Supreme Strategic Construction Systems and Services. Unlike the letter of that same date submitted earlier, which stated August 1999 as the beginning of the beneficiary's employment with that company, the second letter dated August 13, 2004 states that the beneficiary began work at the company in January 2000.

The submissions also included an affidavit dated November 8, 2004 by the beneficiary stating that the first employment certification from Supreme Strategic Construction Systems and Services contained an erroneous start date for the beneficiary, and that the correct starting date for his employment with that company is January 2000.

In a decision dated January 14, 2005, the director determined that the evidence showed experience as a plasterer only since August 1999, a date which is less than two years before the April 20, 2001 priority date. The director therefore found that the petitioner had not shown that the beneficiary had two years of experience in the offered position, as required on the ETA 750. The director accordingly denied the petition.

On appeal, the petitioner submits a copy of an employment certificate dated September 14, 2001 from the general manager of Omicron Construction, Guagua, Pampanga, Philippines. The certificate states that the beneficiary was employed by that company from July 1998 to August 1999 as a plasterer, working 40 hours per week.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, blocks 14 and 15, sets forth the minimum education, training and experience that an applicant must have for the position of Plasterer. On the ETA 750A submitted with the instant petition, block 14 requires six years of grade school education and two years of experience in the offered position. No other requirements are stated in either block 14 or block 15.

The beneficiary states his or her qualifications on Form ETA 750B. On the ETA 750B submitted with the instant petition, in block 15, for information on the beneficiary's work experience the beneficiary states the following:

Name and Address of Employer	Name of Job	From	To	Kind of Business
Supreme Strategic Construction Systems and Services [street address] Binan, Laguna, Philippines	Plasterer	Jan. 2000	Present	Construction

[all other lines in block 15 are blank]

The instructions to block 15 state as follows: "Work Experience. List all jobs held within past three (3) years. Also, list any other jobs related to the occupation for which the alien is seeking certification as indicated in item 9." (ETA 750, Part B, block 15).

As shown above, on the ETA 750B the beneficiary states experience with only one company. However, the letters in evidence claim relevant work experience of the beneficiary with three separate companies. Moreover, the two letters from Supreme Strategic Construction Systems and Services state inconsistent starting dates for the beneficiary's employment. The first of those letters which was submitted asserts a starting date of August 1999, which is inconsistent with the information on the ETA 750B. The second letter which was submitted from that company asserts a starting date of January 2000, which is consistent with the ETA 750B. The beneficiary's affidavit attempts to explain the inconsistent starting dates on the two letters as due to a mistake by the company official who wrote the letters, but the beneficiary does not state how that error occurred. Moreover, the beneficiary's affidavit fails to offer any explanation for the fact that both letters purport to have been written on the same date, August 13, 2004. If the second letter from that company was in fact a correction of the earlier letter, the second letter would logically bear a later date.

Concerning the employment certification submitted for the first time on appeal, that letter states employment of the beneficiary from July 1998 through August 1999, but nothing submitted on appeal offers any explanation for the failure of the beneficiary to state that experience on the ETA 750, Part B, block 15.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "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." The record contains only a partial explanation for one of the inconsistencies noted above, and no explanation for the other inconsistencies.

In his decision, the director did not address the inconsistencies in the evidence, presumably because even if the evidence was viewed most favorably to the petitioner, none of the evidence then in the record asserted any experience of the beneficiary prior to August 1999, a date which was less than two years before the priority date of April 20, 2001.

The employment certificate submitted on appeal attempts to cure the evidentiary deficiency by asserting that the beneficiary's relevant work experience began in July 1998. Nonetheless, that certificate cannot be considered to be reliable evidence, since it asserts experience which was not claimed by the beneficiary on the ETA 750B and since no explanation is offered by the petitioner for the failure to submit evidence of that employment previously. The petitioner failed to submit that evidence even though the director issued an RFE and then later issued an ITD, each of which provided the petitioner with an opportunity to submit evidence relevant to the beneficiary's experience. Moreover, the employment certificate submitted on appeal is not supported by any competent, objective evidence.

For the foregoing reasons, the petitioner has not established that the beneficiary had two years of experience in the offered position as of the April 20, 2001 priority date. Therefore, the petitioner has not overcome the director's decision.

Beyond the decision of the director, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In the ITD, the director stated that CIS records showed that the petitioner had eleven I-140 petitions pending, and the director stated that the evidence in the record did not establish the petitioner's ability to pay the proffered wages to each of the beneficiaries of the pending I-140 petitions.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). See also 8 C.F.R. § 204.5(g)(2).

CIS electronic records show that in 2004, the year in which the instant I-140 petition was filed, the petitioner also filed nine other I-140 petitions.

Even if a petition is withdrawn by the petitioner, the petitioner has the right to substitute a new beneficiary on an ETA 750 labor certification application by filing a new I-140 petition, supported by a new ETA 750B for the new beneficiary. The ETA 750's underlying any withdrawn petitions remain valid, with the same priority dates. Memo. from [REDACTED] Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996); see Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure*, vol. 4, § 43.04 (Mathew Bender & Company, Inc. 2004) (available at "LexisNexis" Mathew Bender Online).

The record contains copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner for 2001, 2002 and 2003. Those returns show adjusted gross income of \$60,927.00 in 2001, \$114,656.00 in 2002, and \$169,300.00 in 2003. The record contains no evidence on the proffered wages of the beneficiaries of the other nine I-140 petitions submitted by the petitioner in 2004. The proffered wage in the instant petition is \$9.57 per hour, which amounts to \$19,905.60 annually. If the proffered wages of the beneficiaries in the other nine I-140 petitions submitted in 2004 are similar to that in the instant case, the adjusted gross income figures of the petitioner's owner would be insufficient to establish the petitioner's ability to pay the proffered wages to each of those beneficiaries. Moreover, where a petitioner is a sole proprietorship, the evidence must also establish the ability of the petitioner's owner to pay his or her reasonable household expenses while also paying the proffered wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

For the foregoing reasons, the evidence fails to establish the petitioner's ability to pay the proffered wage to the beneficiary of the instant petition, while also paying the proffered wages to the beneficiaries of the other nine I-140 petitions filed by the petitioner in 2004.

In summary, the evidence fails to establish that the beneficiary had the experience required by the ETA 750 as of the priority date. Beyond the decision of the director, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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.