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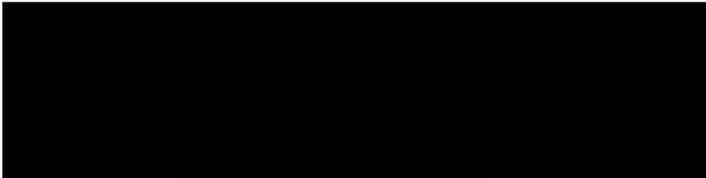
U.S. Department of Homeland Security
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U.S. Citizenship
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File: [Redacted]
WAC-04-047-51179

Office: CALIFORNIA SERVICE CENTER Date **SEP 28 2006**

In re: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is in the tax and financial services business and seeks to employ the beneficiary permanently in the United States as a clerk-typist. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's February 3, 2005, denial, the case was denied based on the petitioner's failure to demonstrate that the beneficiary met the requirements of the labor certification.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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

The petitioner has filed to obtain permanent residence and classify the beneficiary as an unskilled worker. 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 the granting of preference classification to other 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 not available in the United States.

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

The regulation 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.

¹ 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 any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on January 17, 2001. The proffered wage as stated on Form ETA 750 for the position of a clerk-typist is \$13.54 per hour, 40 hours per week, which is equivalent to \$28,163.20 per year. The labor certification was approved on August 23, 2002, and the petitioner filed the I-140 on the beneficiary's behalf on December 16, 2003.

Counsel listed the following information on the I-140 Petition related the petitioning entity: date established: January 1987; gross annual income: \$318,790.00; net annual income: \$265,882; and current number of employees: 4. On October 27, 2004, the Service Center issued a Request for Additional Evidence ("RFE") requesting additional documentation regarding: the petitioner's ability to pay; information related to the petitioner's business; photographs of the business premises; quarterly wage payment reports to the state employment division; evidence to establish the beneficiary's qualifications; and clarification regarding when the beneficiary initially began working for the petitioner. The petitioner responded and provided proof of ability to pay, as well as photos of the business, and business licenses. The petitioner provided a second letter regarding the beneficiary's prior work experience. On March 3, 2005, the director denied the case finding that the petitioner's response was insufficient to document that the beneficiary had the required skills listed on the certified ETA 750 as the petitioner had submitted two letters, which contained contradictory information.

We shall examine the documentation related to the beneficiary's qualifications within the prior record, and then address the petitioner's additional arguments on appeal. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the alien 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). 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).

On the Form ETA 750A, the "job offer" states that the position requires six months of experience in the job offered, as a clerk-typist, or six months in a related occupation as a clerk-typist, with duties including: "collects demographic data. Inputs data into computer. Prints information on to preprinted forms. Generates legal business correspondence. Computes filing deadlines. Types reports, business correspondence, application forms and other material. Files records and reports and posts information to record." The petitioner listed that 12 years of grade school education was required in Section 14, and listed special requirements for the position in Section 15 as: "use of office equipment, fax, typewriter, copier."

On the Form ETA 750B, signed on December 2000, the beneficiary listed that she has worked for: (1) JHC Insurance Services, 811 W. 19th St., #A, Costa Mesa, CA 92627, from January 1998 to August 1998, for 40 hours per week as a Clerk Typist; and (2) South Auto Registration, 1109 S. Bristol St., Santa Ana, CA 92704, from May 1993 to October 1998, 40 hours per week, as a receptionist.

For the individual beneficiary to qualify for the certified labor certification position, the petitioner must demonstrate the beneficiary's prior experience to qualify the individual for that position, and that the beneficiary obtained the experience by the time of the priority date. Evidence must be in accordance with 8 C.F.R. § 204.5(l)(3), which provides:

(ii) *Other documentation*—

(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.

To document the beneficiary's experience, the petitioner initially submitted a letter dated December 20, 2000, from JHC Insurance Services, signed by [REDACTED] the owner, which provided: "this letter serves to verify that [REDACTED] worked for our company from January 17, 1998 to August 15, 1998 as a clerk typist. Some of her responsibilities were to input data into computer, print information on reprinted forms typed business letters, forms and materials."

The Service Center requested additional evidence to document the beneficiary's experience, as the letter initially submitted did not verify whether the beneficiary's experience was full-time or part-time. If the experience were part-time, it would be insufficient to document six months of previous work experience.

In response to the RFE, the petitioner sent an additional letter to document the beneficiary's experience. In a letter dated January 14, 2005, [REDACTED] of S.A.R. South Auto Registration, provided a letter which confirmed that the beneficiary was: "employed by my company when I first started the auto registration business back in 1998 as a data entry clerk typist and with the general preparation of paperwork, forms and correspondence. During that time, I had a small office and she was employed from January 1998 to August of 1998 . . . She was a full time employee, working 40 hours per week . . . She was not in a payroll system and was paid on a cash basis because the business was just starting and we handled it as a family based business. She did get pay stubs but only for the purpose of her records." S.A.R. provided copies of five hand written paystubs dated January 13, 1998, March 27, 1998, May 15, 1998, July 10, 1998, and August 14, 1998, four in the amount of \$230, and one in the amount of \$240.

The Service Center denied the petition noting that the first letter from JHC was deficient in that it did not address whether the beneficiary worked full-time or part-time, and the second letter from S.A.R. conflicted with the experience dates listed on the ETA 750, which listed that she was employed from May 1993 to October 1998 (the letter provides for experience significantly less than since 1993 and lists a different end date, and a different title). Further, regarding the documentation to confirm experience, the decision notes that if the wages represented weekly wages, the handwritten paystubs would verify only five weeks of experience, falling significantly short of the six months required.

On appeal, the petitioner contends that they were not aware of the conflict in the evidence until the petitioner received the denial notice. The petitioner, however, asserts that the beneficiary had noticed the error initially when the ETA 750 Forms were prepared, and that the forms were retyped, and corrected letters were requested from the employers. The petitioner contends that they thought they filed the I-140 Petition with the properly corrected forms, and were not aware that the forms containing the errors in the beneficiary's work experience were submitted for filing. Further, upon reviewing their "old file," "we found that the original corrected documents were still in the file and mixed up with copies of the incorrect documents." The petitioner contends that the discrepancy is a result of "human error."

The petitioner has submitted only the company owner's statement on appeal with the explanation of human error. The petitioner did not submit any evidence to verify the owner's claims, such as the "corrected forms" contained within the petitioner's records, corrected letters from the beneficiary's prior employers, or any corroborating pay

information, such as further paystubs, or W-2 Forms, a statement or affidavit from the beneficiary explaining or verifying her work history, or any other evidence that might allow us to conclude that the mistake was human error.

Further, the petitioner has failed to identify what part of the evidence previously submitted is incorrect. If the positions and experience were reversed on the ETA 750, this would not explain why both employers submitted letters that seem fairly specific (in some aspects, while lacking in other aspects). While the petitioner states that sample letters were provided to the employers, JHC Insurance specifically listed the beneficiary's employment dates of January 17, 1998 to August 15, 1998, specifically adding the exact start and end date to the month and year. This information generally matches the information listed on the ETA 750B Form. The letter, however, is deficient in that it does not list the number of hours that the beneficiary worked per week. It is unclear why the petitioner did not supplement this initial letter in response to the RFE.

The second letter also seems fairly specific in that the owner recalls that the beneficiary was employed "when I first started the auto registration business back in 1998." However, the ETA 750B states her position with S.A.R. as a receptionist, and for a much longer time period than identified in the letter. The letter provides that she was a data entry clerk typist. The petitioner has not addressed the issue of her job title, and whether the forms are incorrect on this point as well.

Based on the conflict in the evidence, which the petitioner has not resolved on appeal, the inconsistencies raise doubts regarding the evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), which states: "Doubt raised on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." Further, "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 petitioner has provided no independent objective evidence to resolve the inconsistencies raised in the director's denial. Accordingly, the petition was properly denied for failure to document the beneficiary's experience.

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.