



U.S. Citizenship
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Services

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[Redacted]

File: [Redacted]
EAC-06-008-52003

Office: VERMONT SERVICE CENTER

Date: JUL 12 2007

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:

[Redacted]

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 Acting Director, Vermont Service Center (“director”), denied the immigrant visa petition. The petitioner then appealed the denial to the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner is in the business of construction and cost estimation, and seeks to employ the beneficiary permanently in the United States as an architect. As required by statute, the petition filed was submitted with Form ETA 9089, Application for Permanent Employment Certification, approved by the Department of Labor (DOL). As set forth in the director’s February 7, 2006 decision, the case was denied, as the petitioner did not establish that the beneficiary met the qualifications listed on the certified Form ETA 9089.

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 a professional worker. The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.”

The petitioner must establish that its ETA 9089 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 9089. The priority date is the date that Form ETA 9089 Application for Application for Permanent 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).

Here, the Form ETA 9089 was accepted for processing by the relevant office within the DOL employment system on July 21, 2005. The proffered wage as stated on the Form ETA 9089 is an annual salary of \$63,360 based on a 40 hour work week. The Form ETA 9089 was certified on August 9, 2005, and the petitioner filed the I-140 petition on the beneficiary's behalf on September 29, 2005. The petitioner listed the following information on the I-140 Petition: date established: 1988; gross annual income: \$4.5 million; net annual income: not listed; and current number of employees: 40.

On November 30, 2005, the director issued a Request for Evidence ("RFE") for the petitioner to provide evidence that the beneficiary had the required two years of experience necessary for the position; and evidence that the beneficiary had the required education to meet the listed educational requirements. The petitioner responded.² Following consideration of the response, the director denied the petition on February 7, 2006, for failure to document that the beneficiary had the required two years of prior experience as an Architect.

In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("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 9089, the "job offer" position description provides:

Plan and design structures; Assist Senior Architects in researching, planning, designing, and administering building projects for clients; use computer-assisted design software (AutoCAD); responsible in site planning and inspection.

Further, the job offered listed that the position required:

Education:	Bachelor's degree
Major Field Study:	Architecture
Experience:	2 years in the job offered, Architect
Other special requirements:	Character references; non-smoking environment.

² The Form ETA 9089 listed that a Bachelor's degree in Architecture was required for the position. The petitioner submitted documentation to show that the beneficiary possessed both a Bachelor's degree and a Master's degree in Architecture obtained abroad, which were evaluated to demonstrate that the beneficiary had the equivalent of a U.S. Bachelor's degree in Architecture so that the petitioner satisfied documentation of this requirement.

On the Form ETA 9089, the beneficiary listed her relevant experience as: (1) LRM Computing Inc., Bethesda, Maryland, from May 27, 2002 to February 28, 2005, position: Architect; (2) Little and Associates Architect, Silver Spring, Maryland, from February 2, 2000 to November 6, 2001, position: Intern Architect/Sr. CAD.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(1)(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.

(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.

To document the beneficiary's experience, the petitioner initially submitted W-2 Forms, which listed the employer as LRM Computing Inc. Specifically, the petitioner submitted a W-2 Form for 2002, which was handwritten, and showed wages of \$5,288.53; a 2003 W-2 Form exhibiting wages of \$30,711.87; and a 2004 W-2 Form exhibiting wages of \$41,718.30.

The director provided in her decision that the W-2 Forms alone were insufficient "to verify the type of work performed by the beneficiary, the beginning and ending dates of employment, a specific description of duties performed, or provide the name and title of the person who could verify the experience as specifically requested and required by regulations." See 8 C.F.R. § 204.5(1)(3).

On appeal, the petitioner provides that the beneficiary has the required two years of experience, exhibited by the beneficiary's sworn statement submitted on appeal, and based on two other letters submitted. The petitioner presented the following documentation in support:

1. Beneficiary's Sworn Statement, dated March 6, 2006, which provided:

That despite . . . effort exerted on my part to follow-up personally, by telephone and by fax my request for a Certification from LRM Computing, Inc. [LRM], no reply has been received from them to date;

That I was formerly employed with LRM . . . as Architect [sic] from May 27, 2002 until February 28, 2005;

That I worked 40 hours a week and received an annual salary of \$41,718.30 . . . ;

That my duties . . . are as follows: work under the supervision of Senior Architect in cost estimating, scheduling, preparing and delivering presentations; perform design, detailing and preparation of working drawings by using . . . computer aided design applications . . . ;

That due to professional and personal differences, I decided to leave LRM on February 28, 2005
...

That I did not have a good relationship with my manager at LRM ... when I left their employ . .
,

That it is for the foregoing reason that LRM fails and continue to refuse [sic] to issue me the
required Certification pertaining to my employment . . . ;

That my employment with LRM as an Architect is verifiable by calling them at [REDACTED]
attention [REDACTED]s, President.

The beneficiary attached the three W-2 Forms that were previously submitted to her sworn statement. The
petitioner additionally submitted:

Letter from [REDACTED], Director of Human Resources, Little & Associates Architects, 5815
Westpark Drive, Charlotte, NC, dated June 11, 2001;
Position title: Intern Architect III/Sr. CADD Specialist in Silver Spring, MD office;
Dates of employment: not listed, the letter states "is a full-time employee;"
Description of duties: "her primary responsibility is developing designs and technical solutions to
architectural challenges, as well as the preparation of construction documents."

Letter from [REDACTED], Construction Manager, [REDACTED], dated March 19,
2002;
Position title: not listed – letter provided as reference for Architectural registration;
The letter provides: "I have known [the beneficiary] for last 2 years [sic]. I have had the opportunity
to review her professional skill and expertise. My appraisal of her academic background and
professional accomplishment has provided me adequate confidence to recommend her for the
architectural registration examination. Her technical knowledge and experience is sound and of good
quality."

The beneficiary provides in her sworn statement that her annual salary with LRM Computing Inc. was
\$41,718.30 a year, which would equate to \$3,476.52 per month. Accordingly, the 2002 W-2 Form, if accurate,³
would represent about one and one half months of work as the wages listed were \$5,288.53. The beneficiary's
2003 W-2 Form showed wages in the amount of \$30,711.87, which would be less than a full year of wages based
on the annual salary that the beneficiary listed. The 2003 W-2 Form would likely represent nine months of wages
based on the beneficiary's listed wage. As the 2004 W-2 Form exhibited wages of \$41,718.30, this would
represent one full year of wages, provided that the beneficiary's wage estimate is accurate. Together, this would
amount to less than two years of employment.

Further, the statement provides that her employment may be verified with [REDACTED] President. As she has
listed the company's president as a contact, it is unclear why the beneficiary could not obtain a letter to document
her experience from [REDACTED]s, even if she had a conflict with her immediate manager. In visa petition

³ We note that the W-2 Form for 2002 was handwritten. The W-2 Forms for 2003, and 2004 were both
typewritten.

proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

We also note that while LRM did not appear to have its own website, a search of the internet located an LRM Computing ad for the Bethesda, Maryland business, which listed the company contact as [REDACTED]. The company description was listed as "software consulting." *See* <http://www.bestjobsus.com/bt-empd-lrmcomputing.htm> accessed on June 20, 2007. Additionally, the internet search results showed that LRM was awarded a government contract in 2004 and supplied the Defense Department ADP Software. *See* [http://www.governmentcontractswon.com/department/defense/lrm computing 06581508.asp?yr=04](http://www.governmentcontractswon.com/department/defense/lrm%20computing%2006581508.asp?yr=04) accessed as of June 20, 2007. The Form ETA 9089 describes the company's business as information technology.

While the beneficiary's description of her work at LRM describes the activities of an architect, from the information online, and the general description of the company's business, we would be unwilling to accept the beneficiary's description of job duties alone to verify her experience. It is unclear how LRM's business relates to the architecture of buildings, as opposed to the architecture of software. The Form ETA 9089 job description clearly contemplates the need for an architect of buildings. Therefore, the two years of experience would pertain to work as an architect of buildings. Doubt cast 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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. *Matter of Ho*, 19 I&N Dec. at 591-592.

Regarding the additional letters submitted, it is unclear from the letter submitted by Little and Associates whether the beneficiary held two positions during her employment, as an Intern Architect III, and as a Sr. CADD Specialist, or whether that was the beneficiary's entire title for the length of her employment. The letter as drafted would be insufficient to demonstrate employment as an architect. The Form ETA 9089 did not list a related occupation as an Intern, or CADD Specialist, or other similar position, but required that the individual show two years of employment as an Architect. The beneficiary did not indicate that she could not obtain an employment letter from Little and Associates, which could have provided the full dates of her employment, and her specific dates in each position [if two different positions], and aided in determining the length of her experience.

The additional letter from the construction manager would not demonstrate that the beneficiary was specifically employed in a position for two years as an Architect, and would not document the beneficiary's prior experience.

Based on the foregoing, the petitioner has failed to establish that the beneficiary meets the qualifications as set forth in the certified ETA 750. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.