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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
SRC 05 201 51518

Office: TEXAS SERVICE CENTER Date: JUN 07 2007

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The acting director, Texas Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a retail store manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position based on lack of evidence as to the beneficiary's two years of relevant work experience, as stipulated by the Form ETA 750. The director also stated that the record did not reflect that the beneficiary was authorized to work in the United States during the years she claimed to be employed. The director accordingly denied the petition.

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 in this case has been discussed in these proceedings previously and is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary¹ is qualified to perform the duties of the proffered position.

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 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 24, 2001.

The regulation at 8 C.F.R. § 204.5(l)(3) 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 worker.* If the petitioner 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

¹ The record indicates that the original beneficiary on the ETA 750 was [REDACTED], and that the petitioner substituted the current beneficiary for the original beneficiary on June 29, 2005, when the beneficiary signed Part B, Form ETA 750.

The minimum requirements for this classification are at least the two years of training or experience.

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.² On appeal, counsel submits a brief and additional evidence. The additional evidence includes the following:

Copies of the Texas State Comptroller's records indicating the signer of each letter of work verification is in fact the director or officer of the company;

Copies of electronic printouts of W-2 information dated December 16, 2005 and identified as being faxed from "IRS ACS." The first page of these printouts appears to indicate that the beneficiary, while living in San Antonio, Texas, earned \$11,639 from [REDACTED] in tax year 2000, and while living in Atascosa, Texas, earned \$5,120 from [REDACTED] in tax year 2000.³ The second page indicates that the beneficiary also earned \$7,040 from [REDACTED], while living in Atascosa, Texas, and received \$273 in interest from Pioneer Muslim Credit Union, from an account in Houston, Texas. The third page of the printouts appears to indicate that the beneficiary with residence noted of Atascosa, Texas, earned \$16,320 from [REDACTED], and also received interest of \$414 from the Houston credit union, with her residence noted as San Antonio, Texas. The final three pages of the computer printout indicate that [REDACTED] paid the beneficiary \$15,200 in tax year 2002 and she earned \$656 in interest on her account with Pioneer Muslim Credit Union in Houston, Texas; that [REDACTED] paid the beneficiary, \$7,200 in wages tax year 2003 with interest earned of \$694; and that [REDACTED] paid the beneficiary \$960 in wages during tax year 2004, with interest earned on her credit union account of \$769.

A copy of a Board of Alien Labor Certification Appeals (BALCA) decision, *Matter of Lendy Muller*, 2000 INA 125 (BALCA September 26, 2000); and

The minutes for a liaison meeting between the Texas Service Center and the American Immigration Lawyers Association (AILA), May 3, 2004.

The record also contains copies of two letters of work verification. One letter is from [REDACTED] San Antonio, Texas, signed by N [REDACTED] president, dated July 20, 2005, and the other letter is from [REDACTED] Atascosa, Texas, dated June 18, 2005 signed by [REDACTED] president.⁴ The letter from [REDACTED] states that the beneficiary worked as a manager of the convenience store and gas station from August 2000 to October 2004. The letter from [REDACTED] states that the beneficiary worked as a manager of the convenience store from February 1999 to August 2000.

² 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).

³ Atascosa, Texas, and San Antonio, Texas are approximately 39 miles from each other. (as seen at <http://www.mapquest.com> on April 11, 2007). The AAO will address the beneficiary's employment with these two businesses more fully further in these proceedings.

⁴ The letter from [REDACTED] c., apparently was submitted with the initial petition, while the letter from [REDACTED] c. was submitted to the record in response to the director's Notice of Intent to Deny (NOID) the petition dated August 3, 2005.

On appeal, counsel states that the petitioner provided the director with sufficient letters of employment verification, based on the regulation at C.F. R. § 204.5(l)(3)(ii)(A). Counsel states that the petitioner is submitting copies of W-2s issued by the beneficiary's employers as additional evidence of her previous employment as a manager of a retail store. Counsel also states that there is no legal basis for finding that unauthorized employment cannot be used as qualifying experience in a labor certification application or a I-140 petition. Counsel refers to *Matter of Lendy Muller*, 2000 INA 125 (BALCA September 26, 2000), and also states that Citizenship and Immigration Services (CIS) has approved thousands of cases under section 245(i) of the Act. Counsel refers to the minutes of a liaison meeting between AILA and the Texas Service Center in which the service center agreed that work experience while in an unauthorized employment status could be counted toward previous employment experience.

Upon review of the record, the AAO notes that counsel's assertion with regard to the use of work experience while in unauthorized employment status for purposes of labor certification application is correct. For purposes of the instant I-140 petition, the beneficiary's work experience prior to the priority date can be utilized in establishing the requisite work experience stipulated on the Form ETA 750.

With reference to the BALCA decision, *Matter of Lendy Muller*, the AAO notes that counsel does not provide legal authority for the applicability of BALCA's precedent decision to these proceedings occurring under the Department of Homeland Security's AAO. While 8 C.F.R. § 103.3 (c) provides that precedent decisions of CIS are binding on its employees in the administration of the Act, BALCA decision are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F. R. § 103.9(a). Nor does counsel submit how CIS's regulatory authority to verify whether the beneficiary is qualified to perform the duties of the proffered position is obviated by DOL. Further, this decision is not analogous to the instant petition. In *Lendy Muller*, the petitioner initially submitted a letter of work verification from a friend of the beneficiary, rather than previous employer. The Department of Labor remanded the decision, among other issues, for further consideration of any other evidence that might establish the beneficiary's previous employment, stating that "it is understandable that such previous employers might be reluctant to document that an alien was illegally employed."⁵

In the instant petition, in the director's request for further evidence, the petitioner was asked to submit further documentation as to the beneficiary's previous employment from February 1999 to August 2000, with evidence as to wages paid. The petitioner responded by submitting a letter from the beneficiary's claimed former employer, [REDACTED], which did not contain any specific information as to wages. On appeal, the petitioner does provide more specific information, specifically W-2 information, on the beneficiary's employment from tax year 2000 to 2004. The AAO notes that this decision does not specifically state that the DOL condones illegal employment, but rather it allows the consideration of such employment for purposes of establishing the petitioner's eligibility for an employment-based visa preference. CIS, in turn, does not condone illegal employment; however, it does consider the documentation of previous wages paid to the beneficiary by the petitioner in its analysis of the petitioner's ability to pay the proffered wage.

⁵ Furthermore, the BALCA decision also noted that the documentation of the alien's previous paid experience from past or present employers "must" include details of the employment including dates of employment, hours of work per day, number of days worked per week, detail statement of duties performed, equipment and appliances used and the amount of wages. Thus, the director's request for further specific evidence in his request for further evidence, appears to be in line with DOL guidance on the topic.

On appeal, counsel also states that *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), has no bearing on the instant petition as the *Ho* decision involved an EB-5 investor. In the instant decision the director utilizes the *Ho* decision to question the petitioner's use of the evidence of the beneficiary's previous illegal employment to establish the beneficiary's requisite two years of work experience stipulated by the Form ETA 750. While the director's use of *Ho* in the instant petition is inaccurate, the AAO notes that the use of *Ho* in questioning inconsistent evidence is appropriate in any CIS decision deliberation.

The AAO also notes that the director can require further documentation beyond the letters of work verification, stipulated at C.F.R. § 204.5(l)(3)(ii)(A), should he or she deem further verification of the claimed employment necessary. Such further documentation may include W-2 forms, or Forms 1099-MISC, or pay stubs. However, the part of the director's decision that precludes the utilization of the beneficiary's claimed previous employment to establish the requisite number of years of work experience stipulated by the Form ETA 750 prior to the priority date is withdrawn.

To determine whether a beneficiary is eligible for an employment based immigrant visa, 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, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of manager. 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)

The applicant must also have 2 years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A states the corrected work schedule will be Monday through Friday, 5:30 AM to 2:30 PM with a one hour break.

The beneficiary did not set forth any academic credentials on Form ETA-750B and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, she represented that she was unemployed from November 2004 to the date she signed the Form ETA 705, namely, June 29, 2005. She also states that she worked at the [REDACTED], in Atascosa, Texas from August 2000 to October 2004, as a manager of a retail store. The beneficiary also states that she worked at [REDACTED] in San Antonio, Texas 78264, February 1999 to August 2000 also as a manager of a retail store.

As stated previously, the regulation at 8 C.F.R. § 204.5(l)(3) 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.

The AAO notes that the two years of relevant work experience must be achieved prior to the priority date of the petition. In this case, as previously stated, the priority date is April 24, 2001. Thus, the petitioner has to establish that the beneficiary has two years of relevant work experience prior to April 24, 2001. In the instant petition, the earliest dates two such years of previous work experience could be established prior to the actual priority date are from April 24, 1999 to April 23, 2001.

In attempting to establish the beneficiary's previous employment as sufficient to fulfill the work experience stipulated by the Form ETA 705, the petitioner submitted two letters of work verification to the record, both of which the director in his decision found insufficient evidence as to the beneficiary's employment. On appeal, counsel submits documentation of the beneficiary's previous employment, namely, the IRS W-2 printouts for tax years 2000 to 2004.

However, these records do not establish that the beneficiary has two years of relevant work experience as a store manager of a convenience store prior to the April 24, 2001 priority date. First the tax documentation does not establish the beneficiary's claimed employment from February 1999 to December 1999 with [REDACTED] San Antonio, Texas.⁶ It only establishes the beneficiary's work with [REDACTED], San Antonio, Texas as of tax year 2000. Second, the tax documentation submitted to the record for tax year 2000 suggests that the beneficiary did not work fulltime during tax year 2000 at either claimed employment site.⁷ Thus, the record is incomplete as to whether the beneficiary's work during tax year 2000 would fulfill a year of fulltime employment. With regard to the period of time in tax year 2001 prior to the priority date, namely, January 1, 2001 to April 23, 2001, the record is incomplete as to whether the beneficiary's employment with [REDACTED] in Atascosa, Texas, was fulltime, based on her annual 2001 wages of \$16,320. As previously stated, the petitioner did not submit any further evidence as to the beneficiary's wages in tax year 1999. Furthermore, while the tax records submitted on appeal establish the

⁶ The AAO also notes that the petitioner did not submit any relevant evidence to establish that [REDACTED] was doing business at this time as [REDACTED]. The claimed employer's letterhead would not constitute sufficient evidence as to the claimed [REDACTED]

⁷ The letters of work verification also do not indicate that the beneficiary worked for either convenience store on a fulltime, 40 hour week basis.

beneficiary's employment from January 1, 2000 to April 23, 2001, this period of time is not sufficient to establish that the beneficiary has the requisite two years of fulltime work experience as a manager of a retail store prior to the April 24, 2001 priority date.

Thus, the AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience prior to the April 2001 priority date from the evidence submitted into this record of proceeding and thus the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered 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 not met that burden.

ORDER: The appeal is dismissed.