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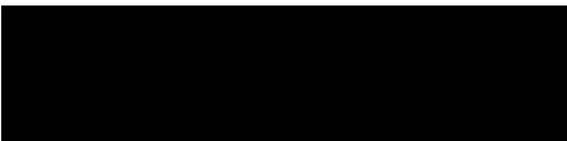
FILE: EAC 04 101 50796 Office: VERMONT SERVICE CENTER Date: MAR 13 2007

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.

Robert P. Wiemann
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the instant employment-based visa petition. The director reopened the matter pursuant to a motion and affirmed his decision to deny. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a demolition company. It seeks to employ the beneficiary permanently in the United States. The visa petition described the proffered position "Lead Demolition Worker." The Department of Labor classified the position as "Demolition Specialist."

As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition and denied the petition accordingly.

On appeal, counsel submitted a statement and indicated that he would file a brief within 30 days. To date, no additional information, argument, or documentation has been received. On February 26, 2007 this office sent counsel a facsimile transmission asking whether he submitted the brief as he indicated. Counsel did not respond to that request.

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 unavailable in the United States.

The regulation at 8 C.F.R. § 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.

Eligibility in this matter hinges on the petitioner demonstrating 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). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on April 30, 2001. The labor certification states that the position requires two years experience in the job offered, Lead Demolition Worker/Demolition Specialist.

On the Form ETA 750B, which the beneficiary signed on October 4, 2001, the beneficiary stated that he had worked as Lead Demolition Worker for “40+” hours per week. The beneficiary did not identify his employer’s name or address, the date he began to work in that position, or the date he left that position. The instructions to that form require the beneficiary to “List all jobs held during the past three years . . . and . . . list any other jobs related to [the proffered position].”

With the petition counsel submitted no evidence in support of the beneficiary’s claim of qualifying employment experience. Therefore, the Vermont Service Center, on October 12, 2004, requested evidence pertinent to the beneficiary’s claim of qualifying employment. The service center requested that the petitioner, “[s]ubmit evidence to establish that the beneficiary possessed the required two years experience as a lead demolition worker as of [the priority date].” Consistent with the requirements of 8 C.F.R. § 204.5(l)(3)(ii), the Service Center requested that evidence of the beneficiary’s experience be in the form of 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.

The service center also requested evidence pertinent to the petitioner’s continuing ability to pay the proffered wage beginning on the priority date. Specifically, the service center requested the petitioner’s 2002 tax return and, if it employed the beneficiary during 2001, 2002, or 2003, Form W-2 Wage and Tax Statements showing wages it paid to him.

In response, counsel submitted a letter dated December 17, 2004 from EMCO Construction LLC in Stamford, Connecticut. That letter stated that it had employed the beneficiary since July of 2002 as a Demolition Specialist. Counsel submitted no other evidence of qualifying employment in response to the request for evidence. Counsel did not submit the requested tax returns or any W-2 forms.

Although the employment verification letter from EMCO alleges more than two years of experience it does not demonstrate that the beneficiary had any relevant experience prior to the April 30, 2001 priority date of the instant petition. On February 4, 2005, the director denied the petition, finding that the evidence submitted did not demonstrate that the beneficiary had the requisite two years of qualifying employment experience as of the priority date.

On motion to reopen,¹ counsel submitted another employment verification letter. This second letter is dated February 24, 2005, is in Polish, and is accompanied by an English translation. The translation states that the beneficiary worked for Firma Remontowo-Budowlana, in Poland, from May 1997 to November 1999 as a Demolition Worker.

On June 8, 2005 the Vermont Service Center reopened the matter and denied the petition again, finding that the employment verification letter from Firma Remontowo-Budowlana does not demonstrate that the beneficiary worked as a **Lead** Demolition Worker, and further that its submission on appeal, given that this prior experience was not noted on the Form ETA 750B, casts doubt on its veracity.

¹ In fact, the I-290B was a tardily submitted appeal, which the director chose to treat as a motion to reopen pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

On appeal, counsel stated,

The letter submitted from Firma Remontowo-Budowlana indicates that the application was employed as a demolition worker from May 1997 to November 1999. You have to note that the position was certified as a demolition specialist rather than as a lead demolition worker. It is correct that the employment was not listed in Part B of the ETA 750. The reason for this omission was the extreme rush experienced by this office in submission of documentation before April 30, 2001 (to qualify under Sec. 245(i) and we did not have all the necessary information.

Counsel's explanation for the beneficiary's failure to list his employment with Firma Remontowo-Budowlana is unconvincing. The beneficiary was required by the instructions on the Form ETA 750B to list all employment related to the proffered position on that form. The beneficiary could have listed the name of the firm, the dates he was employed, the name of his supervisor, and the dates of his employment. If the beneficiary were unsure of any details he could have given his best approximation and indicated the details of which he was unsure.

A petitioner raises serious questions of credibility when asserting a new claim to eligibility on appeal. Counsel's explanation is insufficient to overcome this office's suspicion. Even if counsel's claim of rushing to submit the Form ETA 750 explained why the employment in Poland was not claimed on the labor certification application, that would not explain the failure to provide evidence of that employment claim with the visa petition or in response to the request for evidence.

The regulation at 8 CFR § 204.5(l)(3)(ii)(B) does not encourage petitioners to hold evidence in abeyance and submit it on appeal or on post-appeal motion. Rather, it clearly states that the petition **must be accompanied by** evidence of the beneficiary's experience

In this case, the employment verification letter submitted in response to the request for evidence does not qualify the beneficiary for the proffered position. In response to that finding, counsel has submitted evidence of other, previous employment, never before mentioned in conjunction with this application. This office is not persuaded of the veracity of that newly submitted evidence. This is sufficient reason to disregard the beneficiary's claim of employment in Poland.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

Counsel is correct that the proffered position was classified as a Demolition Specialist, rather than as a Lead Demolition Worker. The employment verification letter from Firma Remontowo-Budowlana, however, states only that the beneficiary worked as a "demolition worker." Counsel offers neither evidence nor argument to demonstrate that those two positions are identical. If counsel intended, on appeal, to support the beneficiary's

claim of qualifying employment with that employment verification letter, counsel should have demonstrated that the experience claimed is, in fact, that of demolition specialist as described at part 13 of the Form ETA 750A.

The evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience in the job offered. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position. The petition was correctly denied on this basis, which has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the original decision of denial and that was analyzed incorrectly in the director's affirmation of that denial.

The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner under the instant visa category to demonstrate its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements. This office notes that during 2001 both the petitioner's net profit and its end-of-year net current assets were less than the annual amount of the proffered wage. This additional basis for denial should also have been considered.

Because the decision of denial did not discuss this issue, and the affirmation of the denial indicated inaccurately that the evidence demonstrated an ability to pay the proffered wage, the petitioner has not been accorded an opportunity to respond to this apparent ground for denial. Thus, today's decision is not based on this issue, even in part. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

Further still, the October 12, 2004 request for evidence asked the petitioner to provide its 2002 tax returns. That return was not provided.²

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied on this additional basis. Because this issue was not raised in the decision of denial and the petitioner has not been accorded an opportunity to address it, this office declines to base today's decision, in whole or in part, on that ground. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

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.

² Counsel did submit 2002 and 2003 Schedules C for EMCO Construction, LLC, the beneficiary's then current employer. Those returns are not, however, relevant to the instant petitioner's continuing ability to pay the proffered wage beginning on the priority date.