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U.S. Citizenship
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Services

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File: [Redacted] LIN-06-208-51689

Office: NEBRASKA SERVICE CENTER

Date: JAN 09 2008

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:



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, Nebraska Service Center (“director”), denied the immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner’s business relates to steel reinforcing, and it seeks to employ the beneficiary permanently in the United States as a reinforcing metal worker (“Reinforcing – Steel Worker”). 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 December 15, 2006 decision, the petitioner filed the petition for a “skilled worker.” The requirements set forth in the Form ETA 750 were for an “other worker.” Accordingly, the petitioner was not able to establish that the position or the beneficiary qualified as a skilled worker.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).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 or skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1153(b)(3)(A)(ii), 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.” Section 203(b)(3)(A)(i) of 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. Section 203(b)(3)(A)(iii) of 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 job offer to the beneficiary is a realistic one. A petitioner’s filing of a Form 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

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).

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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 26, 2001. The proffered wage as stated on Form ETA 750 is \$22.15 per hour for an annual salary of \$46,072 per year. The petitioner additionally listed an overtime rate of one-half times the regular pay rate. The labor certification was approved on January 10, 2006, and the petitioner filed the I-140 Petition on the beneficiary's behalf on June 16, 2006. The petitioner listed the following information on the I-140 Petition: established: February 19, 1987; gross annual income: approximately \$5,000,000; net annual income: "average \$300,000;" and current number of employees: 196.

On December 15, 2006, the director denied the petition as the petitioner filed to classify the petition as a skilled worker position requiring two years of experience. The Form ETA 750 only required one year and six months of prior experience for the position. 8 C.F.R. § 204.5(l)(5) provides, "the determination of whether a worker is a skilled worker or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor." As the certified Form ETA 750 only required one year and six months of prior experience, the position could not be classified as that of a skilled worker, and was denied without prejudice to the filing of another petition. The petitioner appealed and the matter is now before the AAO.

On appeal, counsel provides that:

The petitioner wishes to amend the I-140 petition to reflect that he wishes to apply under classification EB3 Other Workers and not under the skilled worker category. Through this amendment, the beneficiary would become prima facie eligible for AOS [Adjustment of Status], and we therefore respectfully request that you reconsider the Nebraska Service Center's decision.

The record of proceeding has closed, and the petitioner is not able to amend and request consideration under a different category at this stage. As the record clearly demonstrated the beneficiary's ineligibility, CIS denied the petition. *See* 8 C.F.R. § 103.2(b)(8).

Although not raised in the director's decision, the petitioner has failed to document that the beneficiary meets the requirements of the certified labor certification. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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 750A, the "job offer" position description provides:

Positions and secures steels [sic] bars in concrete forms to reinforce concrete. Determines number, sizes, shapes, and location of reinforcing rods from blue-prints, sketches, or oral instructions. Selects and places rods in forms, spacing, and fastening them together, using wire and pliers. Cuts bars to required lengths, using hacksaw, bar cutters, or acetylene torch. Bends steel rods with handtools or rodbending machine. Reinforces concrete with wire mesh. Welds reinforcing bars together, using arc-welding equipment.

Further, the job offered listed that the position required prior experience of: one year and six months of experience in the job offered, Reinforcing, Steel Worker. The petitioner listed other special requirements as "references must be written and verifiable. Must be able to work weekends and arrange own transportation."

On the Form ETA 750B, the beneficiary listed his relevant experience as: (1) the petitioner, from August 2000 to the present (date of signature, April 23, 1001), position: Reinforcing, Steel Worker; (2) East Regional Rebar, Inc., Monrovia, MD, March 1999 to July 2000, Reinforcing, Steel Worker; (3) [REDACTED], Wheaton, MD, February 1998 to December 1998, Landscape Gardener.

A beneficiary is required to document prior experience 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.

(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 record contains confirmation that the beneficiary has been employed with the petitioner since August 2000. However, the petitioner must establish that the beneficiary had the required 1.6 years of experience before the priority date of April 26, 2001. The beneficiary cannot establish that he had the required amount of prior experience by the priority date through his experience with the petitioner.

The petitioner did not provide any letters from the beneficiary's prior employers to document his experience. Instead, the record contains the following statement:

Notarized statement from [REDACTED] dated May 30, 2006;

"This letter is to certify that I have known [the beneficiary] since June 2000. I have been a witness of [the beneficiary's] well behavior, his admirable work ethics and respect for others . . . I have been a legal resident in the United States of America since August 2002 . . . I am now employed with Facchina Construction for 12 years."

The record contains two similar statements. None of the statements are from employers or address the beneficiary's prior work experience to document that he has the prior experience to the meet requirements of the certified Form ETA 750. Accordingly, the petitioner has failed to demonstrate that the beneficiary meets the requirements of the certified Form ETA 750, and the petition should have been denied on this basis.

Based on the foregoing, the petitioner has failed to establish that the beneficiary meets the qualifications of a skilled worker. Further, the petitioner has failed to establish that the beneficiary met the requirements of the certified Form ETA 750. Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.