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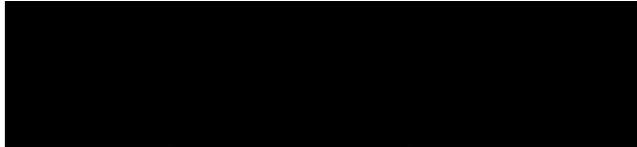
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
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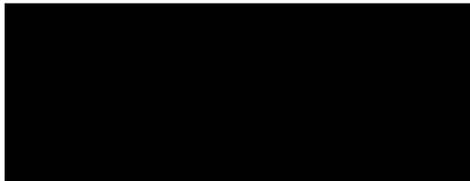
Date: SEP 11 2009

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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment based visa petition was denied by the Director, Nebraska Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the case will be remanded to the director for further investigation and entry of a new decision relevant to the petitioner's verification of the information requested and the petitioner's ability to pay the proffered wage.

The petitioner is a structural engineering firm. It seeks to employ the beneficiary permanently in the United States as a project manager, structural engineering. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not submitted a response to the request for evidence and denied the petition accordingly.

On appeal, counsel submits additional evidence and contends that the petitioner timely responded to the request for evidence.

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).

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [United States Citizenship and Immigration Services (USCIS)].

The petitioner must establish that its ETA 750 job offer to the beneficiary is realistic. 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 petitioner must also demonstrate that a beneficiary has the necessary education and experience specified on the

labor certification as of the priority date, the day the ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA 750 was accepted for processing on April 19, 2002. The proffered wage as stated on Part A of the ETA 750 is \$80,000 per year. On Part B of the ETA 750, signed by the beneficiary on April 1, 2002, the beneficiary claims to have worked for [REDACTED] in Tel Aviv, Israel from February 1995 to November 1997. He then states that he worked for [REDACTED] in New York from November 1997 to May 1999. From October 1999 to September 2000, he worked for [REDACTED] as a structural engineer and subsequently as a project manager, structural engineer from September 2000 to the present (date of signing).

On Part 5 of the Immigrant Petition for Alien Worker, Form I-140, which was filed on March 22, 2007, the petitioner states that it employs over 125 workers, and claims an annual gross income of \$14,339,000 and a net annual income of \$312,000.

On July 16, 2007, the director requested additional evidence from the petitioner establishing whether the beneficiary possessed the special requirements set forth on item 15 of Part A of the ETA 750. Those requirements are expressed as "[k]nowledge of ETABS, GT STRUDL, SAP2000, RAM Structural System, RAM Frame, Risa 3D, AutoCad, ADOSS and PCACOL Software.

The director denied the petition on December 17, 2007, determining that the petitioner had failed to respond to the request for evidence. Rather than conclude that the petitioner had failed to establish that the beneficiary had satisfied the requirements of the Form ETA 750, the director also determined that the petitioner had not established its continuing financial ability to pay the proffered wage.

On appeal, counsel submitted his own sworn statement that a response had been sent via FedEx and was received by the Service Center on July 26, 2007 with several items contained in the same envelope. A copy of a Fedex tracking document was also included on appeal showing this date as a date of delivery. Counsel additionally provided a copy of a letter, dated July 24, 2007, from [REDACTED], the petitioner's CEO. He states that when the beneficiary joined them on November 1, 2003 as a Project Manager, Structural Engineer, he was quite familiar with ETABS, GT Strudl, SAP 2000, RAM Structural System, Ram Frame, Risa 3D, AutoCad, ADOSS, and PCACOL Software. [REDACTED] asserts that although these are specialized software programs, structural engineers commonly use them.

To determine whether the beneficiary is eligible for an employment-based visa, USCIS examines whether the beneficiary's credentials satisfy the requirements of the ETA 750. USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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).

It is noted that [REDACTED] letter, as drafted, fails to document whether the beneficiary gained specific knowledge of the software programs specified on item 15 of the ETA Form 750 as of the April 19, 2002 priority date. It merely states that the beneficiary had that knowledge when he joined the petitioner on November 1, 2003. Further, the director on remand should additionally verify the dates of employment that the petitioner has employed the beneficiary and confirm what type of relationship it had with [REDACTED] as listed on the ETA Form 750, because the petitioner and former employer bear part of the same name. It is noted that on the Form G-325A, Biographic Information form, submitted in connection with the beneficiary's application for permanent residency, signed by the beneficiary on February 20, 2007, he stated that he has worked for the petitioner from October 1999 to the present (date of signing). As noted above, on Part B of the ETA Form 750, from October 1999 to September 2000, the beneficiary also stated that he worked for [REDACTED] [REDACTED] as a structural engineer and subsequently as a project manager, structural engineer from September 2000 to the present (date of signing). It is further noted that Part B of the ETA Form 750 indicates that the beneficiary's job duties with [REDACTED] [REDACTED] includes the first mention that he used the software programs specified on item 15 in the labor certification. The petitioner should clarify who this employer was and how it was related to the petitioner. 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. 582, 591-592 (BIA 1988).

The director's conclusion that the petitioner failed to establish its continuing ability to pay the proffered wage was somehow based on the petitioner's failure to submit evidence responsive to the beneficiary's special knowledge of certain software programs was unclear. If it was an independent determination, on remand, the director should fully articulate his reasons for reaching this conclusion based on the requirements set forth in the regulation at 8 C.F.R. § 204.5(g)(2).

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation relevant to the above and request any additional evidence from the petitioner deemed necessary. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision relevant to these issues.

ORDER: The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.