

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

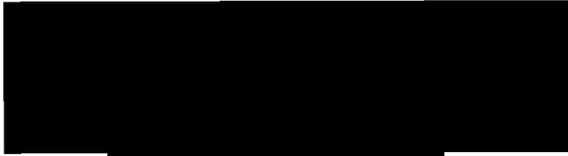
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

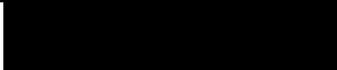
**PUBLIC COPY**

B6



**MAR 15 2010**

FILE:



Office: NEBRASKA SERVICE CENTER

Date:

LIN 06 173 51879

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a concrete construction company.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as a concrete finisher. As required by statute, the petition is accompanied by Form ETA 750, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to establish that the beneficiary had the requisite experience as of the date the labor certification was filed. The director denied the petition accordingly.

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.

As set forth in the director's July 17, 2007 denial, the issue in this case is whether or not the beneficiary had the required experience as of the date that the labor certification was filed.

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.

In examining the issue of the beneficiary's experience, USCIS must look to the job offer portion of the alien 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 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> 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.

---

<sup>1</sup> The petitioner submitted a 2005 annual report from "[REDACTED]" A page of that report states that [REDACTED] acquired the petitioner in January 2005. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In any further filings, the petitioner would need to demonstrate a valid successor in interest relationship and that a bona fide job offer still remains. A valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). Here, the priority date is April 26, 2001. The Form I-140 states that the petitioner was established in 1968 and has 500 employees.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a skilled worker that:

(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

(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 regulations for the skilled worker classification contain a minimum requirement that the position require at least two years training or experience. The Form ETA 750 requires two years of experience in the job offered as a concrete finisher and does not provide for experience in any related occupation. Specifically, the Form ETA 750 requires experience "prepar[ing] and lay[ing] cement/concrete mixture for constructing, reinforcing and covering structures such as basements, walls, reinforcing steel or ironwork, patios and fencing." On the Form ETA 750, signed by the beneficiary on April 25, 2001, the beneficiary indicated that he worked beginning in February 1996 with the petitioner and had previously worked from 1989 to September 1993 with [REDACTED] in Rockville, Maryland. In response to the director's first Request for Evidence dated November 21, 2006 requesting information about the beneficiary's experience, the petitioner submitted a letter from [REDACTED] owner of [REDACTED], stating that the beneficiary worked for the company between May 1993 and January 1996 as a concrete finisher. The letter stated that he worked five days per week, eight hours per day. The AAO notes, as the director did, that the beneficiary did not indicate on the Form ETA 750 that he worked for [REDACTED]. See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) (the BIA in dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750, lessens the credibility of the evidence and facts asserted). 8 C.F.R. § 103.2(b)(8) allows the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* The director issued a second Request for Evidence dated February 20, 2007, requesting clarification regarding the claim of the beneficiary on the Form ETA 750 that he worked for [REDACTED] until September 1993. This information conflicted with the letter from [REDACTED] stated that the beneficiary worked for him between May 1993 and September 1993 (and beyond). The director also noted in the second RFE that no mention of [REDACTED] was made on the Form ETA 750, Part B. In response, the petitioner submitted a letter from the beneficiary stating that he did not list the [REDACTED] experience on the Form ETA 750, Part B because he could demonstrate the requisite two years of experience through

his work with [REDACTED] and that from May to September 2003, he worked jointly for [REDACTED] and [REDACTED] by alternating weeks with the two employers.

In the second RFE, the director requested that the petitioner submit evidence of the beneficiary's salary and how [REDACTED] recalled such dates accompanied "by copies of any documentation which [REDACTED] referenced to ascertain this information." The director noted in his decision the petitioner's failure to submit any supporting documentation in response to this request. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

On appeal, the petitioner submitted Form W-2s from [REDACTED] demonstrating that it paid the beneficiary \$6,505 in 1992 and \$11,073.75 in 1993 and a letter from [REDACTED] of [REDACTED]. The Form I-290-B states that the documentation was not submitted any earlier because [REDACTED] could not be located. Counsel explained that [REDACTED] was then located doing business under a different name and the documentation was submitted as soon as it was received. The letter from [REDACTED] states that the beneficiary worked for the company from 1989<sup>2</sup> to September 1993 full-time "except May through September of 1993 when he worked part-time, earning a weekly salary of \$480.00." The Form W-2s do not support the statements from [REDACTED] that the beneficiary was employed in a full-time capacity. According to the weekly wage amounts provided in [REDACTED] letter, the beneficiary would have earned \$24,960 in 1992 and approximately \$13,520 in 1993 instead of the amounts indicated on the Form W-2s.<sup>3</sup> This would fail to establish two years of full-time experience. "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 (BIA 1988). The petitioner did not submit or explain why it could not submit W-2 statements from [REDACTED] for any other year from 1989 to 1991 when [REDACTED] claimed that it employed the beneficiary. The evidence submitted does not establish that the beneficiary worked in a full-time capacity for [REDACTED] for two years or that he otherwise has the requisite two years of experience as a concrete finisher through other verified employment.

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.

---

<sup>2</sup> Additionally, a letter from counsel in response to the director's first RFE states that the beneficiary arrived in the United States in April 1992. Therefore, the undocumented assertion that he worked for [REDACTED] from 1989 onward is in question. "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).

<sup>3</sup> The figure for 1993 was calculated by taking weekly wage amount from [REDACTED] letter and [REDACTED] statement that the beneficiary worked full-time from January to May 1993 and the beneficiary's statement that he worked every other week from May to September 1993.

**ORDER:** The appeal is dismissed.