

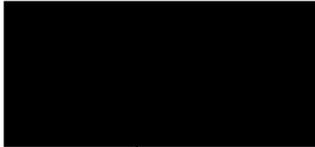
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date:
SEP 14 2010

IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you

Perry Rhew

Chief, Administrative Appeals Office

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

The petitioner is an apparel manufacturer. It seeks to employ the beneficiary permanently in the United States as a sewing machine operator. As required by statute, the petition is accompanied by labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner was not eligible to file the instant petition based on the ETA Form 750. 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 September 12, 2008 denial, an issue in this case is whether or not the petitioner has established that the position requires less than two years of training or experience such that the petition may be approved under the other, unskilled worker classification. An additional issue concerns whether the petitioner has provided any of the initial required evidence to establish the petitioner's ability to pay the proffered wage. A final issue is whether the petitioner has submitted the required evidence to establish the beneficiary's prior work experience.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

On appeal, the petitioner states that the director's decision is based on erroneous information contained in the ETA Form 750. The petitioner states that when the Form ETA 750 was submitted to the Department of Labor (DOL), it received DOL Analyst Findings stating that its requirement for two years experience was excessive because DOL assigned an SVP of four not to exceed six months of prior work experience for the job classification. The petitioner states that in order to receive the labor certification, the petitioner was required to, and did formally, accept the DOL reassessment of a 6 month work experience requirement. The petitioner states that in order to make the ETA Form 750 consistent with the DOL conditions of certification, DOL should have amended Box 14 to read "six months" or made other indications of this fact in the certification document.

On appeal, the petitioner submits three documents to the record. The first is a letter to the [REDACTED] dated December 6, 2006. Annotations on the letter indicate that the petitioner requested that the case be converted to "Reduction in Recruitment" and also states that the

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).

petitioner accepts DOL's assessment of SVP requirements; certifies that its current pay rate equals or exceeds the prevailing wage indicated; and states that the beneficiary's present visa status is "none."

The second document, identified as page three SR-TR3, is dated October 30, 2006 and is entitled "Analyst Findings List." The document describes missing items from Form ETA 750, Part A or B or issues that need to be resolved in order to continue processing the form. The document states that all changes (new and existing) must be initialed and dated by the employer, with changes made by lining through each entry and dating and initialing by the appropriate person.² The third document is the cover letter for the DOL ETA 750 certification dated December 20, 2006.

Among the issues noted on the Analyst Findings List are the following: in Part A., Item 3, the beneficiary's present visa status needed to be identified; in Item 12A, the petitioner's wage offer is below the prevailing wage and must be adjusted to the prevailing wage of \$10.24 an hour; and in Item 13-15 Job duties, responsibilities and/or requirement appeared to be unduly restrictive. DOL also adds that the combination of education/training/experience had been determined to be excessive and restrictive. The writer further noted that the occupational code of 51-6031 (Sewing Machine Operators) had been assigned a standard vocational preparation (SVP) of 4.0, not to exceed six months.

The document concludes by stating that changes to the ETA Forms 750A and B can be faxed in order for recruitment to begin, and that the DBEC must receive originally signed and amended ETA Forms 750A and B or originally signed and dated amendments before a final determination can be made. The AAO notes that the ETA form 750 contained in the record was certified on December 20, 2006, a date after the correspondence provided by the petitioner on appeal, and does not indicate any initialed or changed corrections. The work experience required for the position is noted in Section 14 as two years, while the rate of pay remains \$6.25 an hour, and the beneficiary's visa type, Item 3, remains blank. The document states that Part A or Part B will be returned for correction upon request. The record contains no further correspondence from the petitioner to DOL, or vice versa with regard to any changes to the ETA Form 750.

The Form I-140 was filed on May 4, 2007, along with the certified ETA 750. There are no annotations or amendments on the labor certification reflecting or supporting the petitioner's claims. The petitioner submitted no additional evidence with the I-140 petition.

The AAO notes that the I-140 petition, page one, Part 2, Petition type, section g, indicates the petitioner filed the petition under the other worker classification that requires less than two years of training or experience, while the certified Form ETA 750 requires two years of prior work experience, thus qualifying the proffered position as a skilled worker.

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

² Thus, the instructions on this document suggest that the petitioner is responsible for any changes.

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 regulation at 8 C.F.R. § 204.5(l)(3) also provides

(ii) Other documentation--

(D) *Other Worker*. If the petitioner is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

Further, the regulation at 8 C.F.R. § 204.5(i) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled 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.

In this case, the certified labor certification indicates that the proffered position requires two years of prior work experience. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). In the instant matter, the time for changes to the actual requirements stipulated on the ETA Form 750 would have been prior to certification.

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of

the labor certification. Further in examining the instant petition, both the proffered position and the beneficiary must qualify for the classification sought. In this matter, the appropriate remedy would be to file another I-140 petition with the proper fee, and required documentation. The AAO finds the wrong classification issue in the instant case grounds for a summary dismissal.

The AAO will comment briefly on the two other issues raised by the director in his decision, namely, the petitioner's ability to pay the proffered wage, and the lack of corroboration of the beneficiary's claimed prior work experience.

The regulation at 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also 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 DOL 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 30, 2001. The unchanged proffered wage as stated on the Form ETA 750 is \$6.25 an hour (\$13,000 per year). The Form ETA 750 states that the position requires two years of work experience in the proffered position.

As the director correctly noted, the petitioner did not submit any of the evidence listed at 8 C.F.R. § 204.5(g)(2) with the initial I-140 petition. On appeal, [REDACTED], the petitioner's Vice President, states that the petitioner was already required to certify to DOL that the current pay rate equals or exceeds the prevailing wage.³ He or she certifies, as the financial officer of the petitioner, that the petitioner has the ability to pay the proffered wage. The petitioner's Vice President further states that the petitioner had revenues over \$11 million in 2008 and net income before taxes of over \$800,000. On appeal, the petitioner again fails to submit any evidence of its ability to pay the proffered wage.

³ The instant ETA 750 does not establish that the petitioner's proffered wage exceeds the prevailing wage. The AAO notes that the DOL Analyst Findings Report indicates the prevailing wage to be \$10.24 an hour. This hourly wage results in yearly wages of \$21,299.20, a salary higher than the proffered wage on the certified ETA 750.

The record does not contain any of the petitioner's federal income tax returns during the relevant period of time from the 2001 priority year to the present. Therefore the AAO cannot determine the petitioner's business structure. On the petition, the petitioner claimed to have been established on January 1, 1976, to have a gross annual income of \$9,000,000 dollars, a net annual income of \$700,000 and to currently employ 130 employees. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary claimed to have worked for the petitioner since September 1999.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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 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). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). While the director correctly noted that a petitioner may submit a statement from a financial officer if the petitioner employs more than 100 employees, this does not preclude the director from requesting further evidence. Further based on the director's denial of the petition, the petitioner could have submitted any relevant documentation with regard to the petitioner's ability to pay on appeal, but chose not to do so. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Without such documentation, the AAO cannot determine how to calculate the petitioner's net income or net current assets. Thus the petitioner cannot establish its ability to pay the proffered wage based on wages paid to the beneficiary, its net income, or its net current assets.

The petitioner's officer's assertions on appeal cannot be concluded to outweigh the fact that the record contains none of the required financial documentation to establish that the petitioner could pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL. The AAO notes that the assertions of the petitioner's officer do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus the petitioner has not established its ability to pay the proffered wage as of the 2001 priority date and onward.

With regard to the third issue raised by the director, the lack of documentation as to the beneficiary's prior work experience as a sewing machine operator, 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.

On appeal, the petitioner's vice president states that documentary evidence of the requisite two years of work experience stipulated on the ETA Form 750 is moot, since the requested classification requires less than two years of prior work experience. However, the AAO notes that if the Form ETA 750 had been corrected to reflect the suggested six months of prior work experience, the petitioner would have been required to establish this work experience.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.