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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
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U.S. Citizenship
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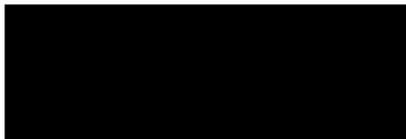
JAN 18 2011

FILE:  Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



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 \$630. 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,

Elizabeth McCormack

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 landscaping business. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary was qualified to perform the duties of the position as of the priority date.

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 November 24, 2008 denial, the issue in this case is whether the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position with one year and six months of qualifying employment experience as set forth on the Form ETA 750.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (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 demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, 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). According to the plain terms of the labor certification, the applicant must have one year and six months experience in the job offered as a landscape gardener, and must be able to supervise up to seven people.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he has been employed as a landscape gardener for Six L's Farms from March 10,

1998 through January 15, 2000; and that he was employed by the petitioner as a landscape gardener from November 1999 through April 2001, the date he signed the document. The beneficiary described his position at Six L's Farms as planning and executing small scale landscaping and maintaining the grounds at various locations. The beneficiary does not provide any additional information concerning his employment background on that form.

The record of proceeding also contains a Form G-325A, Biographic Information sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form under a section eliciting information about the beneficiary's previous employment, he represented that he was employed by the petitioner since August 2000, above a warning for knowingly and willfully falsifying or concealing a material fact.

The regulation at 8 C.F.R. § 204.5(1)(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.

(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.

As evidence of the beneficiary's qualifications, the petitioner submitted a letter of employment dated January 12, 2009 from [REDACTED] the facilities manager for [REDACTED]. To meet the qualifications, the employment letter must include the following: the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A). The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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). Mr. Gay stated that the company employed the beneficiary from March 10, 1998 through March 15, 2000. He described the beneficiary's duties as: "planned and executed small scale landscaping operations and maintained ground and landscaping at the business."

The information given by [REDACTED] conflicts with the beneficiary's statements on the Form ETA 750B, where the beneficiary indicates he began his employment with the petitioner in November 1999, four months before he would have ended his employment with [REDACTED]. Further,

the beneficiary indicated on the Form ETA 750B that he worked for [REDACTED] during the same time period that [REDACTED] states that he worked for [REDACTED] from March 10, 1998 through January 15, 2000. The beneficiary did not list his employment with [REDACTED] on either Form ETA 750B or Form G-325A. Further, although [REDACTED] states that the beneficiary supervised up to seven workers, the beneficiary did not state, in describing his employment experience, that he supervised workers. Because of these unexplained inconsistencies, the AAO does not accept the letter from [REDACTED] as evidence of the beneficiary's one year and six months employment as a landscaper.

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 petition. It is incumbent upon 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 lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Accordingly, it has not been established that the beneficiary has the requisite one year and six months of experience or that he is qualified to perform the duties of the proffered position. 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A).

Beyond the decision of the director, the petitioner has failed to show that it has the continuing ability to pay the proffered wage beginning on the priority date.

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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on December 20, 2004. The proffered wage as stated on the Form ETA 750 is \$10.32 per hour (\$21,465.60 per year).

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on October 1, 1989, and to currently employ 22 workers. According to the tax returns in the record, the petitioner's fiscal year is from October 1 to September 30. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary claims to have been employed by the petitioner, working 40 hours a week, since November 1999.

Although the director determined and the record demonstrates that the petitioner has the ability to pay the beneficiary's proffered wage as of the priority date, USCIS records show that the petitioner has filed multiple immigrant petitions subsequent to the priority date of the instant petition. Therefore, the petitioner must establish that it had sufficient funds to pay all the wages from the priority date and continuing to the present. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offer to each beneficiary is realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750 job offer, the predecessor to the Form ETA 9089 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). Accordingly, even though the record reflects that the petitioner has the ability to pay the proffered wage to the instant beneficiary, because the petitioner has filed multiple immigrant petitions the petitioner must also establish its ability to pay the beneficiary of each petition. The record fails to establish such ability. Thus, it cannot be determined that the petitioner has the ability to pay the proffered wage to the beneficiary in the instant matter. For this additional reason, the petition must be denied.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an alternative ground for dismissal. 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.