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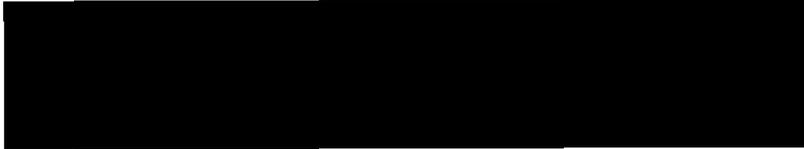
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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MAR 07 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,

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 matter will be remanded to the director for further consideration of the beneficiary's qualifications for the proffered position.

The petitioner is a roofing contractor. It seeks to employ the beneficiary permanently in the United States as a roofer. 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 specifically noted that Section 14 of the certified labor the certification requires one year of work experience in the proffered position *and* five years of work experience in the related field of construction. (Emphasis added). The director then determined that the petitioner filed the petition in the wrong visa preference classification based on the minimum requirements of the labor certification. The director also determined that the petitioner failed to submit sufficient evidence of the beneficiary's claimed previous work experience. 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 February 25, 2009 denial, the single issue in this case is whether or not the petitioner is eligible to file the petition under the unskilled worker classification based on the accompanying certified labor certification. The AAO will also examine the evidence submitted to establish the beneficiary's qualifications for the proffered position.

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 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 contrast, 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.

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, counsel states that the minimum requirements on the ETA Form 750 do not exceed the unskilled worker classification sought under the employment-based visa preference. Counsel states that Section 14 of the ETA Form 750 has three sections, and the petitioner may require experience in the proffered position, or alternatively, may accept experience in an alternate occupation. Counsel states that the labor certification certified in 2007 by DOL requires either one year of work experience as a roofer, *or* five years of work experience in the related field of construction. (Emphasis added). Counsel states that the beneficiary does have experience in either the one year in the proffered position or five years in the related occupation of construction.

Counsel notes that the DOL certified the petitioner's ETA Form 750, after determining two issues: that the experience required for the position was within the Standard Vocational Preparation (WVP) required under DOL's Dictionary of Occupational Titles and that the alternative requirements as stated were not unduly restrictive. In discussing a Board of Alien Labor Certification Appeals (BALCA) holding on the standard concerning alternative experience requirements on a ETA Form 750, counsel states that if the alternative experience to the job offered is appropriate to and related to the job, and a careful reading of the alternative requirements show them to be expansive rather than restrictive, then the alternative requirements are not unduly restrictive. Counsel refers to *Best Luggage, Inc* 88-INA-553 (November 1, 1989) and *Systems International Inc.* 92-INA 60 (August 24, 1992)

Counsel also refers to an interoffice memorandum written by [REDACTED]² with regard to utilizing a request for further evidence if the initial evidence submitted to the record was insufficient to establish eligibility. Counsel also asserts that if the director's reasoning is correct, that the petition could be refiled under the skilled worker classification based on the beneficiary's years of work experience.

In this case, the labor certification indicates that the position requires one year of work experience as a roofer, or five years of work experience in the related field of construction. Counsel is correct in her assertion that the work experience requirement for the proffered position listed in Section 14 is one year of work experience in the proffered position or five years of work experience in the related field of construction. The two types of prior work experience provide alternatives, not additional

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).

² Memorandum from William R. Yates, Associate Director For Operations, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)* HQOPRD 70/2 (February 16, 2005).

requirements to required work experience. Thus, this part of the director's decision will be withdrawn.

At Section 15, Other Special Requirements, the document states "Spanish speaking ability required to train and instruct Spanish speaking employees. Completion of State Approved Roofing Apprenticeship, Ability to obtain California Dr [Sic] upon passing test." The document contains several corrections made by the petitioner and approved by the DOL regional Office on June 12, 2007. These corrections increased the number of employees the beneficiary would supervise from two to three, changed the person to whom the beneficiary reported to from lead roofer to foreman, and changed the title of the proffered position from journeyman roofer to roofer. The AAO notes that the alternative requirement of five years of work experience in the related occupation of construction was not changed at this date.

The AAO notes counsel's assertions with regard to the role played by DOL in labor certification applications and will comment briefly on this issue. Section 212(a)(5)(A)(i) of the Act provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by Federal Circuit Courts.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).³ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

³ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of United States Citizenship and Immigration Services (USCIS) to determine if the petition and the alien beneficiary are eligible for the classification sought.

The AAO notes that based on the one year of work experience required by the labor certification the proffered position is an unskilled worker classification, while the requirement of five years of prior work experience in construction in the related occupation is indicative of a skilled worker classification. On appeal, counsel states that the requirements for the proffered job are one year of experience as a roofer, or five years of work experience in construction. Counsel only comments on the alternative requirements of five years of work experience in construction. The AAO notes that neither the petitioner nor counsel examine whether the record contains sufficient evidence to establish the initial requirement of one year of work experience as a roofer prior to the 2001 priority date.

As stated previously, the director also determined that the petitioner had not clearly established that the beneficiary had the required work experience for the proffered position, referring to the five years of work experience in the related field of construction, determining that the beneficiary had to have both the one year of work experience and the five years of work in construction, for a total of six years experience.. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 30, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). 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.

(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.

With the initial I-140 petition, the petitioner submitted an undated letter of work verification with the

I-140 petition signed by [REDACTED] that provided no details on the beneficiary's claimed work with [REDACTED] from 1988 to May 1994. The petitioner also submitted a letter dated October 24, 2007 written by [REDACTED], the petitioner's owner. In this letter, [REDACTED] states that [REDACTED] and [REDACTED] acquired [REDACTED] on November 13, 2006, and the company formerly known as [REDACTED] is now doing business as [REDACTED].⁴ The petitioner submitted sufficient evidence to establish that the I-140 petitioner is a successor in interest to the ETA Form 750 applicant.

Mr. [REDACTED] in his letter described the beneficiary's job duties and his current weekly salary, but he provides no evidence that the beneficiary worked for a year as a roofer for the original ETA Form 750 applicant prior to the April 30, 2001 priority date. The AAO notes that in Part B, of the ETA Form 750, the beneficiary claims that he worked for ANC Roofing from May 1994 until April 30, 2001, the date he signed the ETA 750. The record also contains the beneficiary's G-325, Biographic Information, that contains the same information. However the petitioner has not provided any such proof of prior employment.

On appeal, the petitioner submitted a more detailed letter from [REDACTED] Michoacan, Mexico, dated March 23, 2009. [REDACTED] described the beneficiary's work for him from 1988 to May 1994 as a builder of concrete roofs, identifying job tasks of concrete repair, constructing house foundations of concrete and installing some tile roofs. Thus, the AAO notes that the petitioner has provided sufficient evidence to establish that the beneficiary possesses five years of work experience in construction prior to 2001.

However the alternate requirements of the proffered job requiring five years of work experience in the related occupation of construction are indicative of a skilled worker classification which confuses the record. Although the petitioner established the beneficiary's qualifications in the alternate work occupation, as noted previously, the record contains no evidence that explicitly establishes that the beneficiary has the one year work experience as a roofer prior to the April 2001 date. If the petitioner wishes to establish the beneficiary's work experience based on his prior five years of work in construction, the instant petition should have been filed in the skilled worker classification.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the beneficiary's qualifications for the proffered position. The director may request any additional evidence considered pertinent. 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.

⁴ The AAO notes that the I-140 petitioner's status as a successor in interest is established by the record and is not an issue in these proceedings.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.