



U.S. Citizenship  
and Immigration  
Services

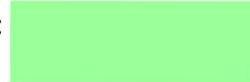
(b)(6)



Date:

Office: TEXAS SERVICE CENTER

FILE:



**JUN 21 2012**

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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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, Texas 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 supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and that the beneficiary had not met the experience requirements of the labor certification as of the priority date. 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.

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.<sup>1</sup>

As set forth in the director's February 27, 2009 denial, at issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director also concluded that the beneficiary did not meet the minimum experience requirements of the offered position by the priority date.

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 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.

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<sup>1</sup> 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).

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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on December 20, 2004. The proffered wage as stated on the Form ETA 750 is \$14.01 per hour, or \$29,140.80 per year. The Form ETA 750 states that the position requires two years of experience in the job offered or two years of experience as a landscape laborer or an assistant landscape foreman.

Upon review of the entire record, including additional evidence submitted on appeal, and considering the totality of the circumstances,<sup>2</sup> the AAO concludes that the petitioner has established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. Therefore, the director's decision on this issue is withdrawn.

The director also concluded that the beneficiary did not meet all of the requirements of the offered position as stated in Part A, Item 14 of Form ETA 750 by the priority date. On appeal, counsel states that the petitioner's employment records are not precise, but that the beneficiary worked for the petitioner from April 22, 2002 until about December 15, 2002. This is a total of 238 days. The beneficiary then returned to work on or about April 6, 2003 until December 13, 2003 for a total of 252 days. In 2004 the claimed dates of employment are approximately May 2 through December 15, for a total of 228 days. The result is a total of 718 days of employment by the priority date. In support of the claimed dates of employment, the petitioner submits copies of its payroll records for 2002, 2003 and 2004.

The labor certification states that the offered position requires two years of experience, which equates to 730 days. Therefore, based on counsel's claimed dates of employment, the beneficiary did not possess the required experience for the offered position by the priority date.

Further, there are inconsistencies in the record pertaining to the beneficiary's claimed dates of employment. 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.

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<sup>2</sup> *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967).

The record contains an employment experience letter of [REDACTED] President of the petitioner, dated December 12, 2007. The letter only mentions beneficiary's claimed employment from March to December in 2002 and 2003. This is less than the required two years of experience. The letter does not mention the beneficiary's claimed employment in 2004, even though the letter was authored in 2007. In addition, the dates of employment on the letter are different from the dates of employment claimed by counsel on appeal. The letter also does not state whether or not the beneficiary was employed on a full-time basis. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

In addition, the beneficiary's qualifying experience was gained with the petitioner in the similar position of landscape laborer. The regulation at 20 C.F.R. § 656.21(b)(5) [2004] states:<sup>3</sup>

The employer shall document that its requirements for the job opportunity, as described, represent the employer's *actual minimum requirements* for the job opportunity, and the **employer has not hired workers with less training or experience** for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

(Emphasis added.)

When determining whether a beneficiary had the required minimum experience for a position, experience gained by the beneficiary with the petitioner in the offered position cannot be considered, except in limited circumstances. This position is supported by the Board of Alien Labor Certification Appeals (BALCA), *See Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA):

[W]here the required experience was gained by the alien while working for the employer in jobs other than the job offered the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment

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<sup>3</sup> The priority date of the labor certification submitted with the petition predates the current Program Electronic Review Management (PERM) system implemented by the DOL on March 28, 2005. Accordingly, the instant labor certification is subject to the DOL's pre-PERM regulations.

practices of the Employer regarding the relative positions, the amount or percentages of time spent performing each job duty in each job, and the job salaries.<sup>4</sup>

In *Delitizer*, BALCA considered whether an employer violated the regulatory requirements of 20 C.F.R. § 656.21(b)(6)<sup>5</sup> in requiring one year of experience where the beneficiary gained all of his experience while working for the petitioning employer. After analysis of other BALCA and pre-BALCA decisions,<sup>6</sup> the Board in *Delitizer* determined that 20 C.F.R. § 656.21(b)(6) does require that employers establish “the ‘dissimilarity’ of the position offered for certification from the position in which the alien gained the required experience.” *Delitizer Corp. of Newton*, at 4. In its decision, BALCA stated that Certifying Officers should consider various factors to establish that the requirement of dissimilarity under 20 C.F.R. § 656.21(b)(6) has been met, and that, while Certifying Officers must state the factors considered as a basis for their decisions, the employer bears the burden of proof in establishing that the positions are dissimilar. *Delitizer Corp. of Newton*, at 5.

The president of the petitioner submitted a letter in support of the petition stating that the offered position is different from the landscape laborer position because it is permanent instead of seasonal, and it involves management and critical-thinking tasks. However, there is no evidence in the record that the DOL conducted an analysis of the similarity of the offered position and the position in which the beneficiary gained his qualifying experience with the petitioner. In the instant case, the primary difference between the two positions appears to be that the offered position entails supervision of two employees. The duties of the two positions as described on the labor certification appear to be fundamentally similar.

In summary, the beneficiary did not possess the two years of experience required by the labor certification, and the evidence in the record pertaining to the beneficiary’s employment history contains multiple unresolved inconsistencies. Therefore, the petitioner has failed to establish that the beneficiary satisfied the two year experience requirement for the job offered. In addition, the beneficiary’s only qualifying experience for the offered position was gained with the petitioner in a similar position. The petitioner was willing to hire the beneficiary with no experience and provide him with the training and experience needed for a more senior position within the company, but was not willing to do so for U.S. workers.

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.

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<sup>4</sup> In a subsequent decision, the BALCA concluded that the factors stated in *Delitizer* for determining whether jobs are sufficiently dissimilar are not exhaustive. See *E & C Precision Fabricating, Inc.*, 1989-INA-249 (Feb. 15, 1991) (en banc.)

<sup>5</sup> 20 C.F.R. § 656.21(b)(5) [2004]

<sup>6</sup> See *Frank H. Spanfelner, Jr.*, 79-INA-188, May 16, 1979; *Mecta Corp.*, 82-INA-48, January 13, 1982; *Inakaya Restaurant d/b/a Robata*, 81-INA-86, December 21, 1981; *Visual Aids Electronics Corp.*, 81-INA-98, February 19, 1981; *Yale University School of Medicine*, 80-INA-155, August 13, 1980; *The Langelier Co., Inc.*, 80-INA-198, October 29, 1980; *Creative Plantings*, 87-INA-633, November 20, 1987; *Brent-Wood Products, Inc.*, 88-INA-259, February 28, 1989.

(b)(6)

**ORDER:** The appeal is dismissed.