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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
[illegible] Street N.W.
Washington, D.C. 20536

[redacted]

FEB 26 2004

File: WAC 02 026 58443 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

INSTRUCTIONS:
This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a landscaping firm. It seeks to employ the beneficiary permanently in the United States as a landscape construction supervisor. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had failed to establish that the beneficiary had the requisite three years of work experience as a landscape construction supervisor required by the offered position.

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

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. Pursuant to 8 C.F. R. § 204.5(d), the filing or priority date of a visa preference petition accompanied by an approved labor certification from the Department of Labor is the initial receipt date by any office within the employment service system of the Department of Labor. In this instance, that date is April 24, 1997. As noted on the labor certification, the beneficiary must have three years of experience in the job offered as set forth on Block 14 of the ETA 750.

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.

In this case, the petitioner submitted an affidavit from [redacted] to support the petitioner's claim that the beneficiary possesses three years experience as a landscape construction supervisor. Mr. [redacted] states that he worked as a landscaper with the beneficiary from June 1983 until October 10, 1984 at a Texas company named "C.L. Bonham Enterprises." Mr [redacted] asserts that the beneficiary was a landscape supervisor and supervised his activities. Mr [redacted] also states that he worked with the beneficiary at "Evergreen Lawn Sprinkler Co." in Evermion, Texas for one month from November 1984 until December 1984. He states that the beneficiary also had landscape supervisory duties at that company. Although he left this company in December 1984, Mr. [redacted] asserts that he knows that the beneficiary remained with Evergreen until November 1987. Mr. [redacted] did not provide any further contact information or basis of his knowledge of the beneficiary's duration of employment with Evergreen.

On May 24, 2002, the director requested additional evidence from the petitioner in support of the beneficiary's professional experience as a landscape construction supervisor. In response, counsel for petitioner sent a letter to the director stating that the beneficiary's former employer, "Evergreen Lawn Sprinkler Co." no longer operates and that the beneficiary has been unable to reach the former owner of Evergreen Lawn Co. Counsel also states that the beneficiary cannot provide any W-2s because he was paid in cash and has no documentation.

In denying the petition, the director relied on the specific regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) in advising the petitioner that an affidavit from a co-worker could not be accepted to establish employment history rather than verification directly from the employer or trainer.

On appeal, counsel contends that the general regulatory instructions found at 8 C.F.R. § 204.5(g)(1) also apply, in that if evidence from an employer or trainer "is unavailable, other documentation relating to the alien's experience or training will be considered." The AAO agrees with counsel that the evidence must be considered; however, CIS retains the discretion to assign the relevant evidentiary and probative value of such evidence. If an employer letter is not available, then the petitioner should demonstrate its unavailability and submit other relevant and probative evidence.

On appeal, counsel asserts that the evidence previously offered demonstrates that the beneficiary has the required three years of experience and that further documentation of such experience is not available. Assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988). In this case, as noted above, no credible employer letter was submitted either from C.L. Bonham Enterprises or Evergreen Lawn Sprinkler Co. The AAO notes that the employer referred to by counsel and Mr [redacted] as "Evergreen Lawn Sprinkler Co" is listed as "Everman Lawn Sprinkler Co." on the ETA 750-B signed by the beneficiary. In this case, the AAO cannot find that counsel's brief letter of assurance of the unavailability of evidence from one of the employers and an affidavit from one former co-worker provide the kind of detailed evidence sufficient to overcome the absence of direct employment verification as described in the regulations. The AAO cannot conclude that the director erred in determining that the evidence submitted failed to establish the beneficiary's previous employment experience.

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.