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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
425 I Street N.W.
Washington, D.C. 20536

[redacted]

MAR 11 2004

File: LIN 02 252 50398 Office: Nebraska 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: SELF-REPRESENTED

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 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 transportation firm. It seeks to employ the beneficiary permanently in the United States as a dispatcher. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL), accompanies the petition. The director determined that the petitioner had failed to establish that the position requires at least two years training or experience. The director further determined that the petitioner had not established it had the continuing ability to pay the proffered wage from the priority date.

On appeal, the petitioner states the position requires at least two years of training or experience and it has ample funds with which to pay the proffered wage.

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 or seasonal 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.

Furthermore, 8 CFR 204.5(l)(3)(ii) states, in pertinent part:

> (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.

Eligibility in this matter hinges on whether the position as certified is that of a skilled laborer and on the petitioner's ability to pay the wage offered as of the petitioner's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor and continuing until the alien is granted permanent residence. The petitioner's priority date in this instance is April 18, 2001. The beneficiary's salary as stated on the labor certification is $15.00 per hour or $31,200 per year.

In differentiating between skilled and unskilled workers, CIS will look to the training or experience requirements placed on the position by the prospective employer as certified by the Department of Labor (DOL). *See* 8 C.F.R. § 204.5(l)(4).

With the petition the petitioner submitted an ETA 750 indicating the proffered position did not require any experience and required no specific educational requirements. The only criterion listed was that the individual have a knowledge of transportation with a commercial driver's license preferred and to be bilingual in Spanish and English. The petitioner presented no evidence of its ability to pay the proffered wage.

The director determined that the petitioner had not established that the position required any training or experience, and the position therefore cannot be classified as a skilled worker. He further determined that the petitioner had not established its continuing ability to pay the proffered wage from the priority date.

On appeal, the petitioner states the position requires at least two years experience because of the complicated nature of the job and because it is a small firm, it cannot train an employee. The petitioner also submitted copies of its 2002 Form 941, Employer's Quarterly Federal Tax Return and its state unemployment tax report for the third quarter of 2002.

The petitioner failed to specify the minimum two-year experience requirement on the ETA 750 that was submitted for certification by the DOL. Therefore the position as certified by DOL does not require as least two years experience and cannot be classified as that of a skilled worker. The petitioner must first obtain DOL certification that the employer requires two years experience

before the alien can be granted visa preference as a skilled worker.

The petitioner presented no evidence of its ability to pay the proffered wage as of April 18, 2001. Evidence of this ability to pay should be in the form of federal income tax returns if the petitioner does not have annual reports or audited financial statements. As appropriate, the petitioner may also submit bank account records or profit/loss statements if deemed probative and competent evidence of its ability to pay. 8 C.F.R. § 204.5(g)(2).

Upon review, it is determined that the petitioner has not provided sufficient evidence to overcome the findings of the district director in his decision to deny the petition. The petitioner has not established eligibility pursuant to section 203(b)(3)(A)(i) of the Act and the petition will be dismissed.

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.