

B5

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date:

NOV 01 2004

IN RE: Petitioner: [Redacted]
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 of the Administrative Appeals Office 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.

For
Robert P. Wiemann, Director
Administrative Appeals Office

PUBLIC COPY

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a wholesale/retailer/distributor of music cassettes and compact discs. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the beneficiary did not meet the experience required by the labor certification.

On appeal, counsel submits a brief.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is July 13, 1998.

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 contained the only information appearing in these sections. This information appears as follows:

Education	College Degree Required		
Experience Job Offered	Related Occupation	Related Occupation	
Yrs.	Yrs.		
2			

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of bookkeeper must have two years experience as a bookkeeper.

The regulation at 8 C.F.R. § 204.5(g)(1) requires that evidence relevant to qualifying experience or training must be submitted in the form of letters from current or former employers or trainers and must include the name, address, and title of the writer and a specific description of the alien's duties. If this evidence is unavailable, other documentation will be considered.

In this case, the petitioner submitted a letter from [REDACTED] signed by [REDACTED] President. On September 17, 2003, the director requested an investigation be conducted to verify the beneficiary's employment.

A report, conducted on October 31, 2003 by the Anti-Fraud Unit of the United States Embassy – Tijuana, Mexico, contains the following description of the investigation:

On September 26, 2003, this office received a request for employment verification in Mexico. According to the request, SUBJECT Garcia presented an employment letter stating that she worked for International Parque Industrial in San Luis Rio Colorado in the state of Sonora, Mexico.

On, October 31, 2003, I traveled to the address stated on the employment letter, [REDACTED] 606, Col Comerical, San Luis Rio Colorado. Please be advised that the letter of employment presented by SUBJECT [REDACTED] is false. There is no such company. I inquired with several businesses in the area and I was told that there is no such company.

On December 21, 2003, the director issued a Notice of Intent To Deny notifying the petitioner of the findings of the investigative report and affording the petitioner thirty days within which to reply to those findings.

In response, counsel submits another letter from [REDACTED] stating:

She was employed as a bookkeeper and worked alongside me for two years. Unfortunately, I am no longer associated with this office and I am unable to go in and look for any paperwork. It has been seven years since she worked for me, so I am not even sure if there would be any paperwork identifying her as an employee after all this time. I had a falling out with the other associates involved in this company and we are not in communication. The associates and employees that are now there and have been in that office for the last several years are all new and would not have worked with [REDACTED]

[REDACTED] was compensated in cash as the company was just starting out at that time. She did not receive payment in the form of checks. . . .

The director considered the letter to be insufficient as proof of the beneficiary's employment and denied the petition on January 28, 2004.

On appeal, counsel submits previously submitted evidence and states:

The Code of Federal Regulation specifically requires an exact form of primary evidence to prove the beneficiary's previous experience. In line with this, the beneficiary, [REDACTED] is submitting a duly signed Certificate of Employment issued by [REDACTED] the direct employer of Ms. [REDACTED] at INTERNACIONAL PARQUE INDUSTRIAL, herein attached as Exhibit "H", showing

current address and contact number of [REDACTED] was employed as a Bookkeeper from 1995 to 1997.

* * *

[REDACTED] has accordingly sustained her burden of proof in establishing her qualifying experience as a BOOKKEEPER.

In the MATTER OF E-M, May 24, 1989, 20 I&N Dec. (BIA 1989) states:

“An applicant seeking resident status under Section 245 A of the Immigration and Nationality Act has the burden to prove his eligibility by a **preponderance of evidence.**”

There is no catch all definition of the term “preponderance of evidence.” Whether an applicant has submitted sufficient evidence to meet his burden of proof under Section 245 A of the act will depend upon the factual circumstances of each case. Generally, however, when something is to be established by a preponderance of evidence, it is sufficient that the proof only establish that it is probably true.”

More so, **Immigration and Naturalization Service Manual – Chapter 10:**

Overview of the Adjudication Process Section 10.3(d) states:

“The Burden of Proof. Bear in mind that the proof in establishing eligibility for an immigration benefit always falls solely on the petitioner or applicant. The Service need not prove ineligibility. . . . **When an applicant or petitioner can establish that primary evidence is unavailable, secondary evidence, also in specific forms, may be provided.**

Strict rules of evidence used in criminal proceedings do not apply in the administrative proceedings. . . .”

Hence, we respectfully submit that [REDACTED] two (2) years experience with **INTERNACIONAL PARQUE INDUSTRIAL**, under the auspices of [REDACTED] satisfactorily meets the two (2) years minimum experience required.

Counsel continues by asserting that the denial of the immigrant petition would result in a hardship to the petitioner.

In the instant case, the ETA 750 requires two years of experience in the job offered. The evidence to establish that the beneficiary had two years of experience as a bookkeeper consists of an undated letter from [REDACTED], which was submitted with the I-140 petition. The address on that letter shows both the address of the alleged business in Mexico and another address in Yuma, Arizona. A subsequent letter, dated January 7, 2004, from [REDACTED] shows a third address listed in Mexico.

Although counsel states that the beneficiary need only provide a preponderance of evidence to establish eligibility for the benefit sought, there is nothing in the record that establishes that [REDACTED] business exists or ever existed. It is reasonable to expect that any business would generate personnel records, tax records, payroll records, etc. A mere statement by a prior owner is not sufficient evidence of the beneficiary's previous employment. In addition, counsel has not addressed the main issue regarding the investigative report. The report specifically states that the business does not exist.

There is nothing in the Act or the regulations that would allow CIS to approve an immigrant petition when evidence from an investigative report indicates that information given in support of the petition may be false. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states:

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.

* * *

It is incumbent on 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, in fact, lies, will not suffice.

Counsel's statement that the denial of the petition could result in a hardship to the petitioner is immaterial.

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.