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U.S. Department of Justice  
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File: WAC 00 151 53255 Office: CALIFORNIA SERVICE CENTER Date: 11 APR 2002

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)

IN BEHALF OF PETITIONER:  
[Redacted]

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 the Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

*Robert P. Wiemann*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner on appeal. The appeal will be remanded for further consideration.

The petitioner is a custom embroidery company. It seeks to employ the beneficiary permanently in the United States as a custom embroidery pattern designer. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary had the requisite experience as of the petition's filing date.

On appeal, counsel submits a brief and additional evidence.

The issue to be considered in this proceeding is that to be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's filing date. Matter of Wing's Tea House, supra. Here, the petition's filing date is June 26, 1995.

The Application for Alien Employment Certification (Form ETA 750) indicated that in order to perform the duties of the position, the beneficiary must possess two years of experience in the job offered.

The director determined that the petitioner had not shown that the beneficiary possessed the requisite experience in the job offered, noting that:

The original Form ETA-750 indicates its priority date as June 26, 1995. A review of the new I-140 petition reveals that the substituted alien's experience in the proffered position, as indicated in the uncertified Form ETA-750 Part B (Statement of Qualification of Alien), was obtained from May 1996 to September 1999. On January 03, 2001 the petitioner was advised by the Service that the substituted alien [REDACTED] may be ineligible, because according to the guideline on substitution agreed upon between the (Department of Labor DOL) and INS, the **new substituted for alien must meet all of the minimum education, training, or experience requirement set forth in the original labor certification at the time the priority date was established. In order for the new alien to qualify, his two year experience must be obtained before June 26, 1995.**

The director further noted that, in response to a request for further evidence of the beneficiary's experience, counsel submitted a letter of experience that was not verifiable and is in contradiction to the evidence in the petition. The director stated

that the case contained "false statements, misrepresentations and contradictory information."

On appeal, counsel lists the name and address of two employers and argues that:

The ground on which the petition has been denied should not apply in this case. The beneficiary has established that he has acquired the required experience before the time the priority date was established, June 26, 1995. Accordingly, the denial of the petition should be reconsidered so that the process can continue.

Counsel has submitted a letter from Confecciones Vigras E.I.R.L. which verifies that the beneficiary had the requisite experience. Therefore, it is concluded that the beneficiary had the requisite experience as a machine technician.

While not a basis of the director's decision, it should be noted that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of June 26, 1995, the filing date of the visa petition.

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.

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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing 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. Matter of Wing's Tea House, 16 I&N Dec. 158

(Act. Reg. Comm. 1977). Here, the petition's filing date is June 26, 1995. The beneficiary's salary as stated on the labor certification is \$8.50 per hour or \$17,680.00 per annum.

The only financial information provided by the petitioner is a copy of its 1999 Form 1120 U.S. Corporation Income Tax Return. This document does not establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition. Accordingly, the petition may not be approved under section 203(b)(3)(A)(i) of the Act.

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 issue stated above. 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.

**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 Commissioner for review.