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U.S. Department of Homeland Security

Citizenship and Immigration Services

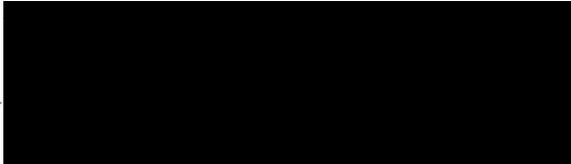
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ADMINISTRATIVE APPEALS OFFICE

CIS, AAO, 20 Mass, 3/F

425 I Street, N.W.

Washington, DC 20536



File: WAC 02 146 52952

Office: CALIFORNIA SERVICE CENTER Date:

DEC 16 2003

IN RE: Petitioner:  
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



**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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a phone-servicing firm. It seeks to employ the beneficiary permanently in the United States as a telephone maintenance mechanic. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 turns, in part, on the petitioner's ability to pay the wage offered as of the petition'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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date in this instance is January 14, 1998. The beneficiary's salary as stated on the labor certification is \$13.27 per hour or \$27,601.60 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated May 10, 2002, the director required

additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. The RFE exacted, as evidence, the petitioner's federal income tax return, annual report or audited financial statement for 1998-2001, as well as Wage and Tax Statements (Forms W-2) for payments to the beneficiary, if any, for 1998-2001.

Counsel submitted the petitioner's Forms 1120S, U.S. Income Tax Return for an S Corporation. The federal tax returns reflected ordinary income or (loss) from trade or business activities, for 1998-2001, respectively, of \$311,550, (\$22,913), \$24,642, and (\$88,481), each less than the proffered wage. A single Form W-2 reported a previous employer's payment of wages to the beneficiary of only \$3,573.63 in 1994. It will be discussed in the evaluation of the qualifications of the beneficiary. The petitioner offered no Form W-2 for 1998-2001.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, the petitioner's CEO says in a letter, dated August 29, 2002 (CEO letter), that:

In 1997 and 1998, [the petitioner] lost one half of its payphones due to a separation of assets with one of its former owners. We did go through a tough three years after that, but we are now stronger and more financially stable than ever.

The statement does not provide evidence of greater financial stability. As noted, above, ordinary income and losses were mixed from 1998-2001. Moreover, each federal tax return reported, in Schedule L, very large deficits of net current assets, reported as the difference of current assets minus current liabilities.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel asserts of the CEO letter that:

. . . The [petitioner] provides factors, which should clarify its ability to pay this wage.

Counsel identifies no factor and provides no authority to clarify any future expectations of the ability to pay the proffered wage. Counsel's reliance on the reasoning of *Matter of Sonogawa*, 12 I&N

Dec. 612 (Reg. Comm. 1967) is misplaced. It relates to a petition filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonegawa*, have been shown to exist in this case, nor has it been established that 1998-2001 were uncharacteristically unprofitable years for the petitioner.

After a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The other issue is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750, as of the petition's priority date. Form ETA 750, in block 14, specified three (3) years of experience in the position of telephone maintenance mechanic.

The petitioner submitted insufficient evidence of experience with Amtel Communications, Inc. (Amtel) in a letter dated March 8, 2002 (first Amtel letter). MG issued it without any access to Amtel records, in the name of Paytel Supply Co. (Paytel), and without any statement of her capacity in any company.

The first Amtel letter admitted, upon the filing of the Immigrant Petition for Alien Worker (I-140) that:

. . . [The beneficiary] was employed by HDT Supply Company, Division of [Amtel] sometime between August 1993 and August 1995. I was also employed by [Amtel] during this period.

I am unable to verify exact dates and have no access to employee records as these records were kept in San Diego [California] at the companies [sic] main office and that company [sic] declared bankruptcy in August 1995.

The specification of dates of employment as "sometime" wholly failed to verify the requirements of the Form ETA 750. The RFE, therefore, exacted a statement of experience from the previous employer in a letter with the capacity of the writer and dates of the beneficiary's employment, and, also, credible evidence of the alleged job experience, such as pay stubs, Form W-2, or quarterly wage reports (DE-6).

In response to the RFE, counsel resubmitted, substantially, the failed contents of the first Amtel letter. This time it was dated May 28, 2002 (second Amtel letter). The second Amtel letter added only a recitation of the beneficiary's duties, apparently copied from one sentence of the Form ETA 50, block 13. The second Amtel letter met no requirement of the RFE and satisfied no defect of the initial submission of evidence of three (3) years of experience in the job offered.

Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before Citizenship and Immigration Services (CIS), formerly the Service or INS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

Otherwise, the limited response to the RFE consisted of one (1) 1994 W-2 as evidence of experience of three (3) years before the priority date. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements.

See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The single Form W-2 reported the payment of wages by ACI-HDT Supply Company to the beneficiary of merely \$3,573.63, only in 1994. The evidence shows no dates of this employment, but the wages suggest a very short term.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

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.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The director concluded that the beneficiary did not meet the petitioner's qualifications of three (3) years of experience, as required by Form ETA 750, and denied the petition.

On appeal, counsel submits a letter, dated August 21, 2002, from Boutique Cellular, said to prove one (1) year of experience. Actually, the Boutique Cellular letter presents a defective and summary translation. The translation does not satisfy evidentiary requirements, as it is not verbatim and contains obvious inaccuracies. See 8 C.F.R. § 103.2(b)(3). The Boutique Cellular letter claims that the beneficiary worked there from February 1988 to October 1989, 21 months.

Even 21 months at Boutique Cellular, plus "sometime" at Amtel, do not prove three (3) years of experience as exacted by the RFE. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The Form ETA 750 and the RFE were quite explicit as to qualifications for the job the nature of the evidence, which the regulation exacts. Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before CIS. *Matter of Soriano*, *supra*.

The petitioner has not established that the beneficiary had three (3) years of experience in the job offered, as required in block 14 of the labor certification, as of the day it was filed with the Department of Labor. For this additional reason, the petition must be denied.

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.