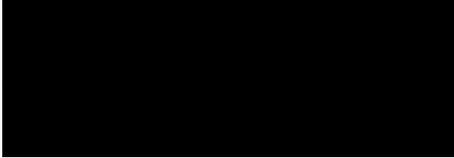


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U.S. Department of Homeland Security
Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536

PUBLIC COPY



File: [Redacted]
WAC 02 034 54743

Office: CALIFORNIA SERVICE CENTER Date:

DEC 17 2003

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



Identifying data deleted to
prevent unauthorized disclosure
invasion of personal privacy

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 installs decorative ironwork. It seeks to employ the beneficiary permanently in the United States as an apprentice ornamental ironworker. 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 hinges on 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. The petition's priority date is determined by 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 proffered wage was \$826 per week, or \$42,952 per year. The petitioner required of the beneficiary two (2) years of experience in the job offered.

Counsel initially submitted insufficient evidence both of the

beneficiary's two (2) years of experience to meet qualifications for the position and of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated February 22, 2002, the director required additional evidence to verify the beneficiary's experience, especially a letter on the letterhead of the previous employer, A.V.I. Industries [AVI], showing the name and title of the person verifying the beneficiary's title, duties, dates, and hours per week of employment. Also, the RFE exacted the petitioner's federal income tax returns, annual reports or audited financial statements from 1998, the priority date, and continuing to the present.

Counsel submitted, in response, the petitioner's 1998 Form 1120, U.S. Corporation Income Tax Return, and its 1999 and 2000 Form 1120S, U.S. Income Tax Return for an S Corporation. They all referred to the same corporation and employer identification number. The director and counsel did not discuss them any further.

For verification of two (2) years of experience, counsel offered the beneficiary's own "Declaration" of May 13, 2002. It claimed full-time experience with A.V.I. from May 1989 to January 1992.

The beneficiary's declaration stated that the beneficiary did not find AVI at the former business site, had no knowledge of what had occurred to AVI, and found it undeniably impossible to submit anything other than the declaration. The petitioner and counsel, evidently, made no other effort to locate AVI. As to AVI's wage payments to the beneficiary, counsel did offer evidence of \$7,565 paid under 1990 Miscellaneous Income (Form 1099) and \$11,920 under 1991 Wage and Tax Statement (Form W-2).

The director observed that the previous employer did not verify the beneficiary's employment and noted that Forms 1099 and W-2 did not substantiate that the beneficiary worked full-time during qualifying employment. The director concluded that the evidence did not establish, as required by Form ETA 750, two (2) years of experience at the priority date and denied the petition.

Counsel submitted the appeal on July 15, 2002 with, after all, a letter from the previous employer's owner, [Mr. AI]. Counsel forthwith stipulated that Mr. AI did not have the beneficiary's files and, further, admitted that:

Regrettably, the letter issued by [Mr. AI] contained typographical errors. Since he was not in possession of [the beneficiary's] files at that time, [Mr. AI] misstated [the beneficiary's] period of employment. [The beneficiary] hereby confirms and affirms that he

worked for [AVI] from **January 1990 until he resigned in August 1992**. Please see [Exhibit I].

Directly contradicting Mr. AI's letter and counsel's emphasis, *supra*, the beneficiary had stated, in Form ETA 750 Part B, block 15, that he was employed at AVI from May 1989 to January 1992. Finally, in block 15, the beneficiary had admitted that he was unemployed from January 1991 onward.

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.

The beneficiary, not the petitioner, offers new evidence to Citizenship and Immigration Services (CIS), formerly the Service or the INS, on appeal, and now confesses in a new Declaration of July 12, 2002 (exhibit I) that, after all:

Upon receipt of the denial by [CIS] of the [Immigrant Petition for Alien Worker (I-140)] on my behalf, I exerted more efforts to track down [Mr. AI], the then owner of AVI.

* * *

[Mr. AI] issued and signed a letter on June 27, 2002, certifying that I was employed as an Ornamental Ironworker on a full-time basis with [AVI]. Please see attached original letter [exhibit H], together with [Mr. AI's current] business card.

Mr. AI, the previous employer, now offers to prove the beneficiary's requisite two (2) years of experience, but simply states in exhibit H that:

As the owner of [AVI], I further certify that [the beneficiary] worked for [AVI] as an Ornamental Iron Worker on a full-time basis.

[The beneficiary] started working for [AVI] in January 1990 and resigned in August 2002.

As a result of the appeal, the record now has, at least, four versions of the beneficiary's dates of alleged, full-time employment with AVI. The only corroborating documentation

pertains to 1990 and 1991. The Form 1099 and the W-2 report wages less than a fourth of the proffered wage for full-time employment, as determined in the Form ETA 750, Part A, block 12.

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).

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).

At pages 3-4 of the brief on appeal, counsel stipulates that business records of the former employer were not available to verify the beneficiary's experience, as the RFE required. Conflicting recollections and excuses for typographical errors will not do. 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*, 19 I&N Dec. 764, 766 (BIA 1988).

The petitioner exacted two (2) years of experience in the job offered in Part A, block 14 of Form ETA 750 as of the priority date. The petitioner has not established that the beneficiary had two (2) years of experience, as specified, at the priority date. Therefore, the petitioner has not overcome this portion of the director's decision.

After a review of the ETA 750, Form 1099, W-2, declarations of the beneficiary and the previous employer, and the transmittals and briefs of counsel, it is concluded that the petitioner has not established that the beneficiary met all of the requirements, stated by the petitioner in block 14 of the labor certification as of the priority date.

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.