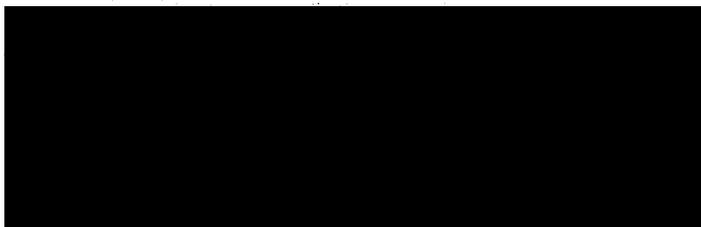


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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services

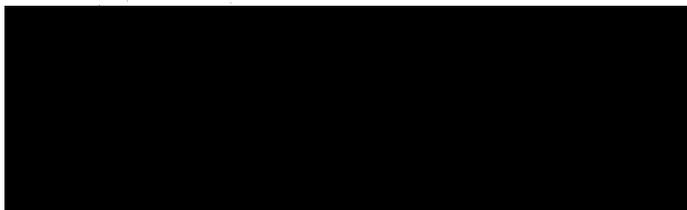


FILE: SRC-02-053-54070 Office: VERMONT SERVICE CENTER Date: APR 23 2004

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

PETITION: 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:



PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is an import and export firm. It seeks to employ the beneficiary permanently in the United States as a customer/sales representative. 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. Section 203(b)(3)(A)(iii) of the Act provides for the granting of preference classification to qualified workers who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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, 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. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is September 20, 2000. The beneficiary's salary as stated on the labor certification is \$29.35 per hour or \$61,048.00 per year.

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. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus, the petitioner must illustrate that the beneficiary alien met the requirements for the position at the time it filed the alien labor certification application.

The Form ETA 750 indicates that the position of customer/sales representative requires twelve years of grade school education and one year of experience in the job offered. The block for other special requirements states "Oral and written fluency in Portuguese language [sic]."

The I-140 petition as originally submitted had a check mark in the block indicating the petition type as one for a skilled worker or professional. Under the Act, the skilled worker category requires at least two years of training or experience.

The documentation submitted with the I-140 petition contained insufficient evidence of the beneficiary's qualifications. The only evidence on that issue was a statement signed by the beneficiary attesting to her experience working for a pet shop in Brazil from 1996 to 1999.

In a request for evidence (RFE) dated March 28, 2002 the director required additional evidence to establish that the beneficiary possessed the required one year of experience as a customer/sales representative as of the September 20, 2000 date of filing. The RFE stated that it did not appear that the petition was approvable under the third preference category of INS § 203(b)(3)(i) because the ETA 750 requires only one year of experience. The RFE contained a two-line form for the petitioner to sign if the petitioner wished to request a change in classification.

The RFE also stated the following:

Evidence relating to qualifying experience shall be in the form of letter(s) *from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien* or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience will be considered.

(Emphasis in original).

Counsel responded to the RFE with a letter dated April 8, 2002. With the letter counsel returned the original RFE, on which the lines for requesting a change in the preference classification had been completed to request adjudication as a 4th preference petition [sic] under section 202(b)(3)(iii). The signature appearing on the form below the request is illegible, but counsel's letter identifies the signature as that of "the Petitioner, Edson Pagotto." It should be noted that the petitioner in this case is not Edson Pagotto, but Intercom Exporting and Importing, Inc. The I-140 petition was signed by Edson Pagotto as president of the petitioner.

Counsel's letter and the returned RFE containing the petitioner's request to change the petition's preference classification to section 202(b)(3)(iii) were the only documents submitted in response to the RFE.

The director found that the evidence failed to establish that the beneficiary possessed the required one year of experience in the offered position as of the priority date, and denied the petition.

On the I-290B notice of appeal counsel states that he represents the beneficiary. According to the regulation at 8 C.F.R. § 292.4(a), only the petitioner may authorize counsel to appear. Nonetheless, Forms G-28, Notice of Entry of Appearance as Attorney or Representative, in the file show counsel entering his appearance on behalf of both the petitioner and the beneficiary, including a G-28 dated December 6, 2001 which is signed by the president of the petitioner. Therefore the AAO finds that this appeal has been properly taken by the petitioner.

On appeal counsel submits a brief and additional evidence.

The AAO will first evaluate the decision of the director based on the evidence submitted prior to the director's decision. The evidence submitted on appeal will then be considered.

In his decision the director found that the statement signed by the beneficiary attesting to her work experience in Brazil was entitled to little weight as evidence, since it was signed by the beneficiary and since it appeared to be "self-serving."

On appeal, counsel asserts that the statement signed by the beneficiary attesting to her work experience in Brazil should be found to be sufficient evidence of her experience, since the beneficiary was a co-owner of the business for which she worked. No evidence in the record prior to the decision of the director supports counsel's assertion that the beneficiary was an owner of the business in Brazil for which she worked. Moreover, 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). 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 regulations at 8 C.F.R. § 204.5(l)(3)(ii) state the following concerning evidence which would establish a beneficiary's qualifications:

Other documentation – (A) General. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The beneficiary's statement says in part,

I started as a sales person, and customer relations, making sure that our customers came in looking for a product and left with the best to fill their pet's needs. We carried a line of medicine, pet food, toiletries, bedding, toys and accessories.

I was quickly promoted to the Stock Control and later to the Accounting Department.

The statement fails to contain an adequate description of the experience of the beneficiary. It does not state the number of hours per week worked by the beneficiary, nor describe her actual duties as a pet store sales person and as an employee working in customer relations. The letter merely describes the beneficiary's duties in terms of the results of her work: "making sure that our customers came in looking for a product and left with the best to fill their pet's needs." Also, the beneficiary's statement fails to state the length of time which the beneficiary worked in sales and customer relations. The statement says that she was "quickly promoted" to another position. The statement by the beneficiary also fails to give the title of the beneficiary in the capacity in which she signed the statement.

In addition to the statement's failure to provide sufficient information on the matters discussed above, the content of the beneficiary's statement about her work experience is inconsistent with any claim that she was an owner of the business for which she claims to have worked in Brazil. The beneficiary's language, "I was quickly promoted," implies that her job assignments were made by someone other than herself, a practice which would be inconsistent with her supposed role as co-owner.

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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*, at 491-92.

For the foregoing reasons, the beneficiary's statement fails to establish that the beneficiary had one year of experience as a customer/sales representative, as required by the ETA 750.

It should be noted that one reason the director determined not to rely on the beneficiary's statement about her experience was that the statement was "self-serving." The use of that term obscures the proper reasons for giving any such statement little evidentiary weight. The fact that a statement by a beneficiary provides support to the beneficiary's position is not in itself a reason to discount such a statement. The burden of proof rests with the petitioner, and if a beneficiary has information which the petitioner believes would be useful evidence in favor of a petition it is appropriate for the petitioner to submit a statement from the beneficiary including that information. Nonetheless, the fact that a beneficiary has an interest in the approval of the petition may be considered by the adjudicator in evaluating the credibility of any statement by a beneficiary and the evidentiary weight which should be given to any such statement.

In the instant case, for the reasons discussed above the written statement of the beneficiary in the record is not sufficient to establish that the beneficiary had the required one year of experience in the offered job as of the priority date.

The decision of the director to deny the petition was therefore correct, based on the evidence in the record before the director.

The evidence submitted on appeal consists of an additional copy of the beneficiary's statement of her work experience in Brazil, a copy of a Form I-797 receipt notice dated December 7, 2001 acknowledging receipt of the instant I-140 petition and a document in Portuguese identified by a hand-written notation at the top in English as "Incorporation Documents for Company."

The Form I-797 receipt notice submitted on appeal shows a filing date of December 6, 2001 for the I-140 petition, a fact which is not at issue in the instant appeal. Therefore only the Portuguese-language document is evidence potentially relevant to this appeal. No certified English translation of that document appears in the record. The regulation at 8 C.F.R. § 103.2(b)(3) requires a certified English translation with any document containing foreign language which is submitted to CIS. Lacking a certified English translation, the Portuguese-language document is not acceptable evidence.

Furthermore, even if a certified English translation had been submitted with the Portuguese-language document, that document would appear to be precluded from consideration on appeal by *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

Counsel has made no claim that the Portuguese-language document was unavailable prior to the director's decision. Counsel had ample notice of the need for evidence concerning the beneficiary's qualifications from the RFE dated March 28, 2002 which is discussed and quoted above. Therefore evidence on that issue submitted for the first time on appeal would be precluded from consideration on appeal.

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.