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U.S. Citizenship
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Services

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[REDACTED]

FILE: [REDACTED]
WAC 03 130 53669

Office: CALIFORNIA SERVICE CENTER

Date: **JUL 13 2005**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as an Other Worker 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.


Robert P. Wiemann, Director
Administrative Appeals Office

Jul 13 05 - 146203

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 an office products manufacturing firm. It seeks to employ the beneficiary permanently in the United States as a machine operator. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to establish that the beneficiary had the requisite three months work experience required by the offered position.

On appeal, counsel submits additional evidence and asserts that the petitioner establishes the beneficiary's eligibility for the position offered.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants 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.

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 or priority date of the petition is the initial receipt in the DOL's employment service system. 8 C.F.R. 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is March 20, 2001. The visa petition indicates that the petitioner was established in 1936 and has ten employees. The visa petition also indicates that the beneficiary arrived in the United States in December 1989.

As noted on Part A, item 14 of the approved labor certification (ETA-750), the beneficiary must have 3 months of experience in the job offered of machine operator.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) 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.

* * *

(D) *Other worker.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

Because the record did not initially contain sufficient documentation in support of the petitioner's continuing ability to pay the proffered wage, as well as evidence to establish that the beneficiary possesses the

employment experience specified on the labor certification, the director requested additional evidence on July 24, 2003. He advised the petitioner that the ETA 750B, signed by the beneficiary on February 9, 2001, indicated that the beneficiary had been working in Mexico City for [REDACTED] Manufactureros [REDACTED] at [REDACTED] from December 1988 until March 3, 1990, but the Immigrant Petition for Alien Worker (I-140) states that the beneficiary entered the United States in December 1989. The director requested the petitioner to provide a detailed explanation as to how the beneficiary could have worked in Mexico while living in the United States. The director also instructed the petitioner to submit evidence of the beneficiary's qualifying work experience as a machine operator consisting of previous employment letters provided on the employer's letterhead and documenting the title, duties, position, dates of employment and number of hours per week that the alien worked for the employer.

In response, the petitioner, through counsel, submitted a copy of a letter, dated August 7, 2003, from [REDACTED] the proprietor and supervisor of "[REDACTED]" of Felipe Villanueva No. 182, Col. Peralvillo, in Mexico City. Mr. [REDACTED] states that the beneficiary worked full-time for his firm as a machine operator from December 1, 1988 until March 30, 1990. He also explains that the shop was previously located at the same address as that of the [REDACTED] Manufactureros del Pais. [REDACTED] does not mention the change of the business' name.

On October 8, 2003, the director requested that the immigration unit at the U.S. embassy in Mexico City conduct an investigation to verify the beneficiary's employment in Mexico. On November 25, 2003, the embassy investigator reported that he went to the address located at Felipe Villanueva, No. 182, Col. Peralvillo in Mexico City and was unable to contact Mr. [REDACTED] but left a business card with Mr. [REDACTED] sister. Mr. [REDACTED] subsequently called the investigator and was questioned as to the beneficiary's position and duties during his employment. The investigator states that Mr. [REDACTED] told him that the beneficiary was hired in December 1988 but that he left for three months and did not return until March 1989. Mr. [REDACTED] added that the beneficiary worked from April 1989 to March 1990 and that he was working as an assistant and learning the job for one year.

On January 29, 2004, the director issued a notice of intent to deny the petition. He noted the petitioner's failure to provide a detailed explanation of the discrepancy between the beneficiary's date of arrival in the United States as stated on the I-140 and the Application to Register Permanent Resident or Adjust Status (I-485) and his dates of employment in Mexico. The director also noted that the petitioner had provided no additional corroborating evidence such as rent receipts or medical records that would support the beneficiary's residence in Mexico during the period of alleged employment. The director further stated that the results of the immigration investigation unit failed to corroborate that the beneficiary had been a machine operator in Mexico rather than an assistant or apprentice "learning the job." The director afforded the petitioner an additional thirty days in which to respond to the issues presented in the notice of intent to deny the petition.

In response, the petitioner provided a letter from the beneficiary in which the beneficiary states that he is amending his date of last arrival to April 1990. He also states that he worked for "Rectificades Especiales Sam" in Mexico City from December 1988 until March 1990. After working as an assistant for three months, he states that he worked as a machine operator until March 30, 1990. He provides a copy of an U.S. Wage and Tax Statement (W-2) for 1990 in which he states that the level of wages earned reflects that he only worked part of the year in the United States. The petitioner also provides another letter, dated February 12,

2004, from Mr. [REDACTED]. In this letter, Mr. [REDACTED] states that the beneficiary worked on a trial basis for 90 days, beginning December 1, 1988, and then worked as a machine operator until March 30, 1990.

On March 4, 2004, the director denied the petition. The director summarized the evidence submitted by the petitioner and concluded that the record failed to present sufficient persuasive corroboration necessary to resolve the contradictions presented by the beneficiary's alleged date arrival in the United States, the dates of employment in Mexico, and the embassy investigation conducted in Mexico City.

On appeal, counsel asserts that the beneficiary actually did work as a machine operator for the required three months prior to the visa priority date. Counsel attaches a third letter, dated March 19, 2004, from Mr. [REDACTED]. In this letter, Mr. [REDACTED] identifies the beneficiary's supervisor and confirms the beneficiary's dates of employment between December 1988 and March 1990 as a machine operator. He states that the investigator misunderstood the information in that the beneficiary helped in the business as a machine operator not that he was a helper of the machine operator. Mr. [REDACTED] adds that he is able to confirm this information in person if necessary.

Along with these declarations, counsel asserts on appeal that the date of arrival, "December 1989," was actually the beneficiary's wife's date of arrival in the U.S. Counsel asserts that the information submitted establishes the beneficiary's qualification for the certified position.

Counsel's statement that the date of arrival claimed as December 1989 by the alien beneficiary actually signifies his wife's arrival in the United States, representing the first attempt to explain the discrepancies between the beneficiary's employment dates in Mexico and his dates of arrival, is not persuasive. This assertion cannot be accepted as evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It is incumbent on the petitioner to credibly 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Citizenship and Immigration Services (CIS) must look to the labor certification to determine the qualifications for the position. It 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 AAO does not find the beneficiary's evidence sufficiently credible to overcome the findings of the embassy investigator and the basis for the director's denial of the petition. As noted by the director, the embassy investigation's findings that the beneficiary had been working as an assistant and learning the job, rather than as a machine operator as required by the terms of the labor certification clearly contradict the subsequent assertions submitted to the record. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In addition, it must be noted that while Mr. Prieto's

signature on his February 12th and March 19th, 2004, letters appear to be the same, the signature shown on the first letter, dated August 7, 2003, appears different, thus raising a question as to the authorship of that letter. 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. at 591.

In this case, the record fails to credibly establish that the beneficiary has at least three months of employment experience as a machine operator as required by the terms of the labor certification. 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. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As the petitioner has not established that the beneficiary meets the requirements of the approved labor certification, the petition may not be approved.

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.