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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 22 2005
WAC-00-056-50071

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:



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 employment-based preference visa petition was initially approved by the Director, California Service Center. In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), the director served the petitioner with notice of intent to revoke the approval of the petition (ITR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will remain approved.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a garment manufacturing company. It seeks to employ the beneficiary permanently in the United States as a sample maker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. In his revocation decision, the director determined that the petitioner had not established that the beneficiary had the experience required on the ETA 750, and denied the petition accordingly.

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.

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. § 103.2(b)(1), (12). *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d).

The priority date in the instant petition is May 22, 1997. The proffered wage as stated on the Form ETA 750 is \$9.19 per hour, which amounts to \$19,115.20 annually. On the Form ETA 750B, signed by the beneficiary but not dated, the beneficiary claimed to have worked for the petitioner beginning in November 1990 and continuing through the date on which the ETA 750B was prepared.

The I-140 petition was submitted on December 17, 1999. On the petition, the petitioner claimed to have been established in April 1997, to currently have three employees, to have a gross annual income of \$328,563.00, and to have a net annual income of \$205,151.00. With the petition, the petitioner submitted supporting evidence.

The director initially approved the petition on September 10, 2000.

The beneficiary submitted a Form I-485, Application to Register Permanent Residence of Adjust States on December 4, 2000. An interview on the beneficiary's application for adjustment of status was held in the CIS District Office on December 5, 2001. On that date, the adjudicator issued a Form WR-827 (LOS) 2218

requesting additional documentation. The Form WR-827 set a deadline of twelve weeks from the date of the notice for the beneficiary to respond.

In a memorandum dated December 20, 2001 to the CIS Office in Charge, American Consulate, Mexico City, the Los Angeles District Director requested an investigation to verify the employment claim of the beneficiary with a firm in San Mateo Cuanala, Puebla, Mexico.

In a Report of Investigation dated April 2, 2002, a CIS investigator stated that an investigation had indicated that the beneficiary's claim of work experience with the firm in San Mateo Cuanala was false.

On September 20, 2002, CIS received a copy of the Form WR-827 which had been issued to the beneficiary on December 5, 2001. Some of the documents which were requested on the Form WR-827 are now in the file, but the file order does not clearly indicate whether those documents were submitted with the copy of the Form WR-827 or at some other time.

In a Notice of Intent to Revoke (ITR) dated July 8, 2003, the director informed the petitioner of the findings in the investigator's report and stated the director's intention to revoke the I-140 petition. The director afforded the petitioner thirty days within which to submit evidence in support of the petition and in opposition to the proposed revocation.

In response to the ITR, the petitioner submitted additional evidence. The petitioner's submissions in response to the ITR were received by CIS on August 11, 2003.

In a Notice of Revocation (NOR) dated March 11, 2004, the director determined that the petitioner's evidence contained unexplained material inconsistencies, specifically concerning the address in Mexico where the beneficiary claimed to have gained his prior work experience. The director therefore determined that the evidence failed to establish that the beneficiary had the experience required by the ETA 750 as of the priority date. The director accordingly revoked the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that the director erred in finding material inconsistencies. Counsel states that documentation submitted on appeal corroborates the addresses in Mexico of the location of beneficiary's claimed prior employment and of the home address of the owner of the business for which the beneficiary claimed to have worked.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, none of the documents submitted for the first time on appeal were specifically requested by the director. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

The Form ETA 750 states that the position of sample maker requires two years of experience in the offered position. On the ETA 750B the beneficiary claimed to have prior work experience as a sample maker with the firm [REDACTED] at the address of [REDACTED]

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of 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 or training will be considered.

The document submitted initially as evidence of the beneficiary's work experience was a copy of a letter dated September 7, 1987 signed by [REDACTED] general manager, Originales Henry [sic]. That letter states that the beneficiary was employed by the clothing factory named Originales Henry from January 17, 1987 until December 12, 1989. The address stated for that factory is [REDACTED] Cuanala, Puebla, Mexico. The letter is not on letterhead. The title of the signer is general manager, and the body of the letter describes the beneficiary's duties making samples of clothing items for women and for men. It should be noted that the English translation at one point refers to the town as [REDACTED] Puebla," which is an inaccurate rendition of the Spanish original, which is [REDACTED]. The translation erroneously renders "San Mateo" as "San Marco," and also erroneously inserts a comma before the word "Cuanala," which thereby indicates that San Mateo is a subdivision of Cuanala, whereas in fact the name of the town consists of three words, [REDACTED].

The petition was approved on September 10, 2000. The beneficiary then applied for adjustment of status on December 4, 2000, but in the course of adjudicating that application the Los Angeles District Director questioned the beneficiary's work experience in Mexico. In a memorandum dated December 20, 2001 to the CIS Office in Charge, American Consulate, Mexico City, the Los Angeles District Director requested an investigation. A copy of that memorandum is found on the non-record side of the file.

The memorandum states in pertinent part as follows:

Subject was interview [sic] on December 5, 2001 by an officer of this service. The following items are case specifics, some of which have led us to suspect fraud:

- Subject entered EWI in the U.S. in 1990.
- Subject letter of experienced [sic] from "Originales Henry" dated September 7, 1987 or December 14, 1999.
- Copies of ETA-750 with continuation sheet, G-325A Biographic Information, I-140 Immigrant Petition for Alien Worker, Mexican passport, and birth certificate.

The District Director also stated, "We strongly suspect fraud in this case." (Memo. from Los Angeles District Director, Dec. 20, 2001, at 1).

Of the three items listed by the District Director, only the second item appears to have any direct relevance to the instant petition, in which the District Director describes the beneficiary's letter of experience as having two different dates. That description, however, misreads that letter. The Spanish language original letter closes with the date of "7 de Septiembre de 1987," appearing just above the signature on the letter. That date is correctly translated in the certified English translation as "September 7, 1987." Below the English translation of the letter is a certificate of the translator, which states as follows: [REDACTED] declare under the penalty of perjury that I am competent to translate from Spanish to English, and the foregoing is true and correct translation of all pertinent information from the Spanish original." Below the certificate is a

signature line of [REDACTED] with her name and address, and her signature, and to the right of her name is the date "December 14, 1999."

The foregoing information shows that no inconsistency exists in the dates on the beneficiary's letter of experience. The date of September 7, 1987 is the date of the Spanish language letter, and the date of December 14, 1999 is the date of the certified English translation.

The regulation at 8 C.F.R. § 103.2(b)(3) requires certified English translations of any document containing foreign language which is submitted to CIS. It appears that the certified English translation of the September 7, 1987 letter was prepared for submission with the I-140 petition, which, as noted above, was submitted on December 19, 1999. Since a certified English translation of the Spanish language letter was required by the regulation at 8 C.F.R. § 103.2(b)(3), the date of the translation, December 14, 1999, provides no basis for questioning the authenticity of the Spanish language letter.

The file contains no notes of an adjudicator or other information indicating any other reason for the director's doubts about the beneficiary's work experience.

On the non-record side of the file is a Report of Investigation dated April 2, 2002 by a CIS investigator with the United States Embassy, Mexico City, in response to the request of the District Director. That report states in pertinent part the following:

Subject has a pending adjustment of status application with the Los Angeles District Adjudication's section. At the adjustment interview subject presented a doubtfully [sic] job letter from Cuanala, Puebla, Mexico.

INS/LOS is requesting that INS/MEX search and verify subject's work history.

INS/MEX was able to conduct a search and found that the job letter is a false document the address mentioned belongs to the Municipal Palace of San Mateo Cuanala. [sic].

This writer asked to the Mexican authorities [sic] if they know about a business "Originales Henry" and I was informed that mentioned business doesn't exist.

(Report of Investigation, Apr. 2, 2002, at 1).

The report contains no further details, and no supporting documentation. The report uses the term "Municipal Palace," apparently using "palace" as a translation for the Spanish "palacio." The word "palace" in English usually indicates a large building, but that may not be the intended implication of the investigator. It is assumed that the reference is to the municipal government building.

The report is ambiguous with regard to the address checked by the investigator, referring only to the "address mentioned." That reference presumably is to the address [REDACTED] Mexico, which is the address mentioned in the beneficiary's letter of experience dated September 7, 1987. In that address, the street name is apparently [REDACTED]. The word "prolongacion" is a cognate of the English word "prolongation." Yahoo, *Spanish Dictionary*, http://education.yahoo.com/reference/dict_en_es/ (accessed July 13, 2005).

Two Internet Web sites contain information which is inconsistent with a finding that the address [REDACTED] is the address of the municipal government building of Cuanala.

One Web site gives the address of the municipal government building in [REDACTED] San Mateo Cuanala." [REDACTED] *Informacion General*, http://www.pan.org.mx/pics/gobierno/edo_pue/juan_c_bonilla.htm (accessed July 12, 2005) (the first result of a search using the Google Internet search engine, by the words [REDACTED])

Another web site gives the address of the municipal government building as on "Av Hidalgo," at the corner with [REDACTED] *Direccion de Servicio Social, Honorable Ayuntamiento de Bonilla*, <http://www.serviciosocial.buap.mx/conveniopublicomu.htm>, select Sector Publico, Municipal, Honorable Ayuntamiento de Bonilla (accessed July 12, 2005). That Web site states that the municipal government building lacks a street number, using "s-n," the abbreviation for "sin numero" in Spanish, or "without number." See WordBank, *Language Reference Guide for Latin American Spanish*, http://wordbank.com/en/pdfs/lang_guide_latin_american_spanish (accessed July 12, 2005).

Searches using Internet search engines produce links to several other Internet Web sites referring to the town San Mateo Cuanala. The town is sometimes referred to simply as "Cuanala." It is located six miles northwest of the city of Puebla, Mexico. It is the capital town of the municipality of Juan C. Bonnilla, in the state of Puebla, Mexico. AllRefer.com Reference, *Cuanala, Puebla, Mexico*, <http://reference.allrefer.com/gazetteer/C/C12040-cuanala.html> (accessed July 5, 2005). See also Gwillim Law, *Administrative Divisions of Countries ("Statoids"), Mexico, Municipality, Municipalities of Mexico*, <http://www.statoids.com.ymx.html> (accessed July 12, 2005);

An Internet map service shows Cuanala within the map of the metropolitan area of the city of Puebla, Mexico. The map contains sufficient detail to show Avenida Hidalgo as the main street running through Cuanala, but the map lacks details of any cross streets in that town. The map shows the street [REDACTED] but does not show [REDACTED]. See Mapquest, *Puebla, Puebla, Mexico*, [http://www.mapquest.com/maps/select/Outside of U.S. and Canada, Mexico, search Puebla, select Puebla, Puebla, MX](http://www.mapquest.com/maps/select/Outside%20of%20U.S.%20and%20Canada/Mexico/search/Puebla/select/Puebla,Puebla,MX) (accessed July 12, 2005).

Due to the ambiguity and lack of detail in the Report of Investigation done by the CIS investigator, as well as the information about the address of the municipal palace in Cuanala on public Internet Web sites, the Report of Investigation is insufficient to establish an inconsistency in the petitioner's evidence concerning the location of the beneficiary's claimed work experience in that town. From the Internet Web sites referenced above it appears that the municipal government building is at the intersection of [REDACTED] 16 de Septiembre. The building either lacks a street number, or it has the street number [REDACTED] not on [REDACTED]

In response to the director's ITR dated July 8, 2003, the petitioner submitted a letter dated July 21, 2003 signed by [REDACTED] General Manager, "Originales Henry" [sic]. The letter states that the beneficiary worked for that firm from January 1987 until December 1989. The letter is on letterhead of that firm, but with the address [REDACTED] Tex. Pue. [REDACTED]. The abbreviation "Tex." apparently refers to Texmelucan, a municipality about ten miles northwest of Cuanala. See Maps-of-Mexico, *Puebla*, <http://maps-of-mexico.com/puebla-state-mexico/publa-state-mexico-map-b2.gif> (accessed July 12, 2005). That letter was received by CIS on August 8, 2003. The petitioner later submitted another letter dated July 21, 2003 signed by Asuncion Garcia Garcia, identical in content to the first, but also containing as part of the letterhead a copy of a government stamp showing a business registration of Asuncion Garcia Garcia. That letter was received

by CIS on August 26, 2003. That letter is also on letterhead, but the appearance of the letterhead differs from that on the letter submitted on August 8, 2003. On both letters, the letterheads do not appear to have been professionally printed, and each letterhead has an appearance indicating that it may have been prepared on a personal computer. For example, the font used for the address and telephone numbers on each letterhead is identical in style and size to the font used in the body of each letter.

The evidence in the record prior to the director's revocation decision contained no explanation for the difference between the address on the earlier letter dated September 7, 1987, which stated the address of the beneficiary's work location as [REDACTED] Puebla and the letterhead address on the two letters dated July 21, 2003, an address in [REDACTED] Puebla. Moreover, in a cover letter dated July 29, 2003 counsel stated that the address in [REDACTED] Texmelucan, was the same as the address which appeared on the letter dated September 7, 1987, an incorrect statement by counsel.

In his revocation decision, the director cited the differing addresses on the letters of experience as grounds for the revocation, along with the adverse findings in the investigative report.

On appeal, counsel submits a brief and additional evidence. Counsel on appeal for the first time offers an explanation for the inconsistent addresses on the letters attesting to the beneficiary's work experience. Counsel states that the address stated on the letter of September 7, 1987 of [REDACTED] Puebla, is the actual work location of the factory where the beneficiary worked, and that the address on the letters dated July 21, 2003 is the home address of [REDACTED]. Counsel notes that on the ETA 750B the beneficiary stated the address of his experience as the address at [REDACTED]. Counsel's assertions are supported by a copy of an undated letter from Asuncion [REDACTED] with certified English translation dated April 2, 2004. Since the letter appears to have been written in response to the director's March 11, 2004 revocation decision, the letter appears likely to have been written in March 2004. In that letter, [REDACTED] states the following, according to the certified English translation:

The address [REDACTED] Mexs, Pue, Mex. appearing on the letter dated July 21, 2003, issued on behalf of [the beneficiary] is my home address, this is the address where I receive all my mail to assure delivery.

However, my business is located at [REDACTED] in San Mateo Cuanala, Pue., Mex. and has been in the same location since 1986 and it is not located in a municipal palace.

I am enclosing documents that proves [sic] that both addresses exist.

(Letter of Asuncion Garcia Garcia [March 2004], certified English translation, at 1).

A notation at the bottom of that letter states: "Note, I would like to point out that there is an error on the [REDACTED] address since Telmex changes numbers often." (Letter of [REDACTED] March 2004], certified English translation, at 1). This notation apparently refers to a copy of a telephone bill submitted with the letter, which is discussed below.

The evidence submitted on appeal also includes a copy of a voting card for 1993 of [REDACTED] showing his address as [REDACTED] Texmelucan, Pue, with a

notarized certificate in Spanish attesting to the accuracy of the copy, and with a certified English translation of the text of the card.

The record also includes a copy of a telephone bill dated February 25, 2004 in the name of [REDACTED] Asuncion." The bill shows the address as 1 [REDACTED] Sn Martin Texmelucan, PU, 74129-CR-74001. The number "4" after Zaragoza, rather than "6," is apparently the alleged error described in the notation at the bottom of the March 2004 letter of [REDACTED]

The record also includes a copy of a telephone bill dated March 25, 2004 in the name of [REDACTED] Asuncion." The bill shows the address as [REDACTED] Pue, PU, 72000-CR-72001.

The telephone bill dated March 25, 2004 corroborates the petitioner's evidence that [REDACTED] Garcia has a connection with the address at [REDACTED]. The copy of that bill submitted in evidence bears no apparent indications of alteration. Moreover, the two phone bills for [REDACTED] two addresses show long distance calls made during the month and some of those calls are between the two locations. On the February 25, 2004 bill, for service as the Tianguismanalco address, three of the calls are to the telephone number for the premises at the San Mateo Cuanala address. On the March 25, 2004 bill, for service at the [REDACTED] address, one of the calls is to the number at the Tianguismanalco address.

The telephone bills, especially the bill dated March 25, 2004, are sufficient to establish that the address at [REDACTED] is not the address of the municipal government building of that town. Further support on that same point is found in the March 2004 letter of Asuncion Garcia Garcia, which asserts that that address is his business address and that his business is not located in the municipal palace. Furthermore, information on public Internet Web sites discussed above indicates that the municipal government building in San Mateo Cuanala is not at the address of [REDACTED]

The report of investigation states that the investigator asked Mexican authorities if they knew about a business named [REDACTED] and states that the investigator was informed that that business does not exist. The report fails to identify the Mexican authorities who were asked about [REDACTED]. The report does not indicate whether those officials had authority over business licenses or had other official functions pertaining to businesses. The report contains no supplemental documentation, such as photographs of the premises in question or of the neighborhood, which could give additional information to support the report's conclusions.

In his revocation decision, the director relied on the adverse findings in the report of investigation as grounds to revoke the petition. For the reasons discussed above, the report of investigation is an insufficient basis for finding that the work experience letter dated September 7, 1987 is a fraudulent document. The report of investigation is also an insufficient basis for finding that the business named [REDACTED] does not exist, because the only basis for that conclusion is the investigator's statement that Mexican authorities said that the business does not exist. But those authorities are identified neither by name nor by title.

The only reference in the report to an inquiry made to Mexican authorities about the business in question is the following sentence: "This writer asked to [sic] the Mexican authorities if they know [sic] about a business [REDACTED] and I was informed that mentioned business doesn't exist." (Report of Investigation, Apr. 2, 2002, at 1).

The report fails to establish that the Mexican authorities who were asked about the business "Originales Henry" would be expected to have knowledge about that business in the course of their duties, or would be expected to have access to official information about that business, if in fact the business did exist.

In his revocation decision, the director also relied on the inconsistencies in the address on the letters attesting to the beneficiary's work experience. Based on the evidence in the record then before the director, the director's analysis was correct on that point. Even without relying on the Report of Investigation, the differing addresses on the letters certifying the beneficiary's experience were sufficient grounds to revoke the petition. However, as discussed above, the evidence submitted on appeal contains an adequate explanation for the two addresses, supported by documentation in the form of telephone bills showing service provided at both addresses to the person who signed the letters certifying the beneficiary's work experience, and by a letter of explanation from the owner of the business.

Although the decision of the director to revoke the petition was correct as of the date of that decision, the evidence submitted on appeal is sufficient to overcome the decision of the director.

As noted above, on the Form ETA 750B, signed by the beneficiary but not dated, the beneficiary claimed to have worked for the petitioner beginning in November 1990 and continuing through the date on which the ETA 750B was prepared. However, that employment status apparently changed later. On the non-record side of the file is found a sheet with notations apparently made during the interview of the beneficiary on December 5, 2001 as part of the adjudication of his I-485 application to adjust status. One notation states that the petitioner closed its business in January 2001, and that as of the date of the interview the beneficiary was working with another company, doing the same type of work as he had been doing for the petitioner. The notations provide no further information about this matter, and the status of the petitioner as an employer was not among the issues discussed by the director in his notice of intent to revoke the petition or in his notice of revocation.

If the petitioning employer's business has in fact terminated, that would be a ground for automatic revocation of the petition, under 8 C.F.R. § 205.1(a)(3)(iii)(D).

It should be noted that the American Competitiveness in the 21st Century Act (AC21), Pub.L.No. 106-313, became law on October 17, 2000. AC21 § 106(c) added a new subsection (j) to section 204 of the INA, which provides beneficiaries of approved employment-based immigrant petitions with added flexibility concerning job changes, where an adjustment of status application has been pending for more than 180 days. *See* INA § 204(j) (*added by The American Competitiveness in the 21st Century Act (AC21)*, Pub.L.No. 106-313, § 106(c), 114 Stat. 1251 (2000)).

Moreover, even after the beneficiary's interview date of December 5, 2001, counsel has continued to submit documentation on behalf of the petitioner, including documents pertaining to the instant appeal. The information in the file provides an insufficient basis for concluding that the petitioner no longer exists. The petitioner is under no obligation to provide employment to the beneficiary pursuant to the instant petition until the beneficiary has been granted permanent resident status based on the instant petition. As stated in a 2003 memorandum from [REDACTED] Acting Associate Director for Operations, "there is no requirement in statute or regulations that a beneficiary of a Form I-140 actually be in the underlying employment until permanent residence is authorized." Memo. from [REDACTED] Acting Associate Director for Operations, to Service Center Directors, BCIS and Regional Directors, BCIS, *Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (AD03-16)* at 2-3 (August 4, 2003) (available at <http://uscis.gov/graphics/index.htm>; path

Immigration Laws, Regulations and Guides; Immigration Handbooks, Manuals and Policy Guidance; Immigration Policy and Procedure Memoranda; *topic category* Forms).

The issue in the instant appeal is whether the beneficiary met all of the requirements stated by the petitioner in block 14 of the ETA 750 labor certification application as of the day it was filed with the Department of Labor. The petitioner has established that the beneficiary had at least two years of experience as a sample maker as of the priority date, experience which was gained with an employer other than the petitioning employer.

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 met that burden.

ORDER: The appeal is sustained. The petition remains approved.