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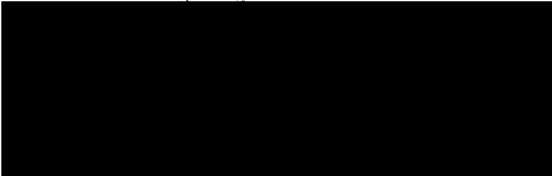


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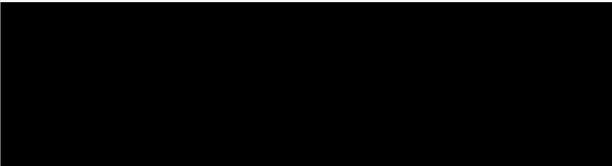


FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC-97-139-50987

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 (IRR). In a Notice of Revocation, 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 law office. It seeks to employ the beneficiary permanently in the United States as a Secretary, Bilingual (English & Korean). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary had two years of experience in the offered position as required on the Form 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 October 5, 1992.

The Form ETA 750 states that the offered position requires two years of experience in the offered position.

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 instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. [REDACTED] Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

The I-140 petition was submitted on April 22, 1997. On the petition, the petitioner claimed to have been established in September 1992, to currently have four employees, to have a gross annual income of \$340,120.00, and to have a net annual income of \$43,510.00. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On that Form ETA 750B, signed by the beneficiary on March 19, 1997, the beneficiary did not claim to have worked for the petitioner.

The petition was initially approved by the director on May 20, 1997.

The beneficiary submitted an I-485 Application to Register Permanent Residence or Adjust Status on June 27, 1997. An interview on that application was held on April 9, 1999 at the Los Angeles District Office of CIS. During the interview, questions arose about whether the beneficiary had the work experience claimed on the ETA 750B. The adjudicator issued the beneficiary a form WR-827 Form Letter for Returning Deficient Applications/Petitions, containing a handwritten request stating "Please provide us proof with evidence that you actual worked with your pervious employer [sic]." The deadline of April 25, 1999 was given for a response.

In response to that notice the petitioner submitted additional evidence.

In a Notice of Intent to Revoke (ITR) dated October 9, 2002, the director stated that it had been determined that the applicant for adjustment of status, that is, the beneficiary on the I-140 petition, did not have the minimum experience required on the ETA 750. In the ITR, the director afforded the petitioner a period of 30 days to submit evidence in support of the I-140 petition and in opposition to the proposed revocation.

On November 7, 2002 counsel submitted evidence in response to the ITR, but that evidence apparently was not immediately placed in the file.

In a Notice of Revocation dated November 14, 2002 the director stated that no response to the ITR had been received by CIS. Accordingly, the director revoked the petition.

The evidence which had been submitted on November 7, 2002 was placed in the file at some point after November 14, 2002.

In a Motion to Reconsider dated November 19, 2002, counsel stated that the petitioner had submitted a timely response to the ITR, and submitted a printout of a tracking report from a Federal Express Internet web site as evidence that the petitioner's submissions had been received by CIS on November 7, 2002.

In a decision dated June 26, 2003, the director granted the petitioner's motion to reopen the petition. On that same day, the director also issued a new Notice of Revocation on the merits of the I-140 petition. The director stated that copies of Form W-2 Wage and Tax Statements of the beneficiary had been requested by the director for the years of the claimed experience, but had not been submitted. The director stated that the petitioner had submitted other types of evidence to corroborate the previous claimed experience of the beneficiary but the director found that the evidence was insufficient to establish that the beneficiary had the claimed experience. The director accordingly revoked the petition.

On appeal, counsel submits a brief and additional evidence.

Counsel states on appeal that the evidence submitted to the director adequately corroborated the beneficiary's claim of prior experience. Counsel also states that the petitioner provided a sufficient explanation for the absence

of Form W-2 Wage and Tax Statements for the period of the claimed employment, namely that the beneficiary was not then legally authorized to be employed in the United States, and that the employer did not keep official records of her employment. Counsel also asserts that section 245(i) of the INA provides a procedure for an applicant to pay a fine and thereby to be relieved of certain further adverse consequences of unauthorized employment.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation 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). The evidence submitted for the first time on appeal consists of documentation concerning experience of the beneficiary as a secretary with a firm in Korea. No documentation concerning that experience was submitted previously, and 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 ETA 750 application for labor certification was filed by the Law Offices of Michael E. Kim on October 5, 1992. The record contains a copy of a merger agreement dated October 1, 1992 between that firm and the petitioner, effective January 1, 1993. The record also contains a copy of a form letter sent by the Law Offices of [REDACTED] the clients of that office advising them of the merger and stating that [REDACTED] would be employed by the petitioner and that he and the petitioner would continue to represent all clients of the Law Offices of [REDACTED]. The foregoing documents are sufficient to establish that the petitioner is a successor in interest to the Law Offices of [REDACTED]. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

As noted above, the ETA 750 was submitted on behalf of a previous beneficiary. In a cover letter submitted with the I-140 petition, counsel states that the previous beneficiary is no longer interested in the job offer from the petitioner, and that the petition is being submitted for a substituted beneficiary. With the petition, as noted above, the petitioner submitted a new ETA 750B for the new beneficiary.

The instructions to the ETA 750B, block 15, for work experience state as follows: "List all jobs held during the past three (3) years. Also list any other jobs related to the occupation for which the beneficiary is seeking certification as indicated in item 9."

On the new ETA 750B, signed by the current beneficiary on March 19, 1997, the only work experience stated by the beneficiary is as a secretary with Bowers Enterprises, Bellevue, Washington, from April 1988 until August 1991.

In the ITR dated October 9, 2002, the director stated that during an interview at the Los Angeles District Office it was determined that the beneficiary did not have the minimum experience required on the ETA 750. The director stated that a call to the telephone number listed on the letter certifying the beneficiary's experience produced no response or answer. The director stated that the beneficiary had been requested to provide evidence to corroborate her claim of prior experience, but had not done so. In the ITR, the director afforded the petitioner a period of 30 days to submit evidence in support of the petition and in opposition to the proposed revocation. Concerning any evidence to be submitted, the director stated as follows:

NOTE: If the petitioner responds to this notice, they must submit the following:

- 1) IRS issued copies of the applicant's Forms W-2 from 1988 through 1991; The period of time the applicant claims to have been employed with that entity.

(ITR, October 9, 2002, at 2) (punctuation as in the original).

Although the number "1" appears in the language quoted above, the ITR contains no further text after the quoted material and the director's signature and name follow immediately after the quoted language.

The record on appeal now contains the evidence submitted prior the ITR, the evidence submitted in response to the ITR, and evidence submitted for the first time on appeal. The order in which those documents were submitted for the record is not relevant to deciding the merits of the instant appeal. Therefore all relevant evidence will be considered as a whole.

The evidence now in the record relevant to the beneficiary's experience includes the following documents: copies of Fisherman's Ledger Cards of Anchorage, Alaska, for the periods January 1, 1991 through December 31, 1991 and January 1, 1992 through December 31, 1992; a copy of an invoice dated April 6, 1992 issued to Bellevue, Washington, by Shoreline Marine Electrical, Bellingham, Washington; a copy of an invoice dated April 21, 1992 issued by Northland Services, Inc., Marine Transportation for shipping by Bellevue, Washington, billed to Trident Seafoods Corp., Seattle, Washington; a copy of a letter dated March 13, 1997 from President, Bowers Enterprises, La Crescenta, California; a business card of Troy Bowers, Bowers Enterprises, Bellevue, Washington; a letter dated April 15, 1999 from Mukilteo, Washington; a letter dated April 15, 1999 from with no address given; a copy of a letter dated April 19, 1999 from Anchorage, AK; a letter dated April 20, 1999 from Enterprises, Bellevue, Washington; a copy of a portion of a statement of the National Bank of Alaska dated August 18, 1999 for an account of Enterprises, Anchorage, Alaska; a sworn letter dated October 27, 2002 from Bellevue, Washington; and an affidavit dated November 2, 2002 of Minnesota.

The evidence in the record relevant to the beneficiary's experience also includes the following documents, which are submitted for the first time on appeal: a letter dated July 7, 2003 from the president of Tube Company, Seoul, Korea, stating the beneficiary's employment as a secretary with that company from September 1984 to June 1987; a copy of a business registration certificate of Company dated November 24, 1999, with certified English translation; a copy of a personnel record of the beneficiary of Tube Company dated September 27, 1984, with certified English translation; and copies of payroll records of Company dated in 1984, 1985, 1986 and 1987, with certified English translations.

The most detailed evidence concerning the beneficiary's previous work experience in the United States is found in a sworn letter dated October 27, 2002 from the owner of Bowers Enterprises. In that letter, Mr. states that he owned and operated a commercial fishing operation from 1969 to 1999. Mr. states that due to an industry slow-down, he retired from commercial fishing in 1999.

Mr. states that he hired the beneficiary as a full-time secretary in April of 1988, and that her duties included communicating with potential customers from Asia in Korean. Mr. states that at the

beneficiary's request he paid her in cash, because she had told him that she was not supposed to work, "or something of that nature." (Bowers letter, October 27, 2002, at 1). The letter supports the assertion of previous counsel that the beneficiary was not legally authorized to be employed during the period of claimed employment.

In the notice of revocation dated June 26, 2003, the absence of Form W-2 Wage and Tax Statements for the beneficiary's claimed experience was a principal reason given by the director for revoking the petition. The petitioner's previous counsel had explained the absence of W-2 forms by stating that the beneficiary's was not legally authorized for employment in the United States during the claimed period of employment. The director discounted this explanation, stating as follows:

If this is the case, then both the employer and the beneficiary have engaged in illegal acts, both from immigration violations as well as failure to file correct individual and corporate income taxes, applicable state and payroll taxes, and Social Security contributions. Since the petitioner has admitted evading the law and practicing deception regarding payroll records and immigration issues, there is little reason to give credence to the purported letters of employment.

(Notice of Revocation, June 26, 2003, at 2).

The director cited no legal authority in support of his statements quoted above and the director's statements raise difficulties involving circularity of reasoning. Counsel's brief on this point states as follows: "The 'illegal acts' referred to [by the director] are those consequent upon the unauthorized employment of the beneficiary, which is also her 'qualifying employment' pursuant to the labor certification. How then is it possible to conclude that the very same employment did not occur?" (Brief, at 5). In the director's decision, the fact that purported former employer acted illegally in giving employment to the beneficiary is cited as the reason for disbelieving statements by the purported former employer about that employment. Of course, had the petitioner submitted other corroborating evidence, such as pay records showing the employment of the beneficiary, the director's reasoning might have been different. Nonetheless, the director's decision appears to require evidence of employment to be in the form of W-2 Wage and Tax Statements and to discount as inherently unreliable all statements by the employer who illegally hired the beneficiary.

In a 1976 decision of an INS regional commissioner, adjustment of status to permanent residence was denied as a matter of discretion where the applicant was the beneficiary of an immigrant visa based on a labor certification and where the beneficiary had met the work experience requirements for the labor certification through unauthorized employment in the United States. *Matter of Yarden* 15 I&N 729 (Reg. Comm. 1976). In a 1980 decision, the Board of Immigration Appeals held that unauthorized employment is a negative factor in the exercise of discretion for adjustment of status to permanent residence, but that unauthorized employment alone is not generally a sufficient reason to deny adjustment of status. *Matter of Khan* 17 I&N Dec. 508 (BIA 1980).

The Immigration and Nationality Act has been substantially revised since the decisions mentioned above, therefore their continued validity is not certain. Notably, the INA now includes section 245(i), which allows certain aliens to adjust status to permanent residence, notwithstanding some prior violations of immigration law. Moreover, the instant appeal does not involved an adjustment of status application, but an immigrant petition which, if approved, could serve as the basis either for an adjustment of status in the United States or for overseas immigrant visa processing. Concerning employment-based immigrant petitions, no authority has been found for discounting evidence from a previous employer solely on the ground that the claimed employment was unauthorized by law.

Adjustment of status is a benefit within the discretion of Secretary of Department of Homeland Security, authority delegated to CIS. *See* INA § 245(a); DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1. Under that authority, CIS may take into account such matters as unauthorized employment and tax evasion when adjudicating an application to adjust status to permanent residence. Where an applicant qualifies for the provisions of INA § 245(i), including having paid an extra fee of \$1,000.00, some past violations of immigration law will not be considered as adverse factors for adjustment of status to permanent residence.

In any event, the instant appeal is not from a denial of an adjustment of status application, but rather is from a revocation of an immigrant visa petition. Unlike the adjudication of adjustment of status applications, the adjudication of immigrant visa petitions is not discretionary. *See* INA § 204. Of course, the credibility of statements made in documentary evidence is always an issue in every application or petition for immigration benefits, and a past violation of law by a person submitting a written statement may properly be considered in evaluating the credibility of any such written statement. However, a past violation of law would be only one factor in evaluating credibility, along with other factors, such as the level of detail in the written statement and the consistency of the information in the written statement with other evidence.

In the instant petition, the evidence of the beneficiary's former employment in the United States is not limited to statements by the former employer and the beneficiary. The record also contains evidence from several other persons, including an affidavit from [REDACTED] who states that he was formerly employed by [REDACTED] Enterprises and that he communicated frequently with the beneficiary who was then working there as a secretary; a letter from [REDACTED] who states that he worked with [REDACTED] and with the beneficiary; and a letter from [REDACTED] who states that she knew the beneficiary as the bookkeeper for [REDACTED]. Supplementing the affidavit and letters are business documents from Bowers Enterprises, corroborating the statements by [REDACTED] and by [REDACTED] that Bowers Enterprises was a commercial fishing business. The evidence in the record concerning the beneficiary's claimed employment with [REDACTED] Enterprises is detailed and is consistent. That evidence is sufficient to establish that the beneficiary had experience as a bilingual secretary with [REDACTED] Enterprises from April of 1988 to August of 1991. That experience is more than the minimum of two years of experience in the offered position as required on the ETA 750.

The record on appeal also includes evidence concerning the beneficiary's prior experience as a secretary with [REDACTED] Tube Company, Seoul, Korea, from September 1984 to June 1987. That experience was not stated by the beneficiary on the ETA 750B. The beneficiary signed the ETA 750B on March 19, 1997. Therefore her experience with [REDACTED] Tube Company ended more than three years before she signed the ETA 750B. The evidence does not indicate that the beneficiary's duties with that firm involved bilingual communication in English and Korean, so presumably her duties involved only the Korean language. Her position with that company may not have been the same as the position offered on the ETA 750. Nonetheless, that experience would still appear to be relevant to the instant petition, and therefore should have been included on the ETA 750B.

Notwithstanding the omission from the ETA 750B of any information about the beneficiary's experience as a secretary in Korea, the evidence submitted on appeal about that employment is detailed and is consistent. The evidence consists of a letter dated July 7, 2003 from the president of [REDACTED] Tube Company, a copy of a business registration certificate of [REDACTED] Metal Tube Company dated November 24, 1999, a copy of a personnel record of the beneficiary of [REDACTED] Metal Tube Company dated September 27, 1984, and copies of payroll records of [REDACTED] Metal Tube Company dated in 1984, 1985, 1986 and 1987. Certified English translations are provided of the relevant portions of all Korean language documents. The foregoing evidence is sufficient to establish that the beneficiary had two years and eight months of experience as a secretary in Korea. That experience may not qualify as experience in the offered position, since no bilingual duties are mentioned in

the evidence about that job. But the evidence about the beneficiary's employment as a secretary in Korea is additional corroboration of her claim to have later worked as a bilingual secretary in the United States for Bowers Enterprises.

Based on the foregoing analysis, the decision of the director that the evidence submitted prior to the director's revocation decision failed to establish that the beneficiary had the required experience as a bilingual secretary was incorrect. The assertions of counsel on appeal are sufficient to overcome the decision of the director. Moreover, the additional evidence submitted for the first time on appeal of the beneficiary's experience in Korea as a secretary provides further corroboration of her claim of experience in the United States as a bilingual secretary.

The issue is whether the beneficiary met all of the requirements stated by the petitioner in block 14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has established that the beneficiary had the required experience. Therefore, the petitioner has overcome the director's decision.

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.