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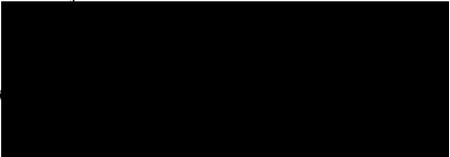
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FILE: WAC-02-127-50075 Office: CALIFORNIA SERVICE CENTER Date: **JUN 22 2005**

IN RE: Petitioner:
Beneficiary:

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 preference visa petition was denied by the Director, California Service Center, and came before the Administrative Appeals Office (AAO) on appeal. The appeal was dismissed by the AAO. The petition is again before the AAO on the petitioner's motion to reopen. The motion will be granted. The appeal will remain dismissed and the petition will remain denied.

The petitioner is a company providing overseas air parcel and money remittances services. It seeks to employ the beneficiary permanently in the United States as an executive secretary. 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 it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and that the petitioner had not established that the beneficiary had the experience required on the ETA 750. The director 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.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which 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). 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 in the instant petition is August 3, 1998. The proffered wage as stated on the Form ETA 750 is \$12.44 per hour, which amounts to \$25,875.20 annually. On the Form ETA 750B, signed by the beneficiary on July 23, 1998, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on February 27, 2002. On the petition, the petitioner claimed to have been established in May 1998, to currently have 129 employees, to have a gross annual income of \$26,114,997.00, and to have a net annual income of \$680,288.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated April 10, 2002, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2), the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also requested additional evidence to establish that the beneficiary possessed the experience listed on the Form ETA 750.

In response to the RFE, the petitioner submitted additional evidence.

In a second RFE dated June 20, 2002, the director again requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage. The director also requested additional evidence relevant to the beneficiary's experience, noting that a letter previously submitted attesting to the beneficiary's experience did not indicate that the beneficiary had two years of experience in the job offered as required by the Form ETA 750.

In response to the second RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the second RFE were received by CIS on August 1, 2002.

After the submission of the petitioner's response to the two RFE's, the record before the director consisted of the following documents: partial copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for its 1998, 1999 and 2000 tax years; a letter dated May 6, 2002 from the maintenance manager of Forest City Enterprise, Cleveland, Ohio stating the beneficiary's experience with that company as an assistant secretary from November 1996 to June 1997; a letter dated May 9, 2002 from the controller of Alfaomega Grupo Editor, Mexico, D.F., stating the beneficiary's experience with that company as an executive secretary from June 1995 to September 1996; an undated letter from the finance director of Mexico Express, La Mirada, California, stating that audit reports on the petitioner for 2001 would be submitted soon to the INS (now CIS); a letter dated July 25, 2002 from the chief operating officer, Mejico Express, Los Angeles, California, stating the beneficiary's experience with that company as an executive secretary from July 1997 to July 2002; and copies of audit reports for the petitioner for the year ending September 30, 1999, for the nine-month period ending June 30, 2000, and for the six-month period ending December 31, 2000.

The petitioner's tax return for its 1998 tax year covers the period from October 1, 1998 through September 30, 1999. Its return for its 1999 tax year covers the period from October 1, 1999 through September 30, 2000, and its return for its 2000 tax year covers the final quarter of 2000, from October 1, 2000 through December 31, 2000.

In a decision dated September 26, 2002, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary

obtains lawful permanent residence. The director also determined that the evidence did not establish that the beneficiary had the required two years of experience in the offered job as of the priority date. The director therefore denied the petition.

The petitioner's notice of appeal was received by CIS on October 22, 2002. With the notice of appeal, the petitioner submitted additional evidence. In the proceedings before the director, the petitioner was represented by counsel. The notice of appeal, however, was signed by the petitioner's human resources director.

The evidence submitted with the notice of appeal consisted of the following: a letter dated July 25, 2002 from the chief operating officer, Mejico Express, Inglewood, California, stating the beneficiary's experience with that company as an executive secretary from July 1997 to July 1998, a letter dated March 11, 2004 from the controller of [REDACTED] stating the beneficiary's experience with that company as an executive secretary from June 1995 to September 1996; a copy of a diploma issued to the beneficiary on June 22, 1978 by the Instituto Michigan, Mexico, D.F. for the course of study of "Secretaria Ejecutiva," with accompanying transcript; partial copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 1998, 1999, and 2000, covering the periods as described above and for 2001, covering the period from January 1, 2001 through December 31, 2001; and copies of the petitioner's Form 100S California S Corporation Franchise of Income Tax Returns for 1998, 1999, 2000 and 2001, covering periods which are the same as the petitioner's corresponding federal income tax returns.

Two of the letters certifying the beneficiary's experience submitted on appeal were similar, but not identical, to two letters which had been submitted prior to the director's decision.

One pair of letters is from an official at a company named [REDACTED] ditor.

Prior to the director's decision, the petitioner submitted a letter dated May 9, 2002 from the controller, [REDACTED], Mexico, D.F. That letter is on letterhead printed on eggshell colored paper. To the left of the company name on that letterhead is a logo symbol incorporating the Greek letters of Alpha and Omega. The address and telephone number information on the letterhead is "[REDACTED] 06700 Mexico, D.F., Tels.: [REDACTED] Fax: [REDACTED]". The letter states the beneficiary's job title as Executive Secretary, describes her duties, states her hours worked per week as "40 hours, minimum," and states her dates of employment as "June 1995 to September 1996."

On appeal the petitioner submitted another letter dated May 9, 2002 from the controller, [REDACTED], Editor, Mexico, D.F. That letter is on letterhead printed on light gray paper. No logo symbol appears on the second letter. The address and telephone number information on the letterhead is identical to that on the first letter, but spacing of the company name is different than on the first letter. In the body of the letter, however, the information, spacing, and layout are identical to the first letter.

A second pair of letters is from an official at a company named Mejico Express.

Prior to the director's decision, the petitioner submitted a letter dated July 25, 2002 from the chief operating officer, Mejico Express. The printed address and telephone number information on the letterhead appear at the bottom of the page. That information is [REDACTED]. The letter states the beneficiary's job title as Executive Secretary, describes her duties, states her hours worked per week as "40 hours, minimum," and states her dates of employment as "July 1997 to July 2002."

On appeal, the petitioner submitted another letter dated July 25, 2002 from the chief operating officer, Mejico Express. The printed address information on the letterhead of that letter appears at the top of the page, and is stated as [REDACTED]. Neither a telephone number nor a post office box address appears on the second letter. The letter states the beneficiary job title as Executive Secretary, describes her duties in language identical to that used in the prior letter, states her hours worked per week as "40 hours, minimum," but states her dates of employment as "July 1997 to July 1998." It should be noted that in the first letter, the last year of employment is 2002, but in the second letter the last year of employment is 1998.

All four of the letters discussed above bear original signatures. The letterheads on the letters differ as noted above. But the text in the body of each of the four letters is in an identical font and with nearly identical layout, though the letters purport to be from two different persons at two different companies.

In a decision dated February 26, 2004 the AAO dismissed the appeal. In the decision, the AAO noted the inconsistencies described above concerning the letters stating the beneficiary's work experience as among the grounds for dismissing the appeal.

The petitioner's motion to reopen was received by the AAO on March 29, 2004. The motion was submitted by a new attorney for the petitioner, who submitted Form G-28 Notice of Entry of Appearance as Attorney or Representative, cosigned in the appropriate block by the petitioner's human resources director.

The evidence submitted with the motion to reopen consists of the following documents: a letter dated March 11, 2004 from the legal representative, Alfaomega Editor Group, S.A. of C.V., Mexico, D.F., stating the beneficiary's employment with that company as an Executive Secretary from April 6, 1989 until June 25, 1995; a copy of a document dated June 25, 1995 signed by the beneficiary stating her resignation from Alfaomega Editor Group, S.A. of C.V.; a copy of an individual employment agreement between the beneficiary and Alfaomega Editions, S.A. of C.V. dated April 6, 1989; a letter dated March 12, 2004 from the human resources personnel director of GroupEx, La Mirada, California, describing affiliation relationships among the petitioner, the company GroupEx, and the company Mejico Express; a letter dated March 22, 2004 from the petitioner's director of finance explaining the petitioner's tax returns; and copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 1998, 1999, 2000, 2001 and 2002. Each of the tax return copies submitted with the motion to reopen includes depreciations schedules, which were not submitted with the previous copies. The return for 2002 is submitted for the first time with the motion to reopen.

The regulation at 8 C.F.R. § 103.5(a)(2) states in pertinent part as follows: "*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

No regulation or AAO precedent decision defines the meaning of the term "new facts" in the context of immigrant petitions. With regard to deportation proceedings, the process which was predecessor of the process now known as removal proceedings, the Board of Immigration Appeals has stated that a motion to reopen must be supported by evidence which was not available at the time of the original decision. *See Matter of Coelho*, 20 I&N Dec. 464, 472 n.4 (BIA 1992).

In the instant motion, counsel refers to the evidence of the beneficiary's work experience submitted with the motion as "new evidence" (Motion to Reopen, at 2), but counsel makes no claim that such evidence was

previously unavailable. Nonetheless, even assuming that the evidence offered with the motion qualifies as new evidence, it fails to overcome the AAO's decision to dismiss the appeal.

The evidence submitted with the motion to reopen states that the beneficiary was employed by Alfaomega Editor Group, S.A. of C.V. from April 6, 1989 until June 25, 1995. The letter dated March 11, 2004 stating those dates of employment is signed by the same person who had signed the two previous letters from that company. But those dates are inconsistent with the dates of employment as stated in the two previous letters from the company, which give the dates of the beneficiary's employment with that company as from June 1995 to September 1996.

In addition, nothing in the evidence submitted with the motion addresses inconsistencies in the dates of employment stated in two letters previously submitted for the record by Mejico Express. As noted above, the letter from that company first submitted states that the beneficiary was employed by Mejico Express from July 1997 to July 2000, while the letter from that company submitted later states the dates of her employment with Mejico Express as from July 1997 to July 1998. That inconsistency was noted by the AAO in its decision on the petitioner's appeal (AAO decision, February 26, 2004, at 4). Counsel makes no reference to the Mejico Express letters in his motion to reopen, and simply asserts that the newly-submitted evidence from Alfaomega Editor Group, S.A. of C.V. is sufficient to establish that the beneficiary had the required experience as an executive secretary as of the priority date.

Concerning the issue of the petitioner's ability to pay the proffered wage, the evidence submitted with the motion to reopen provides explanations for the varying tax years of the petitioner. A letter dated March 22, 2004 from the petitioner's director of finance states that the short period covered by the petitioner's tax return for 2000 was the result of the petitioner transitioning to a different tax year, and that the petitioner's tax returns for 2001 and 2002 were for tax years which matched those calendar years. The financial information on the five tax returns now in the record shows substantial financial resources of the petitioner for the period from 1998 through 2002. Nonetheless, a letter dated March 12, 2004 from the human resources personnel director of GroupEx, La Mirada, California, indicates that the petitioner's tax returns, which were filed by the petitioner as an S corporation, may not accurately reflect the petitioner's form of organization.

In the March 12, 2004 letter, the personnel director states the letter is being submitted for use of the beneficiary "in providing proof of current employment with GroupEx Corporation." The personnel director states that the petitioner and the company Mejico Express dba Mexico Express "are both related Companies to GroupEx Corporation and are under the umbrella of GroupEx." (Letter, GroupEx, March 12, 2004, at 1). The foregoing statements appears to imply that the petitioner is a subsidiary of Group Ex Corporation. However on the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation a single individual is identified as the owner of 100% of the shares of the petitioner.

In order to elect for tax treatment as an S corporation, a corporation's shareholders must consist only of individuals, estates, certain exempt organizations and certain trusts. Internal Revenue Service, *Instructions for Form 2553, Election by a Small Business Corporation*, at 1 (March 2005) <http://www.irs.gov/pub/irs-pdf/i2553.pdf>. The only situation in which a subsidiary corporation could qualify as an S corporation is where its parent is a 100% owner and where the parent is itself an S corporation. *See Id.* at 1.

The March 12, 2004 letter from the human resources personnel director of GroupEx contains no further information clarifying the relationships among the petitioner, GroupEx Corporation, and Mejico Express, nor does any other evidence in the record clarify those relationships.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "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 record contains no explanation for the inconsistencies in the evidence noted above.

For the foregoing reasons, the evidence submitted with the petitioner's motion to reopen fails to overcome the decision of the AAO to dismiss the 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 motion to reopen is granted. The appeal remains dismissed and the petition remains denied.