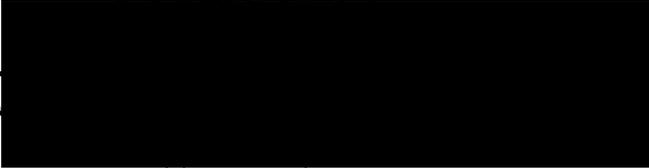




U.S. Citizenship
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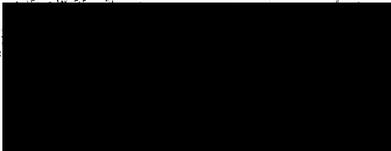
Office: TEXAS SERVICE CENTER

Date: NOV 14 2005

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

PETITION: Immigrant 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 service center director denied the employment-based visa petition. The petitioner submitted a motion to reopen the matter that the director subsequently denied on September 23, 2004. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a mortgage lender. It seeks to employ the beneficiary permanently in the United States as a mortgage loan originator. 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 the requisite two years of work experience as stipulated in the Form ETA 750.

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 nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(1)(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.
- (B) *Skilled worker.* If the petitioner is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification . . . The minimum requirements for this classification are at least the two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on June 11, 2002. The proffered wage as stated on the Form ETA 750 is \$11.50 per hour for a thirty-five hour workweek, which amounts to \$20,930 annually.

With the petition, the petitioner submitted a letter signed by [redacted] General Manager, that described the proffered position, and a letter from [redacted] identified as former vice president, of A.N. Finance Company. [redacted] stated in her letter that the mortgage company was now closed; however, the beneficiary had been employed by the company from March 1991 to June 1995. [redacted] identified the beneficiary's job duties which were identical to the duties outlined in the job offer and in the Form ETA 750. The petitioner also submitted its IRA Form 1120S, for 2001. This document indicated the petitioner has an ordinary income of \$180,234.

The director issued a notice of intent to deny the petition on July 28, 2004. The director stated that the notice was being served on the petitioner based on derogatory information contained in the record. The director then stated that the petitioner had submitted a letter from a previous employer stating that the beneficiary was employed full time as a mortgage loan originator from March 1991 to June 1995; however the beneficiary was paroled into the United States for humanitarian reasons from May 27, 1993 to May 27, 1994. The director noted that the CIS record did not indicate that the beneficiary ever departed the United States or entered the United States on another visa that authorized employment within the United States. The director cited *Hoffman Plastic Compounds Inc. V. Nat'l Labor Relations Board*, 535 U.S. 137, 122 S. Ct. 1275(2002). The director stated that this Supreme Court decision determined that the Immigration Reform and Control Act (IRCA) was enacted to "combat the employment of illegal aliens, and that under IRCA, an illegal alien cannot obtain employment without someone directly contravening explicit federal law." The director then cited Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) and stated that doubt cast on any aspect of the petitioner's evidence, may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. The director requested that the petitioner provide a copy of all CIS approval notices for the beneficiary; copies of Forms W-2 for all the years the beneficiary was employed between 1991 and 1995; copies of the beneficiary's paychecks or pay stubs for [REDACTED] and any supplementary evidence that will establish the beneficiary's employment between 1991 and 1995.

On August 5, 2004, in response to the director's notice of intent to deny the petition, counsel submitted the following documentation with regard to the beneficiary's previous employment:

An original affidavit dated August 4, 2004 from [REDACTED] former Vice President, [REDACTED] this letter [REDACTED] stated that the beneficiary worked for [REDACTED] as a mortgage loan originator from March 1991 to June 1995, and that the company closed in 1995 due to the death of her husband, [REDACTED] who was the president of the company. [REDACTED] stated that she no longer had records from the years 1991 to 1995.

A copy of the beneficiary's employment authorization card (front and back) valid from July 17, 1991 to July 17, 1993.

A copy of the beneficiary's 1995 W-2. This form indicated that the [REDACTED] located at [REDACTED] paid the beneficiary \$11,200 in 1995. This document was accompanied by two weekly pay statements for the beneficiary for the two weeks from December 31, 1994 to January 13, 1995. These two documents indicated the beneficiary earned \$800 a week.

Copies of the beneficiary's Forms 1040, individual federal income tax return, for 1991, 1992, 1993, 1994, and 1995. On the 1992 tax return, the beneficiary identified his occupation as Loan officer/Service. On the 1993 form, the beneficiary identified his occupation as "self-employed, loans." On the 1994 form, the beneficiary was identified as "manager, loan officer." The petitioner also submitted Form W-2 for 1994 for the beneficiary which indicated [REDACTED] paid the beneficiary \$42,600. On the 1995 tax return, the beneficiary earned \$11,200 from [REDACTED] and \$8,644 as a self-employed mortgage broker as documented by the Schedule C submitted with the tax return.

On August 12, 2004, the director denied the petition. The director stated that although the petitioner submitted a letter from [REDACTED] stating the beneficiary had worked as a mortgage loan originator from

March 1991 to June 1995, the record only indicated that the beneficiary had been paroled into the United States for humanitarian reasons from May 27, 1993 to May 27, 1994. The director stated that no evidence of employment authorization existed beyond these dates. The director noted that in response to the director's notice of intent to deny the petitioner, the petitioner submitted a copy of a previous employment authorization card. The director stated that this document permitted employment only from July 1991 to July 1993. The director examined the Forms W-2 submitted by the petitioner, and stated that the Form W-2 for 1995 showed a total wage earned of \$11,200, and that based on the beneficiary's earnings, this wage was equivalent to 28 weeks or seven months of employment. The director stated that this documentation would confirm the beneficiary's claim of employment from January 1995 to July 1995, and the Form W-2 for 1994 would confirm the beneficiary's employment from January 1994 to December 1994. The director noted that no other forms W-2 were submitted to the record.

The director also noted the different terms by which the beneficiary listed his occupation on his Forms 1040. According to the director, when the beneficiary identified his occupation on his Forms 1040, he listed the following occupations: self employed/loans, manager/ loan officer, and mortgage broker.

Based on this documentation, the director stated that the beneficiary did not begin to work for [REDACTED] as a mortgage originator until sometime in 1994 and then continued until July 1995. The director also stated that the beneficiary's individual income tax returns showed that the beneficiary did not begin claiming wages or salary until 1994 and 1995, and that there was no evidence in the record that the beneficiary was employed by [REDACTED] before 1994. Thus, the director stated that the documentation submitted by the petitioner negated the claim of four years of work experience as a mortgage loan originator, in which the beneficiary worked five days per week, eight hours per day, and was paid \$400 per week. The director states that the beneficiary only held one year of experience in the proffered job, namely mortgage loan originator.

On September 1, 2004, counsel submitted a motion to reopen/reconsider the instant petition. Counsel stated that it was submitting new evidence with regard to the beneficiary's employment with [REDACTED]. Counsel submitted a copy of Form 1099-MISC for 1992 that indicated that the beneficiary was compensated \$8,030, and a Form 1099-MISC in 1993 that indicated the [REDACTED] provided the beneficiary with compensation of \$38,312.45.

On the I-290B document that accompanied the additional evidence, counsel stated that CIS erred in its decision that the petitioner had not established the beneficiary's employment with the previous employer, [REDACTED]. Counsel stated that the Forms 1099-MISC for 1992 and 1993 in addition to the beneficiary's already submitted Forms W-2 for 1994 and 1995 clearly established the beneficiary's employment with [REDACTED] for at least the two years required by the ETA 750.

On September 23, 2004, the director denied the motion to reconsider. The director discussed the use of Form 1099-MISC in reporting wages and when such non-employee compensation is exempt from federal income tax withholding. The director stated that the IRS does not recognize employees paid through Form 1099-MISC and does not consider independent contractors as employees. The director stated that the Forms 1099-MISC the petitioner submitted for 1992 and 1993 established that the beneficiary was not employed by the petitioner for 1992 and 1993. The director stated that the evidence suggested that the beneficiary was an independent contractor. With regard to 1991, the director stated that the petitioner did not provide a Form W-2 or Form 1099-MISC and the available tax returns indicate that the beneficiary was self-employed. The director then stated that the evidence submitted by the petitioner on motion in conjunction with the evidence submitted with the initial petition and in response to the director's notice of intent to deny the petition

continued to negate the petitioner's claim that the petitioner had employed the beneficiary from 1991 to 1995 as a mortgage loan originator. The director then stated that the petitioner did not state the reasons for reconsideration, and that the petitioner did not establish that the denial was based on an incorrect application of law or policy. For these reasons, the director denied the motion to reopen the proceedings.

On appeal, counsel stated that the CIS erred in denying the motion to reopen. Counsel stated that the director denied the motion due to the failure of the petitioner to establish that the beneficiary was employed by the petitioner from 1991 to 1995. Counsel states that the beneficiary never claimed to be employed by the petitioner from 1991 to 1995. Counsel also notes the director's statement that the beneficiary was not considered employed by [REDACTED] because Forms 1099-MISC were issued to the beneficiary in 1992 and 1993. Counsel states that the DOL *Occupation Outlook Handbook (Handbook)* clearly confirms that loan officers and mortgage loan originator are paid on a commission basis and are considered to be "employed and their years of employment are considered paid experience." Counsel also states that the director also determined that the job titles of the beneficiary's tax returns were unacceptable. Counsel states that letters of work verification are submitted to provide evidence of job duties, not job titles. Counsel states that the beneficiary has to provide evidence of at least two years training or work experience, and that the petitioner has established well over two years of the beneficiary's work experience.

In the brief submitted with the I-290B, counsel states that the director's decision listed irrelevant factors such as the lack of approval notices for employment authorization documents, the job titles listed on the beneficiary's tax returns, and furthermore, by its reference to *Hoffman Plastic Compounds, Inc. v. NLRB*, implied that an illegal alien cannot obtain employment.

Counsel states that with regard to the multiple titles used by the beneficiary in his tax returns, the Form ETA 750A, item 14, clearly requests that the petitioner state in detail the minimum education, training and experience for a worker to perform satisfactorily the job duties. Counsel emphasizes that item 9, Form ETA 750 does not request the petitioner to provide the minimum experience required in the job title. Counsel states that this is so because item 9 on the Form ETA 750 is the employer's title while the occupational title assigned by the certifying officer on the same page is that specified in the DOL *Dictionary of Occupational Titles (DOT)*.

Counsel states that the *DOT* classifies a mortgage loan originator as a loan officer (DOT Code 186.267-018), and points out that on pages one and two of the ETA 750, the beneficiary's proffered position is clearly classified as a loan officer. According to counsel, the *DOT* considers mortgage loan originator an alternate title of a loan officer, and additional alternative titles listed in the *DOT* include commercial account officer, international banking officer, and mortgage-loan officer. Counsel states that experience in the job duties based on self-employment on a commission basis, as a contractor, or an owner/manager is acceptable experience for a beneficiary as well as for a local resident worker who may apply for the position.

It is noted that, contrary to counsel's assertion, the director's reference to the beneficiary being employed by the petitioner is not irrelevant, as both the previous employer and the petitioner share the same address on [REDACTED] as well as the same building suite. Since the petitioner has not submitted any documentation that conclusively establishes that the [REDACTED] closed following the death of the owner, and that a new corporate entity now functions at the [REDACTED] address, it is reasonable that the director could view the claimed previous employer as the petitioner in the instant petition.

With regard to the director's comments on the types of documentation that may be considered in gauging whether the beneficiary has sufficient work experience for purposes of an I-140 petition, CIS accepts both Forms W-2 and Forms 1099-MISC documentation. The petitioner, in submitting such documentation, is not establishing the legal status or employment status of the beneficiary, but attempting to establish the actual work experience, or payment of the proffered wage. While the director correctly notes the interest of the U.S. government in discouraging the use of undocumented or illegal workers in the U.S. workforce, for purposes of the I-140 petition, the AAO finds both types of documentation acceptable to demonstrate the requisite experience. Moreover, the fact that the employer referred to the "employment" of the beneficiary while he was, in fact, working as an independent contractor does not rise to the level of a material inconsistency when the issue at hand is whether or not the beneficiary has the required number of years of relevant work experience. The AAO does concede that such a distinction could be a material distinction in other matters but not for the instant determination.

Upon review of the record, the petitioner has established that the beneficiary has the requisite two years of work experience, as outlined in the regulations. As pointed out by the director, the salary terms mentioned by [REDACTED] with regard to the beneficiary's full time work at \$20 an hour from 1991 to 1995 are not reflected in the beneficiary's wage documentation and tax returns. However, as also pointed out by the director, Forms W-2 for 1994 and 1995 appear to document a year and a half of work experience. In accepting the Forms 1099 submitted by the petitioner, the AAO finds that the Form 1099 form submitted for the year 1993 indicates a non employee compensation of \$38,312.45, which, while less than the \$41,600 salary suggested by the previous employer's letter, does establish another year of employment of the beneficiary by the previous employer and in the loan mortgage field. The additional Form 1099-MISC and the beneficiary's tax return for 1992 also do not support the previous employer's salary terms, but do establish that the beneficiary worked in the mortgage loan/loan origination field during this year.

Upon review of all the documentation submitted to the record, including W-2 Forms and Forms 1099-MISC, the petitioner has submitted sufficient documentation to establish that over the period of four years, namely 1992 to 1995, the beneficiary worked as either a paid employee or as a self-employed individual compensated by the petitioner's predecessor, for over two years, in a job that had duties synonymous with the job duties described in the Form ETA 750. Counsel's reference to the various job titles described in the *DOT* for the job duties of the proffered position is well founded. The fact that the beneficiary utilized job titles within the general work field of mortgage loan management in his Forms 1040 from 1992 to 1995, as opposed to the provision of a job title entirely outside the proposed job area, adds more weight to the establishment of his employment with the field of loan origination and loan officers.

With regard to the beneficiary's relevant work experience, the petitioner has provided sufficient evidentiary documentation to establish at least another six months of relevant work experience before the priority date of June 2002.

Accordingly, the petitioner has established that the beneficiary had two years of work experience at the time the original petition was filed. 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 with regard to the beneficiary's qualifications to perform the duties of the position.



ORDER: The appeal is sustained.