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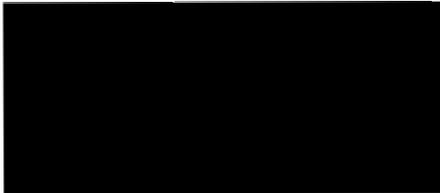
U.S. Department of Homeland Security  
20 Mass, NW, Rm. A3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUN 29 2006  
WAC 05 197 50221

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

PETITION: Immigrant Petition for Other Worker pursuant to § 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)(A)(iii).

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a furniture upholstery company. It seeks to employ the beneficiary permanently in the United States as a supervisor, upholstery department. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the petitioner had not established either that the beneficiary has the requisite experience as stated on the labor certification petition, or that the petitioner had the ability to pay the proffered position. The director denied the petition accordingly.

On appeal, the petitioner submits a brief.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Eligibility in this matter hinges on the petitioner demonstrating that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on May 20, 1997. The labor certification states that the position requires four years experience. Eligibility further turns on the petitioner establishing that it has the ability to pay the proffered wage, which the ETA 750 states is \$17.91 an hour, or \$37,253 per year.

With the petition, the petitioner's representative submitted an original ETA 750.

The director on August 10, 2005, requested pertinent evidence. Consistent with the requirements of 8 C.F.R. 204.5 § (l)(3)(ii), the director issued a Request for Evidence (RFE), seeking evidence of the beneficiary's experience be in the form of 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. The director also requested documentation showing the petitioner's ability to pay the proffered wage.

On November 3, 2005, in his response to the RFE, the petitioner asserted that the company has yet not hired the beneficiary full time and accordingly, has no record of the beneficiary in a Form DE-6 or W2 issued by the petitioner. Further, the petitioner said the file already contains a letter of the beneficiary's job experience.<sup>1</sup>

On January 10, 2006, the director denied the petition, finding that the evidence submitted did not demonstrate either that the beneficiary has the requisite four years of salient work experience, or that the petitioner had the ability to pay the proffered wage. The director noted the petitioner's response to the RFE disavowing an assertion in the ETA 750 that the beneficiary had worked for the petitioner full time since August 1989. The director also

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<sup>1</sup>The petitioner's response to the RFE states that the record already has a job experience letter. This is consistent with ETA 750, Part B, item 14, which states that a letter "from his previous employer of his past three years of experience" is attached. However, the record contains no such letter.

noted that the petitioner, in the same response to the RFE, had asserted his company's ability to pay the proffered wage based upon "the success of my company for the past 34 years."

On appeal, the petitioner asserts that he can get more copies of letters from the beneficiary's previous employers. He also requests two more weeks to submit his federal tax returns to establish his ability to pay the proffered wage, noting that he is about to have heart surgery

On review, the AAO agrees with the decision of the director. The record does not establish that the beneficiary has four years work experience or that the petitioner possesses the ability to pay the proffered wage. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, he should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal or two week after the appeal, as requested. Consequently, the appeal will be dismissed.<sup>2</sup>

The evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

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<sup>2</sup> We note, at any rate, that the petitioner or her representative has not submitted additional evidence of either the beneficiary's experience or the petitioner's ability to pay the proffered wage. The record likewise contains no evidence of either.