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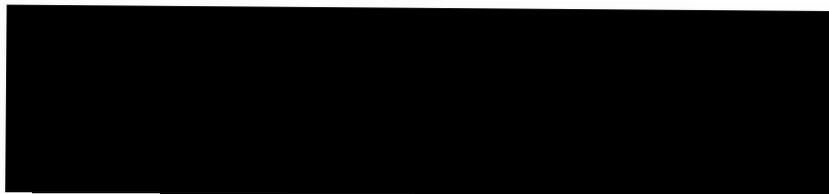
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **MAY 23 2006**
WAC 04 016 52712

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a clothing manufacturer. It seeks to employ the beneficiary permanently in the United States as a garment sample maker. 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 that the beneficiary has the requisite experience as stated on the labor certification petition and denied the petition accordingly.

On appeal, the petitioner submits a statement.

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 unavailable in the United States.

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 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 unavailable.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(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 workers.* If the petition 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, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

(D) *Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

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 January 16, 1998. The labor certification states that the position requires two years of experience in the job offered, garment sample maker.

On the Form ETA 750B the beneficiary stated that he had worked as a garment sample maker for Montana Street Wear of Los Angeles, California from February 1990 to March 1992. The beneficiary also stated that he had worked as a garment sample maker for the petitioner from April 1992 to November 4, 1997, the date he signed that form.

With the petition the petitioner submitted a letter dated February 17, 1997 from Montana Street Wear. That letter states, " [REDACTED] was employed with Montana Street Wear, Inc. in the capacity of garment sample maker from 2-90 to 3-92 as a full time employee." The person who signed that letter is identified by name but not by his or her position at Montana Street Wear.

Because the evidence submitted was insufficient to demonstrate that the petitioner has the requisite experience, and insufficient in other aspects not relevant here, the California Service Center, on January 28, 2003, requested, *inter alia*, evidence pertinent to the beneficiary's employment experience.

Specifically, the service center requested the 1998, 1999, 2000, 2001, and 2002 Form W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary during those years¹ and employment verification letters that conform to the requirements of 8 C.F.R. § 204.5(1)(3)(ii). The service center stipulated that the employment verification letter must be on the employer's letterhead and state the name and title of the person confirming the employment as well as the beneficiary's duties, dates of employment, and number of hours worked per week.

In response the petitioner submitted (1) a letter, dated February 7, 2003 from the petitioner's president, (2) a letter, dated March 22, 2003, from the beneficiary, (3) a copy of the February 17, 1997 letter from Montana Street Wear, (4) a photocopy of a 1998 W-2 form purporting to show wages the petitioner paid [REDACTED] during that year, (5) 1999 through 2002 Form W-2 Wage and Tax Statements showing amounts the petitioner paid to [REDACTED] and (6) photocopies of pay stubs showing amounts the petitioner paid to [REDACTED] during one-week pay periods from August 9, 1999 to March 6, 2003.

The petitioner's president's letter is dated February 7, 2003 and the beneficiary's letter is dated March 22, 2003. Both of those letters state that the beneficiary worked for the petitioner from 1999 through 2002 under the name [REDACTED]. Neither letter mentions 1998 or previous years, although the beneficiary claimed on the Form ETA 750B to have started working for the petitioner during April 1992 and the service center requested evidence pertinent to 1998.

Form W-2 Wage and Tax Statements for 1999 through 2002 were submitted in support of the beneficiary's claim of employment for the petitioner. Those W-2 forms show that the petitioner paid \$6,496, \$15,004, \$15,475.25, and \$18,654 during 1999, 2000, 2001, and 2002, respectively.

¹ The purpose of the request for the W-2 forms was to investigate, pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner's ability to pay the proffered wage. Those forms are relevant to the determination of the beneficiary's eligibility for the proffered position for reasons that appear below.

The end-of-year totals shown on the pay stubs provided confirm the amounts shown on the W-2 forms. The petitioner did not explain why, if the beneficiary worked under the name [REDACTED] and if the petitioner employed the beneficiary full-time throughout 1999 as it claimed, it paid him only \$6,496 during all of that year.

The 1998 W-2 form of [REDACTED] shows that the petitioner paid him \$15,428 during that year. That W-2 form was photocopied on top of the first page of the 1998 Form 1040A joint tax return of the beneficiary and his wife. Although much of that page is occluded by the W-2 form it shows that the beneficiary paid total income of \$15,428 during that year. Although neither the beneficiary nor the petitioner allude to it, the portion of the first page of the beneficiary's tax return was apparently submitted to support the proposition that, in addition to working for the petitioner as [REDACTED] the beneficiary worked for the petitioner using the name [REDACTED].

Finding that the evidence was still insufficient to demonstrate that the beneficiary has the requisite qualifying employment experience the California Service Center, on June 20, 2003, issued another request for evidence in this matter. The service center requested an employment verification letter pertinent to the beneficiary's employment history with the petitioner. Consistent with 8 C.F.R. § 204.5(1)(3)(ii)(A) the service center requested that the verification should include the name, address, phone number, and title of the person verifying the information, and should also state the beneficiary's title, duties, dates of employment, and number of hours worked per week. The service center also requested documentary evidence sufficient to establish that the beneficiary and [REDACTED] are the same person.

In response the petitioner submitted a letter, dated July 9, 2003, from its president. That letter states that the petitioner has employed the beneficiary, also known as [REDACTED], as a garment sample maker since 1992 and that it continued to employ him 40 hours per week on the date of that letter. That letter did not state the names the beneficiary used in working for the petitioner before the priority date.

Because the evidence submitted was still deemed insufficient to demonstrate that the beneficiary has the requisite experience, the service center requested, on May 3, 2004, copies of the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters. That request for evidence also requested that the petitioner provide contemporaneous evidence in the form of letters, contracts, pay statements, etc. to show that the beneficiary has the requisite two years of qualifying experience.

In response the petitioner's president submitted a letter dated July 12, 2004. In that letter the petitioner's president requested that CIS change the classification of the proffered position to one calling for an unskilled worker pursuant to section 203(b)(3)(a)(iii) of the Act if the evidence of the beneficiary's employment history were insufficient to demonstrate eligibility pursuant to the terms of the approved labor certification. That letter also stated that the beneficiary had worked for the petitioner from 1998 through the date of that letter. The petitioner provided none of the types of contemporaneous evidence listed in the request for evidence.

Previous employment verifications from the petitioner had stated that it employed the beneficiary beginning during 1992. This office notes that, if the beneficiary's employment with the petitioner began during 1998, as the petitioner's president stated in his July 12, 2004 letter, then the beneficiary is unable to demonstrate the

two years of experience prior to the January 16, 1998 priority date in this case through its claim of employment for the petitioner.

The petitioner submitted Form DE-6 wage reports for all four quarters of 2003 and the first quarter of 2004. During those quarters the petitioner employed between 42 and 71 employees and paid quarterly wages of between \$293,577.56 and \$340,018.38. Those reports also show that the petitioner employed [REDACTED] during each of those quarters, but not that it employed the beneficiary, [REDACTED]. The reports indicate that the petitioner paid gross wages of, \$4,108, \$3,688, \$4,158, \$3,962.80 to [REDACTED] during the four quarters of 2003, respectively, for a total of \$15,916.90 during that year. The wage reports also show that the petitioner paid [REDACTED] \$3,989.60 during the first quarter of 2004.

Although the petitioner submitted copies of the W-2 forms previously submitted, it petitioner submitted none of the requested contemporaneous evidence (letters, contracts, and pay statements) in support of the beneficiary's employment claim.

Because it found the evidence submitted still did not demonstrate that the beneficiary has the requisite two years work experience, the California Service Center, on September 10, 2004, requested additional pertinent evidence. The Service Center requested that evidence of the beneficiary's experience give the name and title of the person verifying the information and show the beneficiary's title, duties, dates of employment, and hours worked per week.

In response, the petitioner's president submitted a letter dated September 16, 2004. That letter requested, "Due that [sic] the evidence submitted were [sic] not sufficient please changed [sic] the classification to unskilled worker." The petitioner's president also stated, "I declare that the applicant [REDACTED] [REDACTED] are the same person and was employed from 1999² to present [by the petitioner.]

The petitioner submitted the Social Security Statement of [REDACTED] of the same address as the beneficiary. That statement shows that [REDACTED] earned wages during 1999, 2000, 2001, 2002, and 2003. The amounts shown on the Social Security Statement correspond to the amounts shown for corresponding years on the previously submitted W-2 forms as having been paid to [REDACTED]. The amount shown as having been paid to [REDACTED] during 2003 is consistent with the amount shown as having been paid to [REDACTED] on the 2003 Form DE-6 quarterly reports during that same year. That statement further shows that [REDACTED] declared income of \$7,657 during 1996. That statement also shows, however, that [REDACTED] did not report earning any wages during 1992, 1993, 1994, 1995, 1997, and 1998.

On September 22, 2003, the director denied the petition, finding that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient work experience. The director found, citing *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988), that the evidence submitted was insufficient to demonstrate that [REDACTED] is identical to the beneficiary, [REDACTED].

² The petitioner's president previously stated that the beneficiary's employment with the petitioner began during 1992, as well as stating that it began during 1998.

³ This office infers, therefore, that a tax return was submitted during those years under the name [REDACTED].

On appeal the petitioner's president states,

I'm reaffirming that [REDACTED] is the same person as [REDACTED] Also Montana Wear who provided us with an experience letter for [REDACTED] no longer in business. Please change the preference to unskilled worker.

The Department of Labor certified the proffered position with a requirement of two years of experience in the job offered. Had the petitioner specified that no experience was required for the proffered position that would have opened the position to U.S. workers without experience. Although inexperienced U.S. workers may have been excluded from consideration for the proffered position, the petitioner now seeks to hire an alien worker without sufficient proof that he has the requisite experience as stated on the approved Form ETA 750. The purpose of the instant visa category is to provide alien workers for U.S. positions, but only if qualified U.S. workers are unavailable. To permit the petitioner to alter the terms of the approved labor certification such that the beneficiary is eligible for the petition after the petitioner could have excluded U.S. workers with similar qualifications would frustrate the purpose of the instant visa category.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the qualifications required for the position. CIS may not ignore a term of the labor certification, as the petitioner urges in this case, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Unless the petitioner is able to demonstrate that the petitioner has the requisite experience as stated on the approved Form ETA 750 the petition may not be approved.

The beneficiary claimed, on the Form ETA 750B, to have worked for the petitioner since April 1992. The petitioner's president's July 9, 2003 letter states that the petitioner has employed the beneficiary since 1992. The petitioner's president's July 12, 2004 letter also states that the petitioner first hired the beneficiary during 1998. The petitioner's president's February 7, 2003 and September 16, 2004 letters state that the petitioner first hired the beneficiary during 1999. The beneficiary's letter of March 22, 2003 also states that the beneficiary began to work for the petitioner during 1999

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho, supra*.

The beneficiary has submitted a 1998 Form 1040A that he apparently submitted with a W-2 form made out to Jose Lopes. The 1998 W-2 form of Jose Lopes shows that the petitioner paid him \$15,428 during that year.

That W-2 form was photocopied on top of the first page of the 1998 Form 1040A joint tax return of the beneficiary and his wife. Although much of that page is occluded that form shows that the beneficiary

reported total income of \$15,428 during 1998. The 1998 W-2 form of [REDACTED] shows that the petitioner paid him \$15,428 during that year. Because the amounts shown on the beneficiary's tax return matches the amount on [REDACTED] W-2 form this office finds that the beneficiary did, in fact, work for the petitioner during at least some portion of 1998 using the alias Jose Lopes

The evidence further shows that the beneficiary, while employed by the petitioner during 1999, 2000, 2001, 2002, and 2003, used the name [REDACTED]. The evidence is sufficient to demonstrate that the beneficiary worked for the petitioner during those years, and that [REDACTED] is an alias of the beneficiary.

The priority date in this matter, however, is January 16, 1998. The petitioner must demonstrate that the beneficiary was qualified for the proffered position on that date. *Matter of Wing's Tea House, supra*. The evidence pertinent to the beneficiary's employment after that date is not relevant to the beneficiary's eligibility for the proffered position. The evidence pertinent to the petitioner's employment of the beneficiary under the names [REDACTED] and [REDACTED] shows, at most, 15 days of employment before the priority date.

The beneficiary claims to have worked as a garment sample maker for Montana Street Wear of Los Angeles, California from February 1990 to March 1992 and for the petitioner as a garment sample maker from April 1992 to November 4, 1997. Both of those claims exceed the requisite two years. If the petitioner has shown that the beneficiary worked full-time in that capacity for either company the petitioner has demonstrated that the beneficiary is qualified for the proffered position.

The February 17, 1997 letter from Montana Street Wear states that the beneficiary worked for that company as a garment sample maker from February 1990 to March 1992. The position of the writer of that letter, however, is not stated. As such, the letter does not conform to the requirements of 8 C.F.R. § 204.5(1)(3)(ii). On January 28, 2003, May 3, 2004, and September 10, 2004 the service center noted that employment verification letters must conform to the requirements of that regulation. No such conforming employment verification letter has ever been submitted pertinent to the beneficiary's claimed employment for Montana Street Wear. The petitioner's president now states that Montana Street Wear is no longer in business, and that, therefore, no additional employment verification letters can be obtained from that company. The petitioner has not provided, and states that it is now unable to provide, conforming evidence of the petitioner's employment for Montana Street Wear.⁴

⁴ Although the petitioner asserts that Montana Street Wear is defunct, it offers no evidence in support of that assertion. If the petitioner had submitted evidence that the company went out of business between February 17, 1997, when the company allegedly issued the nonconforming employment verification to the beneficiary, and January 28, 2003, when this office sent the first request for a conforming employment letter, this office might have considered some other type of evidence pertinent to the beneficiary's claim of qualifying employment with Montana Street Wear. The record contains no evidence to demonstrate, however, that a conforming employment letter was unavailable when the service center first requested it. Further, because conflicting evidence has been submitted the petitioner is obliged to demonstrate the beneficiary's eligibility with competent objective evidence. Absent such competent objective evidence that Montana Street Wear is no longer in existence, however, and especially in view of the conflicting evidence submitted in this case, the assertion of the petitioner that Montana Street Wear is now defunct does not warrant consideration of any evidence other than employment verification letters conforming to 8 C.F.R. § 204.5(1)(3)(ii).

On the Form ETA 750B the beneficiary claimed to have worked for the petitioner from April 1992 to the date of that form. Subsequently, the beneficiary and the petitioner have indicated that the petitioner continued to employ the beneficiary until the January 16, 1992 priority date.

The assertion that the beneficiary began work for the petitioner during 1992 is contradicted, however, by the various submissions stating that the beneficiary began to work for the petitioner during either 1998 or 1999. Again, pursuant to *Ho, supra*, the petitioner is obliged to reconcile the conflicting evidence with competent objective evidence.

On January 28, 2003 the service center requested a conforming employment verification letter to demonstrate the veracity of the beneficiary's employment history. The petitioner responded with a letter from its president, dated March 22, 2003, and one from the beneficiary. Both of those letters state that the petitioner employed the beneficiary from 1999 through 2002. As such, they contain no evidence pertinent to the beneficiary's eligibility for the proffered position on the priority date.⁵ That evidence does not show that the beneficiary had two years of qualifying employment with the petitioner before the priority date.

On June 20, 2003 the service center requested a conforming letter verifying the beneficiary's claim of employment for the petitioner. In response the petitioner submitted a letter, dated July 9, 2003, from its president. That letter states that the petitioner employed the beneficiary, also known as [REDACTED] as a garment sample maker since 1992 and that it continued to employ him 40 hours per week on the date of that letter. That letter did not state the names the beneficiary used in working for the petitioner before the priority date. This office notes that the social security statement of [REDACTED] does not show any employment from 1990 to 1995 or during 1997 or 1998. No contemporaneous evidence of the petitioner's employment of the beneficiary was submitted with that letter

On May 3, 2004 the service center requested contemporaneous evidence such as letters, contracts, pay statements in support of the beneficiary's claims of qualifying employment. The petitioner submitted no such evidence of its employment of the beneficiary before the priority date, although such evidence should have been readily available to it.

On September 10, 2004 the service center requested, once again, evidence pertinent to the beneficiary's claims of qualifying employment. The response included no evidence pertinent to the beneficiary's employment before the priority date.

No competent objective evidence has been submitted to support the beneficiary's claim of employment for Montana Street Wear or for the petitioner before the priority date. Therefore the evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience, and 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.

⁵ Because the priority date is January 16, 1998 and the petitioner is alleging that it employed the beneficiary from 1999 through 2002, that employment claim does not encompass any time prior to the priority date and that employment is not directly relevant to the whether the beneficiary is able to demonstrate two years of qualifying employment.



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ORDER: The appeal is dismissed.