

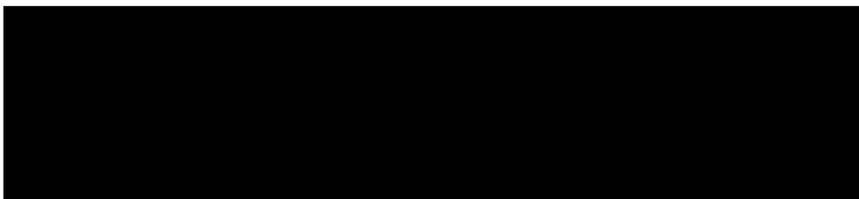


U.S. Citizenship
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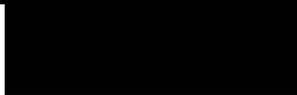
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FILE:



Office: CALIFORNIA SERVICE CENTER

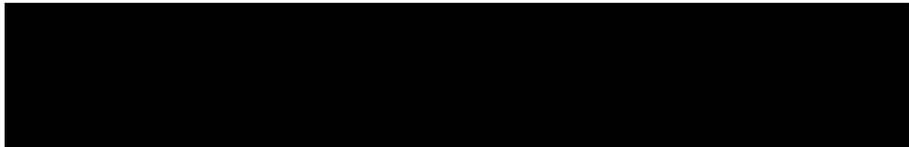
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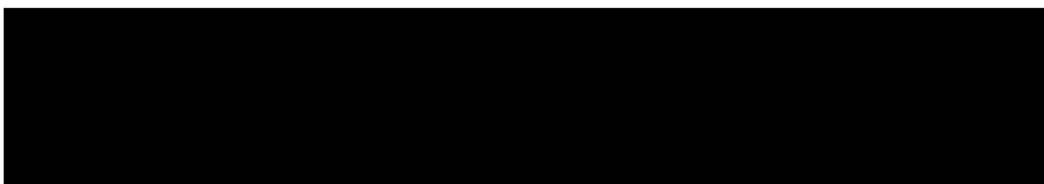
Petitioner:



Beneficiary:

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

The petitioner is a wholesaler and retailer of perfumes and cosmetics. It seeks to employ the beneficiary permanently in the United States as a business operations specialist (contract analyst). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). Based on a report of investigation conducted by the US Consulate General in Chennai, India, the director consequently served the petitioner with notice of intent to deny (NOID). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 8, 2005 denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary possessed the requisite two years of experience and was qualified for the proffered position prior to the priority date.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The petitioner must demonstrate 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). Here, the Form ETA 750 was accepted on April 2, 2002.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. On appeal, counsel submits a brief and a copy of the experience letter previously submitted. Other relevant evidence in the record includes a letter dated May 6, 1998 from P. Satyanarayana of Deluxe The Fancy World, a letter dated October 11, 2004 from [REDACTED], Assistant Commercial Tax Officer, Suryabaugh Circle, Visakhapatnam, a letter dated September 8, 2005 from [REDACTED] Administrative Manger of Deluxe The Fancy World and an investigation report from the US Consulate General in Chennai, India. The record does not contain any other evidence relevant to the beneficiary's requisite two years of experience.

¹ 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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On appeal, counsel asserts that the petitioner already informed Citizenship and Immigration Services (CIS) that the beneficiary's former employer no longer existed and therefore, the consulate's report cannot be the evidence that the beneficiary did not work for that company when it was in operation. Counsel requests completion of the inquiry for a proper verification of the beneficiary's experience.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of business operations specialist (contract analyst). In the instant case, item 14 requires a bachelor degree in law or equivalent to degree as the minimum education requirements. The applicant must also have two years of experience as sales manager or contract analyst.

The beneficiary set forth her credentials on Form ETA-750B and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, she represented that she has been working as a contract analyst for the petitioner since July 1997. Prior to that, she worked as a sales manager/contract analyst for Delux The Fancy World in India from September 1993 to June 1997. She does not provide any additional information concerning her employment background on that form.

The record of proceeding contains copies of the beneficiary's bachelor of arts degree and transcripts from Osmania University, bachelor of Laws degree and transcripts from Andhra University, the beneficiary's bar membership in the State of Andhra Pradesh, Hyderabad, and an academic evaluation from the Trustforte Corporation. There is no dispute that the petitioner has demonstrated that the beneficiary met the minimum education requirements of a bachelor degree in law or equivalent to degree as set forth on the Form ETA 750A.

The proffered position also requires two years of experience as sales manager or contract analyst. The petitioner submitted two experience letters from Deluxe The Fancy World and a letter dated October 11, 2004 from [REDACTED] Assistant Commercial Tax Officer, Suryabaugh Circle, Visakhapatnam. The director determined that the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience for the proffered position prior to the priority date based on an investigation report from the US Consulate General in Chennai, India. Counsel argues that the investigation conducted by the US Consulate in Chennai lacked in due diligence.

The investigation by the US Consulate General in Chennai, India reveals that the beneficiary's experience with Deluxe The Fancy World is not valid due to the fact the business does not exist and that the beneficiary's experience is unverifiable. However, the record of proceeding in the instant case shows that on May 20, 2005 in response to the director's request for evidence (RFE) dated February 25, 2005, the petitioner submitted a letter dated October 11, 2004 from [REDACTED] Assistant Commercial Tax Officer, Suryabaugh Circle,

Visakhapatnam with an experience letter from [REDACTED] d. The tax officer's letter states in pertinent part that:

This is to certify that [REDACTED] is a registered dealer having Registration No. [REDACTED], Jagadamba Junction, Syryabaugh, Visakhapatnam-530020. The dealers have run the business from 4th August 1990 to 2001-02. The dealers have closed their business and left the place of business since 2002 without intimation to the department.

The record shows that CIS was informed before the investigation that the beneficiary's former employer closed its business in 2002 and no longer exists. The investigating officer found out that the business did not exist through checking the telephone number and the address on the letterhead of the company, but that did not provide any new information than what the petitioner had already provided. In addition, because the business does not currently exist cannot directly lead to the conclusion that the beneficiary's experience with the company in past years is unverifiable. Therefore, the AAO will discuss the beneficiary's qualifying experience without considering the consulate investigation report.

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) or 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 record contains an experience letter dated May 6, 1998 from [REDACTED] of [REDACTED] (as May 6, 1998 letter) submitted in response to the director's RFE dated February 25, 2005. The letter states in pertinent part that:

This is to certify that [the beneficiary] was employed by our company as a Sales Manager/Contract Analyst from September 1993 to June 1997. This position as a Sales Manager/Contract Analyst was full time (40 hours per week) and permanent position.

This letter is on the letterhead of the company, was dated May 6, 1998 before the business was closed in 2002, contains a specific description of the duties performed by the beneficiary, and verifies the beneficiary's full time more than three years of experience as a sales manager/contract analyst. However, the letter does not include the title of the writer, and thus it is not clear whether the letter is from a former employer or trainer as the above quoted regulation requires. The AAO concurs with the director's determination that Satyanaranyana's May 6, 1998 letter cannot be considered as primary evidence to establish the beneficiary's qualification.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. On June 24, 2005, the director issued a second RFE. The director requested the petitioner to submit "copies of pay statements and contracts to verify the beneficiary worked for the listed employer." However, the petitioner did not submit any evidence as requested, and instead counsel explained that the alien is unable to obtain copies of contracts and pay statements to verify the employment since she was employed about 10 years ago. Going on record without supporting documentary evidence is not sufficient for purposes of

meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In response to the director's second RFE dated June 24, 2005, the petitioner submitted another experience letter [REDACTED] September 8, 2005 letter). The second experience letter is on the letterhead of [REDACTED], was dated September 8, 2005, is from [REDACTED] as Administrative Manager of the company and contains the exact same contents as [REDACTED] May 6, 1998 letter. Counsel explained with the submission that the beneficiary "made a determined effort to locate the employer and was able to find the former Administrative Manager of the Company who issued the employment verification letter on the old stationery of the company, even though the company does not exist anymore." However, counsel did not provide any further information pertinent to [REDACTED] May 6, 1998 letter, such as what was [REDACTED] position.

The record shows that [REDACTED] closed in 2002, therefore, it appears that a letter from a former employer as generally required by the above regulation is unavailable in 2005 when the petitioner responded to the director's second RFE. Per the regulation, other documentation relating to the alien's experience or training must be considered. See 8 C.F.R. § 103.2(b)(2)(i). Although the regulation at 8 C.F.R. § 204.5(g)(1) states that the director may consider other documentation relating to the alien's experience if a letter from a current or former employer is unavailable, it still requires other documentation meet certain evidence standard. [REDACTED] September 8, 2005 letter appears to be a letter from a former employer using the letterhead of a company which closed three years ago. Counsel did not explain how a non-existent company verifies its former employee's employment. Regulations allow a former supervisor to provide employment verification for his/her employees based on personal knowledge through an affidavit, however, it is not the intent of the regulation at 8 C.F.R. § 204.5(g)(1) to consider an experience letter from a non-existent company as primary evidence to establish the beneficiary's qualifications. In addition, [REDACTED] September 8, 2005 letter did not come with any documentary evidence to support its contents. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Further, [REDACTED]' September 8, 2005 letter is formatted exactly the same as [REDACTED] May 6, 1998 letter except for the writer's name and contact information. [REDACTED] did not refer to [REDACTED] or his May 6, 1998 letter, did not indicate what sources his September 9, 2005 letter is based upon, and did not explain how he can provide the exact same contents as [REDACTED] seven years later. This similarity casts doubt on the origin and reliability of the letters. "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In addition, [REDACTED] May 6, 1998 letter, [REDACTED] September 8, 2005 letter and the information represented by the beneficiary contain inconsistent information regarding the beneficiary's education and employment history. The beneficiary claimed and the record shows that the beneficiary attended Osmania University on a full-time basis from September 1975 to April 1980, Andhra University from September 1992 to April 1995 and from September 1995 to April 1997 while the two letters and the beneficiary also claim that

the beneficiary worked as a full time sales manager/contract analyst from September 1993 to June 1997. Both the experience letters do not explain how the beneficiary managed both full time studies and a full time job at the same time from September 1993 to April 1997. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: 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 does not contain any independent objective evidence to resolve this inconsistency.

Although the beneficiary claimed to have worked for the petitioner as a contract analyst for more than 4 years since July 1997 until the priority date in 2002, the petitioner did not provide an experience letter and documentary evidence such as W-2 forms, payroll records, pay statements, employment contract, or personnel records to establish the beneficiary's qualifying two years of experience set forth on the Form ETA 750A.

Upon reviewing the complete record, the petitioner has not provided sufficient evidence to demonstrate that the beneficiary possessed the requisite two years of experience as a business operations specialist (contract analyst) prior to the priority date.

Counsel's assertions on appeal cannot overcome the director's findings that the beneficiary did not meet the experience requirements of the proffered position as designated on the Form ETA 750 prior to the priority date.

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.