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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 141 51411 Office: CALIFORNIA SERVICE CENTER Date: SEP 06 2005

IN RE: Petitioner: [redacted]
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:

[redacted]

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 on November 21, 2002, and the Administrative Appeals Office (AAO) subsequently denied the appeal on February 10, 2004. The matter is now before the AAO as a motion to reconsider, and/or reopen. The motion to reopen is granted. The appeal will be sustained.

The petitioner is a precision sheet metal company. It seeks to employ the beneficiary permanently in the United States as a punch press setter. 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 relevant work experience as of the priority date of the visa petition. Accordingly, the director denied the petition.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship and Immigration Services (CIS) policy. The petitioner has submitted new documentation with regard to the beneficiary's employment by the petitioner prior to the priority date. This evidence is viewed as sufficient to reopen the proceedings.

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) 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(l)(3) also 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.

To be eligible for approval, a beneficiary must also have the education and experience specified on the labor certification as of the petition's filing date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The filing date of the petition is the initial receipt in the Department of Labor's employment service system. 8 C.F.R. § 204.5(d). In this case, that date is January 16, 1998.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 punch press setter. In the instant case, item 14 describes the requirements of the proffered position as 6th grade education, with two years of experience in the job offered.

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), he indicated that he attended Primaria Emiliano Zapata elementary school, in Villagran, Mexico, from 1980 to 1986, and that he attended Lazaro Cardenas High School in Villagran, Mexico, from 1986 to 1989.

On Part 15, eliciting information concerning the beneficiary's past employment experience, the beneficiary indicated the following in reverse chronology:

1. [redacted], Sinaloa, Mexico, punch press setter, from July 1989 to October 1992; and
2. Unemployed from December 1997 to the present.

The petitioner submitted two letters dated June 29, 1999 and August 20, 1999 that it sent to the Department of Labor (DOL) to correct the employment information contained in the initial ETA 750. Richard Montano, an individual with the Hispanic Legal Services, the beneficiary, and the petitioner signed the June letter, while only [redacted] and the beneficiary signed the second letter. Based on these letters, the beneficiary claimed to have worked for the petitioner as a fulltime punch press setter from October 1994 to the date of the 1999 correspondence. The August 20, 1999 letter describes the beneficiary's duties for the petitioner as:

> sets up and operates dies into power presses to punch, notch, cut blanks, form or draw metal plates, strips, sheets, or blanks. Positions, aligns and locks specified dies into machine ram and bed. Sets stops, guides or installs jigs or fixtures for positioning work piece. Adjusts depth and pressure of stroke. Operates press machine to verify functioning of dies. Examines stamped out metal parts to detect malfunctioning machine and defect in dies. Sharpen dies, using grinding machine. Assembles, aligns and installs progressive dies. Sets up automatic punch presses.

Both letters stated that the beneficiary worked for Metales del Sur from July 1989 to October 1992 in Mexico, and that he had worked as a janitor in two places in the United States prior to working for the petitioner.

With the initial petition, the petitioner also submitted a letter signed by [redacted] Jr., current attorney of record. This letter is dated March 14, 2002 and states that due to a software error, counsel's database reflected incorrect information on the beneficiary's previous experience. Counsel requested that Form ETA 750, Part B be amended to reflect the correct work history. According to counsel, the beneficiary was employed by [redacted] Mexico, from May 1990 to June 1992 as a punch press setter. Counsel submitted a letter from [redacted] Manager, [redacted] that stated the beneficiary's duties consisted of installing and operating machinery specialized in perforating and performing different types of cuts on certain metallic surfaces. Counsel in his letter also noted that the beneficiary had worked

for the petitioner since November 1994; however, counsel presented no further evidentiary documentation to further substantiate this assertion.

On June 4, 2002, the director requested further evidence with regard to the letter submitted from [redacted] that claimed the beneficiary worked for this company from May 1990 to June 1992.[1] The director stated that this work experience with [redacted] was not included in the initial or amended employment experience on Part B of Form ETA 750, and asked the petitioner to provide an explanation for this omission. The director also noted that Part B of the ETA 750 stated that the beneficiary worked for [redacted] from July 1989 to October 1992, and requested the petitioner to provide pay stubs, and a current letter of employment verification with the name and title of the beneficiary's employers, and the current address and telephone number of the company.

In response, counsel stated that the information with regard to prior work experience with [redacted] was erroneously provided. Counsel submitted a second letter from [redacted] Manager, [redacted] described the beneficiary's work duties in more detail, and described his company as producing and selling clutch parts and brakes to the public.

On November 21, 2002, the director denied the petition. In his decision, the director reiterated the job description contained on the Form ETA 750, Part A, and also described the job duties outlined in the [redacted] description contained on the Form ETA 750, Part B. The director apparently viewed the [redacted] duties as dissimilar to the job duties of the proffered position, and stated that the beneficiary was not qualified for the position.

On appeal, a previous attorney of record, [redacted] stated that the ETA 750 B reflected work experience that did not belong to the beneficiary and that the beneficiary was not employed by [redacted] in Mexico as a layout worker. Counsel stated that based on the letter from [redacted] the beneficiary had shown his qualifications for the offered position. Counsel submitted a copy of the letter in question as reference.

Upon review of the record, the AAO determined that the petitioner's earlier 1999 letters to the Department of Labor with amendments to the ETA 750 to reflect the beneficiary's employment with [redacted] and the later assertions of counsel that the beneficiary had worked for [redacted] a different Mexican company, were in conflict. The AAO found counsel's explanation of the conflict to be inadequate and also found that counsel's assertions did not constitute evidence. The AAO also noted that at least three letters in the record, one of which was co-signed by the petitioner, indicated that the beneficiary had worked for the petitioner since November 1994 as a fulltime punch press setter. The AAO further noted that no evidentiary documentation such as pay records, had been submitted to the record to further establish this assertion of the beneficiary's previous work experience as a press punch setter. The AAO stated that the discrepancies in the record cast serious doubt on the reliability of the evidence, and that it was the petitioner's burden to explain or reconcile inconsistencies, utilizing competent objective evidence. On February 10, 2004, the AAO denied the appeal.

---

[1] The letter of employment verification from [redacted] specified the beneficiary's employment for a period of two years, May 1990 to June 1992. Nevertheless these dates also coincided with the claimed employment with [redacted]

On motion, counsel submits a letter from [redacted], the petitioner's vice president, dated March 3, 2004. In his letter, [redacted] states that the beneficiary has worked for the company since November 1994 as a CNC Punch Operator, and described the job duties performed by the beneficiary. [redacted] states the following at the end of his letter: "Through his employment, [the petitioner]has demonstrated to be a knowledgeable worker and due to his prior expertise, he has been able to implement new techniques that have helped speed up production." In addition, counsel submits W-2 Forms for the beneficiary for the years 1994, and 1996 to 2003, that establish the beneficiary worked for the petitioner during these years. Counsel also submits the beneficiary's IRS Forms 1040 that establish that the wages paid to the beneficiary by the petitioner were identical to the income claimed by the beneficiary.

Upon review of the materials submitted to the record on motion, the letters of employment verification from Mexico, as well as counsel's explanation of their contents, are given no weight in these proceedings, due to the inconsistencies found in their contents. *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. Nevertheless, the letter from the petitioner's vice president, submitted on motion with regard to the beneficiary's employment by the petitioner since 1994, some four years prior to the priority date, is viewed as both credible and sufficient to meet the regulations at 20 C.F.R. § 656.21(b)(5).

Thus, the petitioner has established that the requirements for the proffered position as outlined on the Form ETA 750 are the minimum necessary for performance of the job, and that the beneficiary had the requisite two years of relevant work experience prior to the priority date. Accordingly, the director's decision will be withdrawn. The petition will be approved.

ORDER: The appeal is sustained. The petition is approved.