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U.S. Citizenship
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Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 09 2007

WAC 05 169 51548

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, 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 dental office. It seeks to employ the beneficiary permanently in the United States as a dental assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director concluded that the petitioner had failed to demonstrate that the beneficiary possessed the requisite qualifying work experience as of the visa priority date and denied the petition accordingly.

On appeal, the petitioner, through counsel, asserts that his additional evidence of employment verification establishes that the beneficiary's work experience meets the requirements of the approved labor certification.

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(l)(3) further 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 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.

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 26, 2001.[1] The ETA 750B, signed by the beneficiary on April 24, 2001, indicates that she has worked for the petitioner from April 1994 to the present as a dental assistant. She also lists one other employer. From August 1990 to March 1993, the beneficiary claims that she worked as a dental assistant for "Health Services of Hidalgo" in Hidalgo, Mexico.

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[1] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must have. In this matter, item 14 states that no formal education is required, but an applicant must have two years of work experience in the job offered as a dental assistant. The job duties described in item 13 include:

> Assist dentist during examination and treatment of patients: Prepare patient, sterilize and disinfect instruments, prepares materials and assists during dental procedures. Takes, records medical and dental histories. Takes x-rays. Records treatment information in patient records. Schedules appointments, completes insurance forms, prepares bills. Polish teeth using dental instruments.

Relevant to the beneficiary's past qualifying work experience, the petitioner provided two letters. One is from the current owner of the petitioning business, [redacted] who states in a letter, dated April 27, 2005, that the beneficiary has been employed from "2003 to the present as a dental assistant, on a full-time, permanent basis, earning $11.55 per hour. She is highly skilled in her profession and most valuable to our dental office." The petitioner also provided another letter on a letterhead of the [redacted] signed by [redacted] the director of the health center, who states that the beneficiary "was working in this center under my supervision as odontology assistant during the period of August 2, 1990 to march 31, 1993." This letter/certification is dated March 8, 2001 and the translation is dated November 24, 2004.

The director issued a request for additional evidence on June 14, 2005. Relevant to the beneficiary's employment verification he requested copies of the beneficiary's Wage and Tax Statements (W-2s) issued by the petitioner for the years 1994 to 2004, as well as copies of the petitioner's state quarterly wage reports (DE-6), and a current letter from the petitioner on its letterhead verifying the beneficiary's duties, job title, dates of employment/experience and number of hours worked each week. The director also requested a similar employment verification letter from the beneficiary's other employer listed on the ETA Form 750, as well as all previous W-2 forms, pay stubs, and/or wage/tax statements from previous employers. The director requested letters, contracts and pay statements that would verify the beneficiary's claimed employment.

In response, the petitioner, through counsel resubmitted a copy of the Hildago Servicios de Salud de Hidalgo letter previously supplied. Counsel states in his transmittal letter that there are no pay stubs or W-2s available from this employer. The petitioner also provided three separate letters, all dated August 25, 2005, from Dr. Abadi. The first letter states that the beneficiary "is working for this office as a dental assistant." The doctor describes her duties and concludes by stating that "she works 40 hours per week." The second letter states that the beneficiary "is highly skilled dental assistant known to us since April 1994." The doctor then vouches for her professionalism and briefly describes her duties as a dental assistant. The third letter states that the beneficiary "work for us as self employed independent contractor and received no W-2 Form. Regarding DE-6 I have my wife as employee who does not recived paycheck."

The director denied the petition on October 17, 2005. The determined that the evidence submitted in support of the beneficiary's qualifying work experience from the petitioner was inadequate to establish her employment with the petitioner as a dental assistant. The director noted that that petitioner provided no financial verification that he has employed the beneficiary either in the past or presently as a dental assistant. He also concludes that the letter from Mexico failed to specify the beneficiary's duties and hours worked per week.

On appeal, counsel states that the sole reason for the denial was the insufficiency of the letter from Hidalgo Health Services in Mexico. He claims that he is enclosing a new letter from [redacted] that confirms the duties performed and the hours worked by the beneficiary. Counsel also attaches an HQ memo (HQPRD 70/6.2.8-P) relating to the processing of petitions affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313). Counsel explains on appeal that the beneficiary's experience with the petitioner is not a basis to qualify for the position since the experience must occur prior to the petitioner's employment. He refers to the AC21 memo as supporting the notion that a beneficiary is not required to be employed by the petitioner prior to adjustment of status.

We note that the AC21 provisions are not relevant here because the Immigrant Petition for Alien Worker (I-140) has not been approved. Moreover the issue of the commencement of a beneficiary's employment by a petitioner may also be subject to other DOL or non-immigrant regulations. Further, although DOL regulations require that a beneficiary's qualifying employment be obtained with an employer other than a petitioner, Citizenship and Immigration Services (CIS) regulations merely require that the relevant qualifying employment have accrued prior to the priority date. In this case that date is April 26, 2001. Because of inconsistencies appearing in the ETA 750B in which the beneficiary claims dates of employment as a "dental assistant" with the petitioner back to 1994 and [redacted]s reference in one letter with her employment as a dental assistant beginning only in 2003, and in another letter that the beneficiary has only been known to him since 1994, we do not find that her accrual of two years of full-time experience as a dental assistant as of the priority date, can be attributed to the purported employment with [redacted] combined with the lack of any financial records verifying this employment. 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. *See Matter of Ho,* 19 I&N Dec. 582, 591-592 (BIA 1988).

Regarding counsel's reference to a second letter from Hidalgo Health Services enclosed with the appeal, upon review of all of the materials submitted on appeal, we find no new letter from any employer. As the petitioner has failed to establish that the beneficiary obtained the requisite qualifying employment experience as a dental assistant as of the priority date, the petition may not be approved.

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.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.