U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

B6

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 05 2007

WAC 03 094 53807

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 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 construction contractor. It seeks to employ the beneficiary permanently in the United States as a cement mason. 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 has the requisite experience as stated on the labor certification petition and denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact and is accompanied by new evidence. The procedural history of this case is documented in 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 decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on 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 or seasonal nature, for which qualified workers are unavailable in the United States.

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.

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 April 30, 2001. The labor certification states that the position requires two years experience in the job offered.[1]

On the Form ETA 750, Part B the beneficiary, who signed that form on April 12, 2001, stated that he had worked (1) for [redacted] in Natzabualcoyotl, Mexico, full-time, from February 1996 to June 15, 1999 as a construction worker, (2) as a cement mason for Col Nino Artillero in Fresnillo, Zacatecas, Mexico, full-time from January 1997 to 1999, and (3) as a cement mason for the petitioner full-time from February 2001 to the date he signed that form.

Although the beneficiary stated that he worked in Natzabualcoyotl, Mexico on the Form ETA 750B, the employment verification letter in support of that claim appears to state, and this office believes, that his claim is of employment in Netzahualcoyotl, in Rio Grande, Zacatecas, Mexico. If this conclusion is incorrect and prejudices the petitioner's interest the matter may be addressed on motion.

Although the town in which the beneficiary claims to have worked in his second employment verification letter is spelled Presnillo throughout the file, this office is unable to locate a town of that name in Zacatecas and does not believe one exists. This office believes the beneficiary is claiming employment in Fresnillo. If this assumption in incorrect and prejudices the petitioner's interest the matter may be addressed on motion.

This office notes that the beneficiary's claims of employment in Fresnillo, Zacatecas, Mexico and Netzahualcoyotl, Rio Grande, Zacatecas, Mexico overlap. Rio Grande is roughly 40 miles from Fresnillo, and the beneficiary claims to have been working in construction full-time, in both locations for two different employers from January 1997, through all of 1998, and to some date during 1999, beginning at the age of 14.[2] The beneficiary's assertion is improbable.

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*, 19 I&N Dec. 582 (Comm. 1988).

The instructions to the Form ETA 750B require that the beneficiary "List all jobs held during the past three (3) years [and] any other jobs related to the occupation for which the [beneficiary] is seeking certification . . . ." The beneficiary listed no other qualifying experience on that form.

---

[1] In evaluating the beneficiary's qualifications, CIS must look to the portion of the labor certification, Form ETA 750 part 14, which defines the minimum education, training and experience needed for a worker to perform the job duties described at part 13 to determine the qualifications required for the position. CIS may not ignore a term of the labor certification, Form ETA 750 part 14, 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.23d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

[2] The Form I-140 states that the petitioner was born on March 29, 1982.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.[3]

In the instant case the record contains (1) an employment verification letter in Spanish dated April 18, 2001 with an English translation, (2) a document dated December 13, 2001 that is apparently a translation of another employment verification letter, (3) an affidavit, dated April 8, 2003, from the beneficiary, (4) two additional employment verification letters and English translations, both dated January 30, 2006, (5) a Rio Grande, Zacatecas municipal tax certificate, (6) a membership card of the Livestock Regional Union of Zacatecas, (7) a copy of a lease, and (8) an interoffice memorandum dated October 6, 2005. The record does not contain any other evidence relevant to the beneficiary's claim of qualifying employment experience.

One of the beneficiary's employment verification letters is from [redacted] and states that he employed the beneficiary in construction for three years. That letter does not state the beginning or ending date of that employment. Although the letter does not specify it appears to imply that the beneficiary performed a wide range of construction duties.

Any document containing foreign language submitted to CIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. 8 C.F.R. § 103.2(b)(3). The translation of that letter is not accompanied by a translator's certification and is insufficient, therefore, to attest to any qualifying employment during that period.

The second of the beneficiary's employment verification letters actually appears to be the translation without the original letter and purports to be from [redacted] who states that he employed the beneficiary, [redacted], from January 1997 to an unstated date during 1999 performing a wide range of construction work including cement work.

Absent the original this office will not accept a translation as a sufficient attestation. Further, this office notes that the translation is not accompanied by the translator's certification that the translation is complete and accurate and that the translator is competent.

The two January 30, 2006 employment verification letters are from [redacted] and [redacted] who allege that they were supervisor and foreman, respectively, for Construcciones Civiles Grijalva, and that they oversaw the beneficiary's employment with that company from 1997 to 1999. Those letters state that the beneficiary worked "finishing of cement and/or concrete hydraulic."

---

[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In his own affidavit the beneficiary reiterated his apparently conflicting claims of employment in Fresnillo from January 1997 through 1999 and in Rio Grande from February 1996 through June 15, 1999, but did not address the apparent discrepancy. The beneficiary stated that no records were kept of his employment.

The Rio Grande, Zacatecas municipal tax certificate shows that paid $69.86 (Mexican pesos) to that city on January 2, 2002. That certificate does not demonstrate that it pertains to a business. The Livestock Union membership card shows that [redacted] was a member of that organization until at least October 2, 2003. The proposition that card was intended to support is unknown to this office. It does not appear to support the proposition that the beneficiary worked in construction.

The lease was executed b as lessee and the town of Fresnillo as lessor. Because that lease shows that conducts some business in Fresnillo it appears to confirm that the beneficiary's claimed qualifying employment was in Fresnillo. What other relevance it may have to the instant case is unknown to this office.

The October 6, 2005 interoffice memorandum is from a CIS officer in the U.S. consulate in Monterrey, Mexico. That memorandum states that, on September 28, 2005, an investigation was undertaken of the beneficiary's claims of qualifying employment for [redacted] in Fresnillo, Zacatecas. The investigator was unable to locate [redacted] or the business he claims to run at the address the beneficiary provided. The petitioner was informed of this information in a November 22, 2005 notice of intent to deny.

The director denied the petition on January 24, 2006. In that decision the director relied upon the finding of the CIS officer that the existence of the construction business of [redacted] could not be verified.

On appeal, counsel asserted that evidence, and especially the newly submitted January 30, 2006 employment verification letters, demonstrates that the beneficiary's claim of qualifying employment is valid.

In a March 14, 2003 request for evidence the service center requested " . . . verifiable proof of [the beneficiary's] prior employment . . . [e.g.] letters, contracts, and pay statements . . . ." In response, counsel stated, in a letter dated April 25, 2003, "Contracts and pay stubs do not exist from this small village in Mexico. Mexico is not the United States."

This office concurs that Mexico is not the United States but notes that contemporaneous evidence of Mexican employment is routinely submitted in support of visa petitions. While this office finds credible that satisfactory evidence may not be available in a particular case, if no satisfactory evidence can be submitted then the beneficiary's claim of qualifying employment experience is inadequately supported and the visa petition may not be approved.

This is especially so in the instant case, in which an investigation failed to confirm the beneficiary's claim of qualifying employment. Under these circumstances the employment claim must be supported with objective evidence as per *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

In the instant case, in which the credibility of the beneficiary's employment verification letters was called into question by investigation, rather than addressing these doubts with objective evidence as required by *Matter of Ho*, the petitioner submitted two new employment verification letters from a new address, stating that the investigation failed to locate the beneficiary's previous employer because he had moved. This is not credible objective evidence and is insufficient to demonstrate that the beneficiary has the qualifying employment experience stated as a prerequisite for the proffered position on the approved Form ETA 750.

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 petition was correctly denied on this ground, which ground has not been overcome on appeal.

The record suggests additional issues that were not addressed in the decision of denial.

The first employment verification letters submitted, those dated April 18, 2001 and December 13, 2001, do not indicate that the beneficiary worked full-time as a concrete or cement finisher. Rather, they indicate that he worked full-time in construction, and that some portion, however small, of his duties consisted of cement and concrete work. The approved labor certification requires two years in the job offered, rather than in construction in general. The beneficiary's employment verification letters should have been found insufficient to demonstrate the beneficiary's eligibility for the proffered position for this additional reason.[4]

Further still, the notice of intent to deny noted that the investigator had been unable to find [redacted] construction company in Fresnillo, Zacatecas. Counsel countered that the petitioner's employer has since moved from the address the beneficiary gave.

The notice of intent to deny failed to note that the investigator also stated that he found that the address the beneficiary provided for his previous employer does not exist. Because that adverse evidence was not disclosed to the petitioner and counsel, and they were not accorded an opportunity to address it, that adverse evidence forms no part of the basis of today's decision. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

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.

[4] The more recent letters, which, contrary to the first two, appear to state that the beneficiary worked with cement and concrete full-time, were submitted on appeal.