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U.S. Citizenship
and Immigration
Services

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FILE: WAC-02-284-51011 Office: CALIFORNIA SERVICE CENTER Date: FEB 16 2005

IN RE: Petitioner:
Beneficiary:

PETITION: 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, Director
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 company engaged in laminating and copper plating of printed circuit boards. It seeks to employ the beneficiary permanently in the United States as a "plater, copper (electroplating)". 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 three years of experience in the offered position as of the priority date of the instant petition, and denied the petition accordingly.

On appeal, counsel states that the evidence establishes that the beneficiary had the experience required by the Form ETA 750.

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 not available in the United States.

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) of 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.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In this petition, the priority date is February 15, 2001.

The Form ETA 750, in block 14, states that for the offered position of copper plater the petitioner requires no education or training but requires three years of experience in the job offered. The proffered wage as stated on the Form ETA 750 is \$11.71 per hour, which amounts to \$24,358.80 annually. On the Form ETA 750B, signed by the beneficiary on February 8, 2001, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1998, and to currently have two employees. The items for the petitioner's gross annual income and net annual income were each marked "See Attached." In support of the petition, the petitioner submitted a copy of the petitioner's Form 1120 S U.S. Corporation Income Tax Return for an S Corporation for 2001 and no other evidentiary documents.

In a request for evidence (RFE) dated December 3, 2002, the director requested evidence to establish that the beneficiary possessed the experience listed on the Form ETA 750.

In response, counsel submitted a letter dated December 13, 2002, accompanied by a letter dated January 30, 2001 from [REDACTED] of Santa Ana, California, stating that the beneficiary worked for that company as a "platter" [sic] from November 22, 1995 through November 7, 1997. Counsel's submissions were received by CIS on December 18, 2002.

In a second RFE, dated January 10, 2003, the director requested further evidence to establish that the beneficiary possessed the experience listed on the Form ETA 750. The director noted that part 14 of the labor certification shows three years as the minimum amount of required experience for the offered position, but that the letter from the beneficiary's former employer states only two years of experience by the beneficiary with that company. The second RFE requested clarification of this discrepancy, and also requested the beneficiary's Form W-2 for each year of employment.

In response to the second RFE, counsel submitted a letter dated March 17, 2003 accompanied by a second letter from [REDACTED] dated February 20, 2003, and copies of earnings statements for the beneficiary for certain pay periods with ending dates from December 23, 1995 to September 28, 1997. The second letter from [REDACTED] states that the company's previous letter contained a typographical error concerning the year when the beneficiary began working for the company, and that the correct period of the beneficiary's employment was from November 22, 1994 to November 7, 1997. Counsel's submissions in response to the second RFE were received by CIS on March 26, 2002.

In a third RFE, dated April 3, 2003 the director requested evidence to corroborate the claim in the February 20, 2003 letter from [REDACTED] at its prior letter had contained a typographical error. The director stated that the beneficiary's earnings statements in the record were from 1996 and 1997. The director requested evidence for the period from November 22, 1994 through November 1995 in the form of earnings statements or W-2 forms. In the final sentence of the third RFE the director stated, "Additionally, the petitioner is requested to submit evidence, such as copies of earnings statements or Forms W-2, for all periods that the beneficiary is claiming as qualifying experience."

In response to the third RFE, counsel submitted a letter dated June 17, 2003 stating that the beneficiary was being paid in cash by [REDACTED] during the period of 1994 and 1995 and that the petitioner was unable to provide the director with copies of W-2 forms for the beneficiary for that period. With his letter, counsel submitted a third letter from [REDACTED] dated June 11, 2003, and a duplicate copy of the letter from [REDACTED] dated February 20, 2003. In its third letter, [REDACTED] states the specific job duties of the beneficiary during his employment with that company, and refers to its letter of February 20, 2003 for the rest of the information required by the director. Counsel's submissions in response to the third RFE were received by CIS on June 27, 2003.

In a decision dated July 11, 2003 the director summarized the three RFE's and the petitioner's responses. The director found the evidence insufficient to corroborate the assertion that the beneficiary worked for [REDACTED] for three years. The director accordingly denied the petition.

On appeal, counsel submit no brief, but submits additional evidence consisting of a fourth letter from [REDACTED] dated July 24, 2003, and an undated letter from [REDACTED] of Tijuana Mexico, another purported former employer of the beneficiary. In its fourth letter, [REDACTED] states that the beneficiary worked for that company from November of 1994 to November of 1997, but was not put on the payroll until "about December of 1995." The first three letters from [REDACTED] had been signed on behalf of the company by its office manager. The fourth letter from [REDACTED] was signed by the

company's owner. The undated letter from St. John Plating states that the beneficiary worked for that company as a plater from December 1989 to October 1994 and it is signed by the owner of that company

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In the director's repeated RFE's concerning the beneficiary's experience, both the director and counsel appeared to assume that the petitioner's burden of proof would be satisfied if the amended assertion of [REDACTED] were accepted that the beneficiary worked for that company from November 22, 1994 to November 7, 1997. That is the longest period alleged in the evidence in the record. However, although that period is approximately three years, it falls short of three years by fifteen days. Therefore even if the assertion were accepted that the beneficiary worked for [REDACTED] from November 22, 1994 to November 7, 1997, an assertion made in the February 20, 2003 letter from [REDACTED] the evidence would fail to establish that the beneficiary had the three years of experience in the job offered as of the February 15, 2001 priority date. That failure of proof alone would have been sufficient grounds for the director to deny the petition, based on the evidence in the record before the director.

As noted above, however, the director focused his second and third RFE's on the issue of whether the evidence indicated a November 22, 1994 starting date for the beneficiary's experience with [REDACTED] or a date a year later, of November 22, 1995, as stated in the first letter submitted for the record from [REDACTED]. The petitioner's responses to the second and third RFE's failed to provide any corroboration for the claim by that company that its first letter had contained a typographical error in the year of the starting date.

The petitioner's only explanation for the lack of documentary evidence to corroborate the November 22, 1994 starting date was a statement in a letter from counsel dated June 17, 2003 in response to the third RFE that "the beneficiary was getting paid in cash during the period of 1994 and 1995, therefore is unable to provide your office with copies of W-2 Forms." The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The assertion of counsel on this point was supported by no documentary evidence in the record submitted prior to the director's decision.

The documentary evidence in the record is in fact consistent with the later starting date of November 22, 1995. The beneficiary's earnings statements in evidence cover thirty-six of the weekly pay periods ending from December 23, 1995 to September 28, 1997. Those earnings statements covered less than half of the weekly pay periods during that approximately two-year period. However, each earnings statement shows cumulative gross pay for the year to date. The cumulative gross pay figures show steady increases consistent with the level of weekly earnings shown on each individual statement. The earnings statements therefore are sufficient to establish the beneficiary's continual employment during that entire period, despite the absence of earnings statements for the majority of the weeks during that approximately two-year period.

Of notable interest is the first earnings statement, which covers the pay period of December 17, 1995 to December 23, 1995. That statement shows gross pay during the pay period of \$182.75, showing 42 hours of work at \$4.25 per hour plus additional payment reflecting an extra 50% premium for two of those hours, apparently reflecting the overtime rate of pay. The gross pay for the year to date on that statement is shown as \$962.63. Subtracting the \$182.75 earned in the current pay period produces a figure of \$779.87, which would be the amount the beneficiary during that year prior to December 17, 1995. That amount would indicate about four and a half weeks of full-time work at the rate of \$4.25 per hour, and would indicate a shorter period of prior work if any of the \$779.87 represents payment for overtime work. Most of the other

earnings statements in the record show the beneficiary working a significant amount of overtime, so it may be assumed that the \$779.87 earned prior to December 17, 1995 also include significant overtime payments. This information indicates that the beneficiary began receiving payments from [REDACTED] in late November 1995.

A late November 1995 starting date would be consistent with the November 22, 1995 date stated in the first letter from [REDACTED], rather than a November 22, 1994 starting date as claimed in the second letter from that company. The evidence in the record before the director therefore indicated that the beneficiary worked for [REDACTED] for a period of a little less than two years, from November 22, 1995 to November 7, 1997. The evidence therefore fails to establish that the beneficiary had the required three years of experience in the job offered as of the priority date.

In his decision, the director correctly summarized the evidence in the record. The director made no mention of the cumulative gross pay figure on the earnings statement for the pay period beginning December 17, 1995, but the director correctly noted that the earnings statements covered approximately the two-year period as stated in the first letter from [REDACTED]. The director stated that the petitioner had failed to resolve the inconsistencies in the evidence over the starting date of the beneficiary's employment, and that the petitioner had therefore failed to carry its burden of proof. The director accordingly denied the petition. The director's decision was correct, based on the evidence in the record before the director.

On appeal, counsel submits additional evidence consisting of a fourth letter from [REDACTED] dated July 24, 2003, and an undated letter from [REDACTED] of Tijuana Mexico, another purported former employer of the beneficiary. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988), where the BIA stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the beneficiary's experience. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(1) which is quoted on page two above. In addition to the regulation, the petitioner was put on notice of need for evidence to establish that the beneficiary possessed the required experience by published decisions of the AAO and its predecessor agencies. Moreover, in the instant case, the petitioner was put on notice by three RFE's issued by the director of the need for evidence relevant to the beneficiary's experience.

One of the documents submitted on appeal is a letter dated July 24, 2003 from [REDACTED] signed by the owner of that company. The owner states that the beneficiary worked for the company from November 1994 to November 1997. The owner offers an explanation of why the company lacks documentary evidence of the beneficiary's employment prior to December 1995, stating that the beneficiary "worked as a Platter [sic] from the above mentioned dates, but was not put on the payroll until about December of 1995." Although counsel offered a similar explanation in his letter of June 17, 2003 in response to the third RFE, counsel submitted no evidence at that time to support his assertion. As noted above, the

assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506. The petitioner had adequate notice during the proceedings before the director of the need for evidence concerning the inconsistent assertions about the beneficiary's starting date. Yet counsel failed to submit such evidence prior to the director's decision or to offer any explanation for the petitioner's failure to do so. The letter from [REDACTED] dated July 24, 2003 is therefore precluded from consideration by *Matter of Soriano*, 19 I&N Dec. 764.

The second piece of documentary evidence submitted for the first time on appeal is an undated letter from [REDACTED] of Tijuana Mexico, another purported former employer of the beneficiary. That letter is signed by the owner of that company. The Spanish-language original is accompanied by a certified English translation. In the letter, the owner states that the beneficiary worked for his company as a plater from December 1989 to October 1994.

The information in the letter from [REDACTED] is inconsistent with the information on the Form ETA 750B, signed by the beneficiary on February 8, 2001, on which the only claimed relevant work experience is the beneficiary's work with [REDACTED]. The instructions on that form state, "List all jobs held during past three years." The instructions continue, "Also, list any other jobs related to the occupation for which the alien is seeking certification as indicated in item 9." The item number 9 on the Form ETA 750B referenced in the instructions refers to the occupation in which the alien is seeking work. On the ETA 750B supporting the instant petition the occupation is stated as "copper plater."

The description of the beneficiary's duties in the undated letter from [REDACTED] is that the beneficiary worked "in the plating area with gold, chrome, and silver pieces." Those duties are closely related to the offered job, and any claim of experience by the beneficiary in such work therefore should have been stated on the Form ETA 750B.

As discussed above, the petitioner had adequate notice of the need for evidence on the beneficiary's work experience. Notably, in the final sentence of the third RFE the director stated, "Additionally, the petitioner is requested to submit evidence, such as copies of earnings statements or Forms W-2, for all periods that the beneficiary is claiming as qualifying experience." (RFE dated April 3, 2003, page 2 (emphasis added)). Counsel offers no explanation for the failure of the petitioner to submit evidence prior to the decision of the director relating to the beneficiary's experience with [REDACTED]. For these reasons, the undated letter from [REDACTED] which is submitted for the first time on appeal is also precluded from consideration by *Matter of Soriano*, 19 I&N Dec. 764.

For the foregoing reasons, neither of the two documents submitted by the petitioner for the first time on appeal is properly in evidence. Nor do the assertions of counsel in the notice of appeal overcome the decision of the director.

The issue is whether the beneficiary met all of the requirements stated by the petitioner in block 14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has not established that the beneficiary had three years of experience in the offered position as of the priority date of February 15, 2001. Therefore, the petitioner has not overcome the director's decision.

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.