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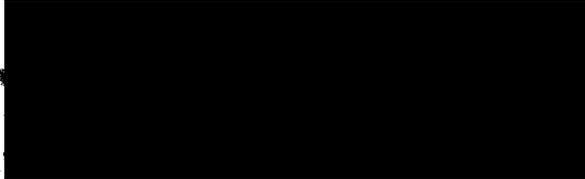
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
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Services

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FILE: [REDACTED]  
WAC 03 030 55809

Office: CALIFORNIA SERVICE CENTER

Date: JAN 04 2005

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

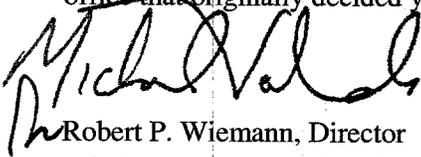
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, 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 public accounting firm. It seeks to employ the beneficiary permanently in the United States as an accountant. 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 failed to establish that the beneficiary had the requisite three years experience required by the offered position.

On appeal, counsel submits additional evidence and asserts that it establishes the beneficiary's eligibility for the position offered.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing 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). In this case, that date is February 29, 2000. The visa petition, filed October 30, 2002, indicates that the petitioner was established in 1987 and employs four workers. An amendment to Part B of the ETA-750, signed by the beneficiary on May 26, 2000, states that she worked for the petitioner as an accountant from 6/1998 to 2/2000. She states that she "worked 20 hours/week with \$18,000 per annum. Up to this present, I am still under the employment of the said company." The beneficiary also declares on the ETA 750B that she worked 40 hours per week for the Pacific Exchange Mortgage Company from January 1997 until May 1998 and that she worked 40 hours per week for the China Banking Corporation as an international foreign teller from August 1995 until July 1996.

As noted on Part A, item 14 of the approved labor certification (ETA-750), the beneficiary must have three years of experience in the job offered of accountant or three years of experience in the related occupation of "public accounting." The beneficiary must also have completed four years of college culminating in a "B.S. in Commerce" with a major in "Accounting."

The regulation at 8 C.F.R. § 204.5(g)(1) provides that "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 regulation at 8 C.F.R. § 204.5(l)(3) also provides in relevant part:

(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.

Because the record did not initially contain sufficient documentation in support of the beneficiary's qualifying employment experience and credentials, the director requested additional evidence on January 22, 2003. The director requested an educational evaluation report of the beneficiary's foreign academic achievements, as well as evidence establishing that the beneficiary possesses three years of full-time experience as specified on the ETA 750A. The director advised the petitioner that the evidence of prior experience should establish that it was obtained prior to the priority date of February 29, 2000 and that it should be provided on the employer's letterhead, showing the title and name of the author, as well as the beneficiary's job title, duties, dates of employment and hours worked per week.

In response, the petitioner, through counsel, submitted copies of the beneficiary's foreign academic credentials and an educational evaluation. The petitioner also provided a declaration by the beneficiary, dated April 11, 2003, describing her employment as a full-time accountant "from 1997 until 1998" with a defunct company called "Pacific Exchange Mortgage Lenders."<sup>1</sup> She states that she can't provide a letter from this employer because it ceased operation in 2000. In lieu of this, she offers a copy of her Wage and Tax Statement (W-2) for 1997 and 1998 to prove that she worked there and received compensation. The beneficiary's 1997 W-2, issued by Pacific Exchange Mortgage, Inc., shows that she was paid \$5,696 in wages. The beneficiary's 1998 W-2 shows that [REDACTED] Inc. paid her \$5,400 in wages.

On April 22, 2003, the director issued an additional request for evidence to the petitioner. The director requested the petitioner to provide additional verification of the beneficiary's experience at its firm, as well as additional corroboration of her employment as an accountant for Pacific Exchange Mortgage.

In response, counsel resubmitted copies of the beneficiary's 1997 and 1998 W-2s from Pacific Exchange Mortgage, Inc. and a copy of the beneficiary's declaration from April 2003. Counsel also submitted a copy of a notice of approval for a nonimmigrant petition issued on July 2, 1997, indicating that the beneficiary's classification as a nonimmigrant with an H1B1 visa, in order to work for "Pacific Exchange Mortgage Lender," was valid from June 30, 1997 until July 15, 2000. In addition, counsel submits a letter, dated July 22, 1996, from ChinaBank in the Philippines. It is signed by [REDACTED] "Manager Human Resource Management & Development Division." [REDACTED] states that ChinaBank employed the beneficiary as a "foreign teller trainee at our International Group-Downtown Center" from "August 23, 1995 until July 15, 1996." Counsel also submitted a letter from the petitioner, dated June 25, 2003, indicating that the beneficiary had been a full-time staff accountant with the petitioner since June 1998.

On July 18, 2003, the director again requested additional evidence from the petitioner relating only to its ability to pay the proffered wage of \$3,000 per month or \$36,000 per year.

In denying the petition, the director reviewed the evidence of the level of wages that the beneficiary received from Pacific Exchange Mortgage Inc. in 1997 and 1998 and could not conclude that it represented full-time employment. Together with the experience accrued with the petitioner before the priority date of February 29, 2000, the director concluded that the petitioner had not established that the beneficiary possesses the requisite three years of experience in the job offered or three years of experience in the related occupation of public

<sup>1</sup> The AAO accepts that this is the same firm as the Pacific Exchange Mortgage Company.

accounting.

Counsel argues on appeal that the petitioner would incur hardship if the preference petition is not approved allowing it to permanently hire the alien beneficiary. Counsel further states that the Department of Labor has approved the labor certification in determining that there are no available U.S. workers that are eligible for the certified position. These arguments are not persuasive. The AAO notes that the Department of Labor's function in determining whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers does not impact the jurisdiction of CIS to review whether a petitioner is making a realistic job offer by evaluating the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. *See Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9<sup>th</sup> Cir. 1984). Similarly, there are no statutory or regulatory provisions that allow consideration of a petitioner's hardship in determining the eligibility of an employment-based visa petition filed under section 203(b)(3) of the Act.

Counsel also asserts that the requirements for education and experience are expressed in the alternative on item 14 of the ETA 750A. Counsel maintains that the beneficiary need only have either a baccalaureate degree in commerce with a major in accounting "or three years Public Accounting or Related Occupation." (Original emphasis). This claim is not persuasive. 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 this case, as noted above, the position clearly requires a baccalaureate degree in addition to either three years of work experience in the job offered as an accountant or three years of experience in a related occupation. The only acceptable related occupation is stated as "public accounting."

Counsel further claims that the beneficiary has sufficient collective work experience to satisfy the terms of the labor certification. Following a review of the evidence submitted with the petition, as well as in response to the director's three requests for evidence, the AAO cannot conclude that the petitioner has carried its burden to establish that the beneficiary has accrued the requisite three year of relevant work experience prior to the priority date of February 29, 2000. In reaching this conclusion, the AAO finds that the discrepancies between the documentation submitted to the record relating to when and how much the beneficiary has worked as an accountant or in public accounting have not been sufficiently explained or otherwise clarified. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The AAO finds sufficient doubt presented in the documentation to question the credibility of some of the statements.

For example, as noted by the director, the beneficiary's W-2s issued by Pacific Exchange Mortgage, Inc., show

that she was paid only \$5,696 in 1997 and \$5,400 in 1998, yet it is claimed on the ETA 750B and on her subsequent declaration of April 11, 2003 that she worked for this company full-time. On the ETA 750B, she claims that her employment ran from January 1997 until May 1998.<sup>2</sup> The April 2003 declaration does not give any months. Moreover, as noted above, a specific amendment was submitted to the Department of Labor, signed by the beneficiary, clearly stating that the beneficiary worked only part-time for the petitioner from 6/98 to 2/2000 at a rate of 20 hours per week at \$18,000 per annum. Subsequently, however, the petitioner claims that the beneficiary has been a full-time employee. It is noted that her 1999 W-2 showed only \$15,972.18 paid in wages, and no contemporaneous payroll record reflecting hours worked per week for 1999 has been submitted to the record. Based on the above, the AAO cannot conclude that the petitioner has carried its evidentiary burden to credibly demonstrate that the beneficiary obtained three full years of relevant work experience prior to the visa priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As the petitioner has not established that the beneficiary meets the requirements of the approved labor certification, the petition may not be approved.

Beyond the decision of the director, it is noted that the evidence submitted does not appear to completely substantiate the petitioner's continuing ability to pay the beneficiary's proffered wage pursuant to the requirements set forth in 8 C.F.R. § 204.5(g)(2). The beneficiary's proposed wage offer is \$3,000 per month, annualized to \$36,000 per year. The petitioner must establish the ability to pay this proposed wage as of the visa priority date of February 29, 2000 and continuing until the beneficiary obtains lawful permanent resident status. The record shows that the petitioner's corporate tax return shows only \$667 in ordinary income. Schedule L further shows that the petitioner's current liabilities exceeded its current assets. Even calculating the beneficiary's accrued salary based on the fiscal year used in filing the tax return, neither the petitioner's ordinary income, nor its net current assets of -\$445 were sufficient to cover the approximate \$20,000 difference in wages actually paid to the beneficiary and the proffered wage of \$36,000 per year. Although the record contains copies of bank account statements, there is no proof that they somehow reflect an additional resource not revealed by the income tax return covering the same period of time.

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.

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<sup>2</sup> A biographical questionnaire (G-325A), submitted with the beneficiary's application for permanent residence, states that she worked for Pacific Exchange Mortgage Lenders from 10/97 to 5/98.