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U.S. Citizenship  
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FILE:

WAC 99 011 50089

Office: CALIFORNIA SERVICE CENTER

Date: JUL 06 2005

IN RE:

Petitioner:

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:

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 Director, California Service Center, revoked approval of the preference visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a sewing contractor. It seeks to employ the beneficiary permanently in the United States as a sample maker. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanies 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.

On appeal, counsel submits a brief and additional evidence.

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(1)(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 October 7, 1996. The labor certification states that the position requires two years experience in the job offered.

The Form ETA 750, Part B instructions request that a beneficiary

“List all jobs held during the past three (3) years. Also list any other jobs related to the occupation for which the alien is seeking certification.”

In response, the beneficiary stated that she worked as sample maker for Il Keun Sa, of Seoul, South Korea, from May 1988 to January 1992. The beneficiary further stated that she was self-employed as a sample maker in Seoul, South Korea from February 1992 until at least September 17, 1996; the date the beneficiary signed that form.

With the petition counsel submitted an employment verification letter in Korean and an English translation. The translation is dated August 14, 1998 and indicates that the employment verification is dated May 14, 1996. The employment verification states that the beneficiary worked as a sample maker for [REDACTED], in Seoul, from May 1, 1988 to January 30, 1992. [REDACTED] a representative of [REDACTED], signed that letter. On the strength of that employment verification, the petition was approved.

Subsequently, the beneficiary was found to have submitted a fraudulent bank letter in a collateral matter before the Service. Because the beneficiary had submitted fraudulent documentation, a CIS officer in Seoul, South Korea conducted an interview with [REDACTED]<sup>1</sup> at the premises of [REDACTED] in Seoul, South Korea. Mr. [REDACTED] indicated that the beneficiary worked for that company as a sewing (machine) operator from March 5, 1990 until about December 1990. Mr. [REDACTED] indicated that he issued employment verification pertinent to her employment at [REDACTED], but could not remember the details of the verification or the purpose for which it was intended. On May 3, 2000 Mr. [REDACTED] signed a letter stating those facts.

On January 23, 2003 the California Service Center issued a Notice of Intent to Revoke in this matter. The Service Center described the evidence adverse to the beneficiary's claim of qualifying employment and accorded the petitioner thirty days to respond.

In response, counsel submitted a revised employment history for the beneficiary. The beneficiary's amended work history is dated December 5, 2000 and states that she worked (1) as a sample maker for Michiel School Uniform, of Seoul, South Korea, from October 1973 to June 1975, (2) as a sample maker for MuGoongHwa School Uniform from October 1975 to June 1977, (3) as a sample maker for Kyung Il School Uniform, of Seoul, South Korea, from October 1977 to June 1979, (4) as the owner and sample maker of the Seoul School Uniform Center in Choongnam-do, South Korea, from April 1980 to October 1982, (5) as a sample maker for Il Keun Sa from May 1988 to January 1992, (6) as a self-employed pattern maker/sample maker in Seoul, South Korea from February 1992 to October 1995, and (7) as the owner and sample maker of Nice Student Uniform in Inchon, South Korea from October 1995 to April 1997. That revised employment history also states that the beneficiary has been unemployed since 1997.

In support of the petitioner's claim of qualifying employment for Michiel School Uniforms counsel submitted a letter in Korean and an English translation stating that the affiant worked with the beneficiary at Michiel Uniforms from October 1973 to June 1976. The affiant states that the beneficiary was a full-time sample maker.

In support of the petitioner's claim of qualifying employment for Kyungil School Uniforms counsel submitted a letter in Korean and an English translation stating that the affiant worked with the beneficiary at Michiel

<sup>1</sup> Although the name of the agent of [REDACTED] is variously translated as either [REDACTED] those different translations appear to refer to the same person.

Uniforms from October 1977 to June 1979. The affiant states that the beneficiary was a full-time sample maker.

As evidence in support of the beneficiary's claim of employment as owner and sample maker for Seoul School Uniform Center counsel submitted a Korean document and an English translation. The translation states that the affiant designed the signboard for that business and that the beneficiary owned that business from October 1974 to 1982. That employment verification conflicts with the assertion by the beneficiary that she started the business in April of 1980.

To support the beneficiary's claim of operating the Nice School Uniform in Inchon counsel submitted a certification from a landlord in Inchon, South Korea, and an English translation, stating that the beneficiary operated the Nice School Uniform in his building from October 20, 1995 to July 30, 2000. This certification conflicts with the assertion of the beneficiary that she terminated operation of that business during April of 1997.

As additional support for that employment claim, counsel submitted a copy of the lease agreement for the space in which Nice School Uniform operated. That lease is dated November 20, 1997 and has a term of two years. Again, this evidence conflicts with the beneficiary's assertion that she started the business during April of 1980.

Counsel submitted a Korean document and an English translation. That translation states that the Korean document is a copy of the Certificate of Business Registration of Daekwangmirim Fashion Company, of Seoul, South Korea, which was established on July 1, 1993 and owned by [REDACTED]. Which of the beneficiary's employment claims the document and translation are intended to support is unclear.

Counsel provided a list of the beneficiary's addresses in South Korea from July 13, 1977 to January 29, 1996 and an English translation. The proposition counsel intended to support with that document is unclear.

Counsel also provided a letter from the petitioner's president. That document states that the beneficiary worked as a sample maker for that company since January 2001 until February 18, 2003, the date of that letter.

In a letter dated February 18, 2003 counsel stated,

Mr. [REDACTED] Informed [sic] the investigator that the beneficiary worked for him for a period of nine months. This contradicted the May 1988 to January 1992, statement of experience attributed to him and appearing on Form ETA 750 submitted with the application as verification of the 2-year period of employment experience required for the position of a garment sample maker.

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<sup>2</sup> The original employment verification was issued by Mr. [REDACTED] and that the subsequent interview was of Mr. [REDACTED]. Other than counsel's statement, the record contains no indication of a Mr. [REDACTED].

As explained in our correspondence to you dated December 15, 2000, the beneficiary advised us that following the employment verification interview of her former employer. Mr. Sa [sic] informed her that because her employment with him during the period reported in Form ETA 750, was "off the tax books" he feared adverse tax consequences if he substantiated the entire period. He therefore misinformed the Embassy personnel.

Counsel provided no evidence to substantiate that explanation of the discrepancy between the employment verification and the information obtained from Mr. [REDACTED] in the in-person interview.

Counsel notes that, pursuant to 8 C.F.R. 204.2(i)(1), if affidavit from former employers cannot be obtained, submission of other documentary evidence, such as affidavits from other people, may suffice to verify a beneficiary's claimed employment. Counsel did not state why affidavits cannot be obtained from the former employers. Absent a credible explanation for the inability to obtain letters from former employers, affidavits from people other than the beneficiary's employers are not acceptable.

On December 24, 2003, the director revoked approval of the petition, finding that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient work experience.

On appeal, counsel again asserts that Mr. [REDACTED] who initially verified the beneficiary's claim of three and one-half years employment for [REDACTED] a, and who subsequently amended that verification to only nine months of employment, told the beneficiary that he retracted the first verification because he feared tax consequences from verifying the entire period. Again, counsel submitted no evidence in support of that assertion. The assertions of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

Counsel cites *Lu-Ann Bakery shop v. Nelson*, 705 F. Supp 7, (1988) for the proposition that the coworker affidavits in this case cannot, without a conclusive determination that they are not credible, be discounted based on a lack of contemporaneous evidence. The evidence submitted by the beneficiary will be recounted in assessing the credibility of those affidavits.

In response to instructions that she reveal every job she had held during the last three years and every job she had held that was related to the proffered position, the beneficiary listed employment for [REDACTED] in Seoul, South Korea, and self-employment, also in Seoul. By submitting that list of employers in response to those instructions, the beneficiary represented the list as an exhaustive list of all jobs she had ever held in positions related to the proffered position in addition to all jobs held during the previous three years.

Because the beneficiary was found, in a collateral matter, to have submitted a fraudulent bank letter, an investigation was undertaken of the beneficiary's employment claim in this case. Under questioning, the representative of [REDACTED] who previously corroborated the beneficiary's claim of three and one-half years of employment for that company, amended his version of the beneficiary's employment. Not only did he change the period of that employment from approximately three and one-half years to approximately nine months, but he amended the beneficiary's job description from sample maker to sewing machine operator. In

response to that evidence, the beneficiary submits a revised employment history containing previous employment never before mentioned.

Questions of credibility are raised by asserting new claims to eligibility in response to evidence adverse to the original claim. Counsel, the petitioner, and the beneficiary provide no explanation for the failure to advance all pertinent employment claims on the Form ETA Application for Labor Certification. Having demonstrated that the beneficiary's first employment claim was fraudulent, CIS is not obliged to discredit sequentially each additional employment claim the beneficiary chooses to submit.

The regulation at 8 CFR § 204.5(1)(3)(ii) does not encourage petitioners to hold evidence in abeyance and submit it on appeal or on post-appeal motion. Rather, it clearly states that evidence of the beneficiary's experience must accompany the petition.

In this case, the experience claimed when the petition was submitted does not qualify the beneficiary for the proffered position. In response to that finding, counsel has submitted an explanation and evidence of other, previous employment, never before mentioned in conjunction with this application.

Further, even if the timing of the submission of the various new employment claims did not render them suspect, the various discrepancies between the beneficiary's new employment claims and the evidence submitted in support of those claims, set out above, would render the evidence, and the claims, unreliable.

The priority date is October 7, 1996. Pursuant to *Matter of Wing's Tea House, supra*, the petitioner must demonstrate that the beneficiary had the requisite experience on that date. Evidence pertinent to the beneficiary's employment after that date is not, therefore, directly relevant to the beneficiary's eligibility for the proffered position.

The original employment verification has been amended from three and one-half years as a sample maker to nine months as a sewing machine operator. That verification does not support the assertion that the beneficiary was employed as a sample maker and is not evidence of any qualifying employment experience.

The various subsequent employment claims are accorded least weight based on their submission after the first claim was discredited. Further, they do not conform to the requirements of the regulations in that no evidence is in the record to show that statements from previous employers are unavailable. Further still, they are not supported by evidence that, under these circumstances, demonstrates their veracity. Finally, some of the evidence submitted in their support contradicts the beneficiary's revised claims.

No evidence remains that indicates that the beneficiary has the requisite two years, or any other amount, of experience in the job offered. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

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.