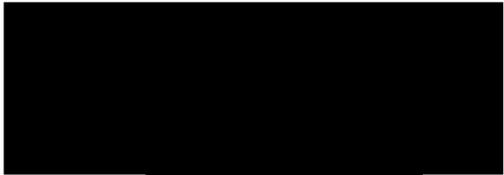


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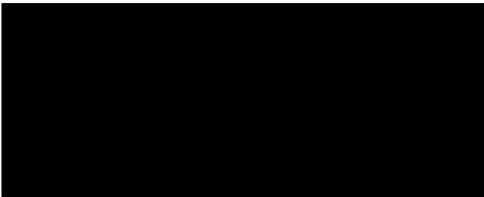
Office: NEBRASKA SERVICE CENTER

Date: **AUG 11 2008**

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

CC:



DISCUSSION: The director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner¹ is a commercial aircraft manufacturing facility. It seeks to employ the beneficiary permanently in the United States as an advanced computing technologist. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director denied the petition because the petitioner failed to provide sufficient evidence that the beneficiary possessed the six years of relevant work experience, stipulated on the Form ETA 750 submitted to the record. The director concluded that the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On appeal, the petitioner's counsel contends that minor addition errors were made in the director's calculation of the beneficiary's years of work experience. Counsel also notes that several short gaps in the beneficiary's work references were excluded. Subsequent to the submission of the appeal, counsel also submits a letter that states the original petitioner was acquired by Mid-Western Aircraft Systems, Inc.² Counsel submits no further documentation.

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

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

To be eligible for approval, a beneficiary must also have the education and experience specified on the labor certification as of the petition's filing date. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The filing date of the petition is the initial receipt in the Department of Labor's employment service system. 8 C.F.R. § 204.5(d). In this case, that date is October 29, 2001. The beneficiary indicated that he had worked for the

¹ The original petitioner is The Boeing Company.

² This letter is dated June 16, 2005, and involves the ongoing acquisition of the Boeing Company facility in Wichita, Kansas by Mid-Western Aircraft Systems, Inc., as of June 17, 2005. This successor-in-interest issue will be discussed further in these proceedings.

original petitioner since April 2001. In an attachment to the ETA 750, the petitioner stated that applicants for the position should have six years of relevant work experience to be considered for the position.

With the initial petition, the original petitioner indicated it was established in 1916, had 166,800 employees, a gross annual income of \$54.06 and net annual income of \$42.9 million dollars.³ The petitioner provided a copy of the beneficiary's diploma from the Faculty of Engineering, Mechanical Engineering section, University of Madras, India, dated April 1995. The petitioner also submitted the beneficiary's statement of marks for eight semesters of studies at the University of Madras. The petitioner also submitted the original petitioner's annual report for tax year 2002. On Part B of the Form ETA 750, the beneficiary indicated that he had worked for the following companies: Boeing Company (the original petitioner) from April 2001 to the date of signing the ETA 750, or October 12, 2001; Martian Clockworks Software, Inc., Lincoln, Nebraska, from May 2000 to March 2001; and Okie World Corporation, Norman, Oklahoma, December 1997 to May 2000.

Because the evidence submitted was insufficient to demonstrate that the beneficiary had the requisite number of work experience stipulated by the Form ETA 750, on April 15, 2004, the director requested additional evidence pertinent to the beneficiary's work experience. The director specifically requested that the petitioner provide letters from current or former employers giving the name, address, and title of the employer and a description of the experience of the alien, including specific dates of employment and specific duties.

In response, counsel submitted the following letters of work verification:

A letter dated April 28, 2004 from [REDACTED] Manager, Factory Systems Operations Computing, Boeing Commercial Airplanes, Wichita, Kansas. This letter states that beneficiary began his employment with Boeing in March 2001.

A letter dated April 27, 2004 from [REDACTED] former President, Martian Clockworks Software, Inc. (defunct). This letter states that beneficiary worked for [REDACTED] from June 2000 to March 31, 2001.

A letter dated September 19, 2000 from [REDACTED] Vice President, Administration, Okie World Corporation, Norman, Oklahoma. This letter states that the beneficiary worked for the company as a systems consultant from December 9, 1997 to May 31, 2000.

A letter dated November 6, 2000 from [REDACTED] Application Development Manager, [REDACTED] and [REDACTED] expert system team leads, State of Nebraska Department of Health and Human Services. This letter states that the beneficiary worked as a consultant from April 12, 1999 to November 6, 2000.

³ As stated previously, after the denial of the instant petition, and the submission of the appeal, counsel submits a letter indicating that Mid-Western Aircraft Systems, Inc., had acquired the original petitioner's commercial manufacturing operations in Wichita, Kansas. However, counsel submits no further information with regard to the current petitioner's size, number of employees, or gross or annual net income.

An individual letter dated November 17, 2000 from [REDACTED] President, Whitehead Consulting, Inc., Lincoln, Nebraska. This letter refers to the beneficiary's consulting position on a team working with the State of Nebraska for a year and a half.

A letter dated April 30, 2004 from [REDACTED] the beneficiary's co-worker on a project for the state of Iowa from January 1998 to March 1999. A corroborating letter dated March 15, 1999 from Jan Fry, X-PERT Project Manager, Iowa Department of Human Services, Des Moines, Iowa is also found in the record. This letter writer identifies the beneficiary's employment on this project from January 19, 1998 to March 19, 1999.

An undated letter from [REDACTED] Director, Amada Soft (India) Pvt. Ltd., Chennai, India. This letter states that the beneficiary worked for Amada Soft India, a subsidiary of Amada, Japan, from October 1996 to October 1997.

A letter from Professor [REDACTED], College Station, Texas. This letter dated April 24, 2004 states that the beneficiary worked with [REDACTED] as a project associate from January 1996 to July 1996 in a wave energy project at the Ocean Engineering Center, Indian Institute of Technology (IIT), Chennai, India. A second letter from Professor [REDACTED] is submitted to the record and dated December 2, 1995, that states the beneficiary worked on a wave energy project from August 1995 to November 1995.

A letter from [REDACTED] Assistant Professor, IIT, Department of Mechanical Engineering, Chennai, India. This letter, dated November 10, 1995, states that the beneficiary worked with [REDACTED] for the past three months on a project entitled CAD CAM of DIES.

Counsel summarized the beneficiary's work experience as follows:

Indian Institute of Technology-August 1995 to July 1996, with August 1995 to November 1995 in the Manufacturing Engineering Department, and January 1996 to July 1996, in the Ocean Engineering Department.

Amada Soft India- from October 1996 to October 1997;

Okie World Corporation- December 1997 to May 2000, with January 1998 to March 1999 at the Iowa Department of Human Services Project, and April 1999 to May 2000 at the Nebraska Health and Human Services Project;

Martian Clockworks- from June 2000 to March 2001, including June 2000 to November 2000, with the Nebraska Health and Human Services Project, and December 2000 to February 2001, working on minor projects; and

The Boeing Company, from March 2001 to the present.⁴

On September 28, 2004, the director denied the petition. In his decision, the director stated that based on a review of the evidence submitted to the record, the beneficiary had work experience that equaled 69 months, or 5 years and nine months, prior to the priority date of October 29, 2001. The director then determined that the beneficiary did not have the requisite six years of work experience prior to the priority date.

On appeal, counsel states that the director determined that the beneficiary had 69 months of relevant work experience, however, minor errors in the addition of the beneficiary's periods of work experience were made. Counsel states that the beneficiary had at least 72 months of relevant work experience, and more than 72 months of work experience, if several short gaps in the beneficiary's references were included. Counsel states that these gaps are times in which the beneficiary was either on a short leave of absence, or awaiting visa approval. Counsel further describes one period of time as the month of December 1995, when the beneficiary did not actively work on any IIT project. Counsel states that this one-month period of time is analogous to that of an individual taking periods of vacation or holidays during the course of their employment, which would not be excluded from a calculation of total experience in other situations. Counsel also described the period of October 1997 to November 1997 as a gap of time that should be counted toward the beneficiary's relevant work experience. Counsel states that during this period of time the beneficiary obtained his H-1B petition approval and U.S. visa to begin working for Okie World Corporation, and that there were slight delays in the beneficiary's travel to the United States. Counsel states this time would be viewed as time spent in the software engineering career field as the beneficiary was waiting for visa approvals to finalize his travel and employment in the United States.

Counsel finally concludes that these two periods of time constitute an additional three months of relevant work experience. Counsel states that while the beneficiary's experience matches or exceeds the required 72 months without considering these additional months, it was inappropriate that they should be excluded.

Counsel calculates the beneficiary's work experience as follows:

Employing Entity	Total Experience
Indian Institute of Technology	11 months
AmadaSoft (India) Pvt. Ltd.	13 months
Okie World Corporation	30 months
Martian Clockworks	10 months
The Boeing Company	8 months
	<hr/>
	72 months

As previously stated, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In the instant

⁴ For purposes of determining work experience prior to the priority date, only the period of time from March 2001 to October 29, 2001 are considered the beneficiary's relevant work experience with the original petitioner.

petition, the Form ETA 750 indicates that six years of relevant work experience is necessary to perform the proffered position. The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C), guiding evidentiary requirements for "professionals," also states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The AAO regards the submission of the beneficiary's statement of marks for eight semesters of studies in mechanical engineering, along with the beneficiary's diploma from the University of Madras as sufficient evidence that the beneficiary had the equivalent of a U.S. baccalaureate degree in engineering. Therefore the only question that remains is whether the beneficiary has the requisite six years of relevant work experience.

Upon review of the record, the director did not explain how he arrived at his conclusion that the beneficiary had five years and nine months of relevant work experience. However, it is noted that some calculations marked on the letter received from the petitioner in response to the director's request for further evidence indicates some possible errors in addition. For example, the period of time October 1996 to October 1997 when the beneficiary worked with [REDACTED] is marked as 12 months when actually this period of time is 13 months.

It is noted that most of the month to month employment periods do not show the specific date of starts and ends of employment. For example, the AAO cannot determine if 10/96 to 10/97 means October 1, 1996 to October 31, 1997 (13 months) or October 1, 1996 to October 1, 1997 (12 months). For purposes of this discussion only, the petitioner will be accorded the most generous interpretation. However, any future motion should include evidence of the specific dates of start and end of employment. Therefore counsel's calculations of 13 months of relevant work experience with AmadaSoft India, 30 months with Okie World Corporation, 10 months with Martian Clockworks, and 8 months with The Boeing Company are viewed as the accurate calculation of the beneficiary's work experience with these companies. In total, the beneficiary's work experience with these companies totals 61 months, or five years and a month.

However, with regard to the beneficiary's work experience with the Indian Institute of Technology, the record is confused. [REDACTED] submitted two letters of work verification that contain two distinct periods of time for the beneficiary's involvement with the IIT wave energy project. In a letter dated December 2, 1995, [REDACTED] stated that the beneficiary worked with him from August 1995 to November 1995; while in his letter dated April 21, 2004, [REDACTED] stated the beneficiary worked for him in the wave energy project from January 1996 to July 1996. If [REDACTED] earlier letter is correct, the beneficiary worked for him at the same time he was working for [REDACTED] from approximately August 1995 to November 1995. Neither counsel nor the petitioner has provided any explanation of the beneficiary working on two projects simultaneously, or that the beneficiary worked for two distinct period of times on the IIT wave energy project. Neither has explained the discrepancies between Dr. [REDACTED] two letters. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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." *Ho* further states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." Without further explanation, the letters of work verification from IIT are not given any evidentiary weight in these proceedings. Therefore the petitioner has only established the beneficiary has five years and one month of relevant work experience.

With regard to counsel's comments with regard to the months of December 1995 and October to November 1997, counsel provides no further evidentiary documentation that the beneficiary held any contractual agreement with the ITT that would permit an absence of one month while working for them, or similar documentation. Moreover, counsel states that the beneficiary did not work during these periods. It is not clear to the AAO how counsel expects periods wherein the beneficiary did not work, to be counted as periods of work. As previously stated, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, *Matter of Ramirez-Sanchez*. Furthermore counsel provides no regulatory or statutory guidance that would support his claim that time spent waiting for a U.S. visa should ever be considered relevant work experience. Therefore neither of the two additional periods of time described by counsel is considered to be part of the requisite six years of relevant work experience. Thus, the petitioner has only established that the beneficiary has five years and one month of relevant work experience. Therefore the director's decision shall stand, and the petition will be dismissed.

Beyond the decision of the director, the current petitioner has not provided sufficient documentation that it is the successor-in-interest to the original petitioner and that it has the ability to pay the proffered wage as of the October 2001 priority date. Although counsel, in a letter submitted subsequent to the initial denial and appeal of the instant petition, states that the Mid-Western Aircraft Systems, Inc. acquired Boeing's commercial manufacturing operations in Wichita, Kansas, counsel submits no further evidentiary documentation to further substantiate his assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore the record contains no evidence that the petitioner qualifies as a successor-in-interest to the Boeing Company. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. While the original petitioner, through the submission of its audited financial report established its ability to pay the proffered wage, in order to maintain the original priority date, a successor-in-interest must also demonstrate its ability to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

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.