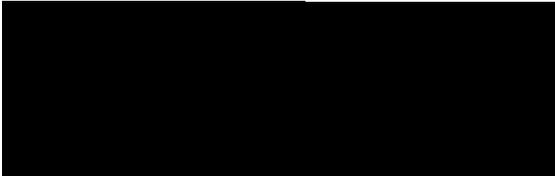


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



B6

FILE:

WAC 01 277 52066

Office: CALIFORNIA SERVICE CENTER

Date: **OCT 19 2006**

IN RE:

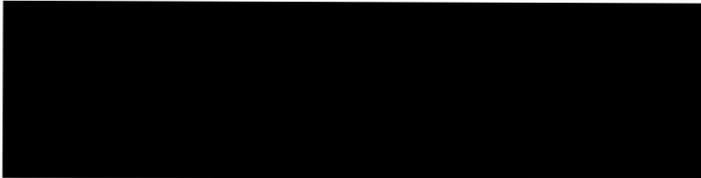
Petitioner:

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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, California Service Center. The director later issued a Notice of Intent to Revoke the approval of the petition and then issued a Notice of Revocation. The revocation is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record shows that the original petitioner, [REDACTED] merged with [REDACTED] on May 15, 2003. [REDACTED] is the surviving company in the merger and the current petitioner. The petitioner is a Cellular Telephone and Paging Equipment Sales Company. It seeks to employ the beneficiary permanently in the United States as a Manager of International Sales. As required by statute, the petition is accompanied by a Form ETA-750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary had the four years of qualifying employment experience as defined by the Form ETA-750 required to perform the duties of the proffered position. The director also determined that the petitioner had not established that it conducted international sales or that it intended to develop any business outside the United States. Therefore, the director revoked the previously approved petition.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by 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 May 13, 2005 Notice of Revocation, the two issues in this case are whether the petitioner has demonstrated that the beneficiary was qualified to perform the duties of the proffered position, Manager of International Sales, as of the priority date, and whether the petitioner regularly engages in sales outside the United States such that it has need of and intends to employ the beneficiary as a Manager of International Sales.

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.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA-750 as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA-750 was accepted on April 20, 2001.

The AAO takes a *de novo* look at issues raised in the denial of the petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.¹ Relevant evidence in the record includes:

1. A summary of the January 14, 2005 interview of the beneficiary conducted at the Los Angeles District Office which indicates that the beneficiary testified: that he

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

began as an International Sales Manager at [REDACTED] during July 2002 and he continued in this position through the date of the January 14, 2005 interview; that he supervised five salesmen in the International Division at [REDACTED] and that [REDACTED] is working to develop a sales force in Argentina, Brazil and the Philippines.

2. A summary of a December 2004 investigation carried out by U.S. Immigration and Customs Enforcement (ICE) which indicates that [REDACTED] does not conduct business outside the United States and that [REDACTED] employed the beneficiary as a salesman serving customers in the United States, not as a Manager of International Sales.
3. Letter written by the Vice-President of [REDACTED] dated April 4, 2005 submitted in response to the Notice of Intent to Revoke which indicates: that the ICE investigators reached incorrect conclusions in December 2004 regarding the nature of the petitioner's business; that American Way Importing, an entity which was closely affiliated with [REDACTED] in 2001 and which merged with [REDACTED] during May 2003, did operate in both North American and European markets beginning in 2001 and continuing through the writing of this April 4, 2005 letter, and that the beneficiary's efforts helped to make its international sales operations possible; that beginning in July 2002, the beneficiary served as Account Executive/Manager overseeing international sales for American Way Importing, with other officers in the company traveling overseas on the beneficiary's behalf as the beneficiary did not have the legal right to travel in and out of the United States; and that after January 2005, the beneficiary's position changed such that he began conducting domestic sales for the company, again because he does not have the legal right to travel in and out of the United States.
4. Certification of Employment on [REDACTED] letterhead signed by Steve Javizad and dated July 31, 2003 [2004] which indicates that the beneficiary began working for American Way Importing Corporation during August 2002 and that he ended his employment with that company during July 2004. The letter specifies that the beneficiary worked full time and held the title of International Sales Manager during his tenure at American Way Importing Corporation.
5. Letter written by the President of [REDACTED] dated February 6, 2002 which specifies: that the beneficiary worked full-time as an Account Executive/Manager at [REDACTED] from September 1998 until the writing of this letter. The letter lists the beneficiary's duties but does not indicate that he had any duties that relate to international sales during this period of employment at [REDACTED]
6. Certification of Employment written by the Head of Marketing, [REDACTED] which is not dated, that indicates that Vision Wide employed the beneficiary full time in Sri Lanka from January 1995 through October 1996. He held the title of Field Sales Manager. The certification lists the beneficiary's

duties but does not indicate that he had any duties that relate to international sales during his tenure at Vision Wide.

7. Form G-325A, Biographic Information, attached to the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status, signed by the beneficiary on May 20, 2002, which indicates that from September 1998 through the date the beneficiary signed this form, he worked as a Senior Account Executive at [REDACTED] and that from January 1995 through October 1996, he worked as a Field Sales Manager at Visionwide International, Ltd., Columbo, Sri Lanka.
8. ETA Form 9089, Application for Permanent Employment Certification, signed by the beneficiary and filed with the DOL on July 7, 2006 which specifies: at part K(d), that from January 2, 1995 through October 1, 1996, the beneficiary worked at Vision Wide, Kaldemulla, Sri Lanka, as a Field Sales Manager supervising sales staff; at part K(c), that from September 1, 1998 through July 31, 2002, the beneficiary worked for [REDACTED] Santa Monica Blvd., Los Angeles, as an Account Manager overseeing sales in Southern California; at part K(b), that from August 1, 2002 through July 31, 2004, the beneficiary worked for American Way Importing Corporation, La Cienega Blvd., Los Angeles, as an International Sales Manager overseeing sales activities in European and Asian markets; at part K(a), that from August 2, 2004 through the date the ETA Form 9089 was signed, the beneficiary worked for [REDACTED], Santa Monica Blvd., Los Angeles, as a Manager (Dealer) Wireless, selling Nextel telephones and activations to seeking out retail wireless dealers in Southern California.
9. Three documents that record a single transaction in which the petitioner bought cellular telephones from a company in Turkey during March 2004.
10. Two documents that record a single transaction in which the petitioner purchased cellular telephones from a company in Germany during December 2002.
11. Three documents that record a single transaction in which the petitioner sold cellular telephones to a company in the United Kingdom during April 2004.
12. Three documents that record a single transaction in which the petitioner had a company in Germany ship cellular telephones to a customer in Russia during December 2001.

The record does not contain any other evidence relevant to the beneficiary's qualifications or to the petitioner's claim that it conducts international sales.

On appeal, counsel indicates that, as of the April 20, 2001 priority date, the petitioner has established that the beneficiary had four years of qualifying experience in the position of International Sales Manager and that the petitioner's business included an international sales division.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the

labor certification. 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, the Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of International Sales Manager. Item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|--------------|----------------|
| 14. | Education | |
| | Grade School | 8 years |
| | High School | 4 years |
| | College | not applicable |

The applicant must also have 4 years of experience in the job offered, the duties of which are:

Manage sales activities in the No. American and European markets; direct staffing, training, and performance evaluations to develop and control sales program. Coordinate sales distribution by establishing quotas, goals and sales territories. Assign sales territory to sales personnel. Analyze sales statistics to formulate policies and strategies. Review market analyses to determine customer needs, volume potential, price schedules and monitor competitor's activity; develop sales campaigns to accommodate goals of company. Conduct and participate in meetings relating to product development, sales activities and new accounts. Analyze and control expenditures of division to conform to budgetary requirements. Prepare periodic sales report showing sales volume and potential sales; report to vice-president of sales and the CEO. Duties to be performed with use of computer software. Supervise three sales associates.

Item 15 of Form ETA 750A does not reflect any additional special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. At part 15, eliciting information of the beneficiary's work experience, he represented that he held the position of Account Executive/Sales Manager at [REDACTED], Culver City, California from September 1998 through the date that he signed the form or April 11, 2001. In describing the duties he performed at this job, the beneficiary does not indicate that he gained any experience in international sales while in this position. He indicated that from January 1997 through November 1998, he held the position of Commercial Driver at Embassy Suites Hotel/LAX. He also represented that from January 1995 through October 1996, he held the position of Field Sales Manager at Visionwide International, Ltd., Columbo, Sri Lanka. In describing the duties he performed at this job, he did not indicate that he gained any experience in international sales while in this position.

The beneficiary does not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(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.

(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.

The petitioner provided the records of only two international sales transactions. Both transactions occurred after the priority date. The other two transaction records which the petitioner submitted suggest that the petitioner *purchased* merchandise outside of the United States, also after the priority date. Such purchases may not be seen as evidence that the petitioner *conducts sales* outside of the United States. Thus, records of two sales of wireless equipment in Europe, one in December 2001 and one in April 2004, are all that the petitioner has provided to demonstrate that its business includes an international sales division. Contrary to counsel's assertions, such evidence is not sufficient to support the petitioner's claims: that the ICE investigators erred in their conclusion that the petitioner's business did not regularly conduct sales outside of the United States; and that the beneficiary gained several years of qualifying experience in the proffered position of Manager of International Sales, prior to the April 20, 2001 priority date, while working as Account Executive/Manager for [REDACTED] from September 1998 through April 2001.

Counsel's assertions that unsupported statements made by officers in the petitioner's corporation - that the petitioner has engaged in and continues to engage in international sales - are sufficient to show that, as of the priority date, the petitioner had an international sales division and it intended to employ the beneficiary as its Manager of International Sales are misplaced. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel's assertions that there is no requirement that a beneficiary show that he was previously employed by the petitioner and that, consequently, CIS erred in finding that the petition could not be approved because the petitioner had failed to demonstrate that the beneficiary had performed the duties of the proffered position on its behalf are also misplaced. The petitioner must demonstrate that the beneficiary had, as of the priority date, four years of qualifying experience in the proffered position of Manager of International Sales. The petitioner presented the beneficiary's employment at [REDACTED], from September 1998 through April 2001 as qualifying experience in the proffered position. The director correctly revoked the previously approved petition based on the petitioner's failure to demonstrate: that, as of the priority date, the beneficiary had acquired qualifying experience while employed by the petitioner or while employed elsewhere; and that the petitioner's business included an international sales division in which it intended to employ the beneficiary as a Manger of International Sales, as set out on the Form ETA-750 certified by the DOL and submitted with the petition.

Counsel's assertion that CIS erred in concluding that the fact that the petitioner's record of having paid the beneficiary is the Form 1099, Miscellaneous Income, rather than the Form W-2, Wage and Tax Statement,

suggests that the beneficiary did not work as a manager for the petitioner, supervising its employees, but that it more likely hired the beneficiary as a type of non-managerial, independent contractor need not be addressed. That is, whether the Form 1099 may be used to record payment to full time managers who are: in charge of supervising several sales personnel, in charge of training and evaluating staff, etc., as counsel asserts, has no bearing on the fact that the petitioner has failed to demonstrate that as of the priority date: the beneficiary had four years qualifying experience in the proffered position and it engaged in international sales on a regular basis such that it had need of and intended to employ the beneficiary as a Manager of International Sales, as set out on the certified Form ETA-750.

In sum, the preponderance of the evidence fails to demonstrate that, as of the priority date, the beneficiary had acquired four years of experience in the proffered position of Manager of International Sales or that the petitioner regularly conducted international sales such that it had need of and intended to employ the beneficiary in 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.