U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 04 016 52762 Office: CALIFORNIA SERVICE CENTER Date: JUL 18 2006

IN RE: Petitioner: [redacted]
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:

[redacted]

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 approval 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 manufacturer corporation. It seeks to employ the beneficiary permanently in the United States as a garment sample maker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition approval accordingly.

On appeal, the counsel submits 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 nature, for which qualified workers are not available in the United States.

8 CFR § 204.5(l)(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.

The petitioner must demonstrate 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).

Here, the Form ETA 750 was accepted on January 16, 1998.[1] The proffered wage as stated on the Form ETA 750 is $12.10 per hour ($25,168.00 per year). The Form ETA 750 states that the position requires two years experience.

The I-140 petition was filed October 23, 2003.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8

[1] It has been approximately six years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., it states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

C.F.R. § 204.5(g)(2),[2] and, 8 CFR § 204.5(l)(3)(ii) the director requested on August 9, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage and the beneficiary's qualifications beginning on the priority date. [3]

The director based the decision on the director's finding that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The following discussion will focus on the record of proceeding as it relates to that issue.

The director, *inter alia,* requested evidence in the form of copies of job verifications from the petitioner on letterhead with the beneficiary's job title, duties, dates of employment and number of hours worked.

As the Form ETA 750 stated that the [redacted] (a prior employer) employed the beneficiary since June 1994 and the beneficiary was employed by the petitioner since September 1996, the director requested that the petitioner provide copies of the beneficiary's W-2 Wage and Tax Statements evidencing that employment. The director requested job verification from the petitioner on the prior employer's letterhead with the beneficiary's job title, duties, dates of employment and number of hours worked. Supplementary evidence was also requested to the above. The director requested contracts and pay statements to verify the above as well as work identification issued by employers, pay stubs or tax returns.

The petitioner submitted a letter dated August 23, 2004, from the petitioner in which, among other things, was enclosed a statement of experience, tax returns and W-2 Forms[4] from 1996 to present (i.e. August 23, 2004), and the request "... if the letter of experience is not sufficient evidence please change the classification to unskilled worker."[5] Also, the petitioner stated the following:

> "Beneficiary's employment history: I declare that the applicant [redacted] and [redacted] are the same person[6] and was employed from 1996 to present with ... [the petitioner] at the ...[the address of the petitioner] ...."

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[2] It is noted that the petitioner has submitted corporate tax returns dated 1998, 2000, 2001, 2002 and 2003 that stated taxable income losses of <$103,853.00>, <$259,287.00>, <$271,026.00>, <$26,280.00>, and <$237,638.00> respectively. There appears to be a lack of an ability to pay the proffered wage based upon the financial information submitted. Should this matter be further pursued, this issue should be determined.

[3] The director based the decision on the director's finding that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition

[4] Since the IRS W-2 Wage and Tax Statements are issued to three different named individuals, their probative value in this discussion is slight. The petitioner's statement that all the statements were issued to the named beneficiary, without supporting documentation, is not proof. 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)).

[5] Neither the law nor the regulations require the director to consider lesser classifications if the petitioner does not establish the beneficiary's eligibility for the classification requested. There is no provision permitting the petitioner to alter the visa classification sought upon its initial filing. Additionally, it is noted that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc.Comm.1998). In the facts of this case, it would not make a difference in the outcome since the requirements of the labor certification require two years of job experience.

[6] According to the petition, the beneficiary last entered the United States without inspection on May 1996.

The director denied the petition on October 28, 2004 finding that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition .

The issue to be discussed in this case is whether or not the petitioner had established that the beneficiary has the requisite experience as stated on the labor certification petition. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & 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 the instant case, the Application for Alien Employment Certification, Form ETA-750A, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of a garment sample maker.

In the instant case, item 14 describes the requirements of the proffered position as follows:

| | | |
|---|---|---|
| 14. | Education .....[7] | |
| | Grade School | Blank |
| | High School | Blank |
| | College | Blank |
| | College Degree Required | Blank |
| | Major Field of Study | Blank |
| | Training ..... | |
| | Experience ..... | |
| | Years | 2 |
| | Related Occupation ..... | |
| | Years | Blank |

In the instant case, the Application for Alien Employment Certification, Form ETA-750B, item 15, set forth work experience that an applicant listed for the position of garment sample maker.

15. WORK EXPERIENCE

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The only evidence of the beneficiary's identity is a partial copy of a birth certificate and a partial translation of that certificate. Should this matter be pursued further additional evidence of the beneficiary's identity should be requested. The present evidence submitted is insufficient. According to the petitioner's statement above recited, the beneficiary has assumed various identities. We find that the beneficiary's identity is not proven.

[7] The petitioner had typed "Not Required" across the information fields Education and Training that are above noted as "blank."

a. NAME AND ADDRESS OF EMPLOYER
[redacted], Los Angeles 90058
NAME OF JOB
Garment sample Maker
DATE STARTED
Month – 09 [September] Year – 96 [1996]
DATE LEFT
Month – To Present
KIND OF BUSINESS
Manufacturing
DESCRIBE IN DETAIL DUTIES…
Mark/cut/sew to complete sample garment by hand …
NO. OF HOURS PER WEEK
40

15. WORK EXPERIENCE

b. NAME AND ADDRESS OF EMPLOYER
[redacted]Los Angeles CA 90014
NAME OF JOB
Garment Sample maker
DATE STARTED
Month – 06 [June] Year – 94 [1994]
DATE LEFT
Month – 08 [August] – 96 [1996]
KIND OF BUSINESS
Manufacturing
DESCRIBE IN DETAIL DUTIES…
Mark/cut/sew to complete sample garment by hand ….
NO. OF HOURS PER WEEK
40

In this case an employment verification statement was submitted by the petitioner to prove the beneficiary's work experience as a garment sample maker.[8]

As already stated, in a statement dated August 23, 2004, from the petitioner stated that a letter of experience was enclosed. That letter is from the [redacted] located in Los Angeles and it is dated February 17, 1997. It is on computer-generated letterhead and it does state a telephone number. It is signed by [redacted]s without indication of the signer's title or position within that company. It stated simply that the beneficiary known as [redacted] was employed there "…in the capacity of garment sample maker from 6-90 to 08-92 as a full time employee."

[8] The petitioner submitted approximately 76 photos of the business premises into evidence as found in the record of proceeding. The beneficiary is not identified in any photo.

As is set forth above the commencement and end dates of employment differ by four years. This letter is does not bear a title of anyone in the company, and, it does not describe the training or duty responsibilities. It is not notarized, and according to the director, the employer could not be contacted for verification.

The problem that arises in this case is the multiple inconsistencies in information provided by the beneficiary, and, the lack of credible evidence of the occupation from a prior employer. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) 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." *Matter of Ho*, 19 I&N Dec. at 591-592 also 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."

The AAO concurs with the director's determination that no probative evidence establishes that the beneficiary has two years of experience as garment sample maker. No trainer's or employer's affidavit, document, letter, or pay stub contained in the record of proceeding establishes conclusively that the beneficiary was employed for two years in an employment capacity with duties similar to the duties of the proffered position. There is no support letter inn the record of proceedings from the petitioner to satisfy this requirement.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The petitioner has not met that burden.

**ORDER**: The petition is dismissed.