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U.S. Citizenship and Immigration Services

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[redacted]

FEB 20 2004

FILE: WAC 99 235 52013 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: 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]

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 manufacturer of solar optics. It seeks to employ the beneficiary permanently in the United States as a precision lens centerer and edger. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 not available in the United States.

Eligibility in this matter hinges on whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is January 27, 1997.

The petitioner initially submitted insufficient evidence to establish two (2) years of the beneficiary's experience in the job offered. In a request for evidence (RFE), dated November 18, 2000, the director required a letter from the prior employer to establish experience. The RFE exacted it on the employer's letterhead with the capacity of the writer and, also, the verification of the beneficiary's title, duties, dates of employment, and number of hours worked per week.

Counsel submitted, in response to the RFE, the letter of Electronica Duty Free, S.A. de C.V. (EDF1), dated December 18, 1996. It stated:

> "This letter is to verify that [the beneficiary] worked for this company from 1989 to 1990 in the Optical Department. His duties were to cut and frame lenses. While his employment here [sic] he was very responsible, educated and correct in all his work."

The director observed that the letter did not state the writer's capacity, determined that it did not verify beginning and ending dates, or two (2) years, of employment, concluded that the evidence did not establish two (2) years of experience in the job offered, as required by Form ETA 750, and denied the petition.

The appeal, received June 7, 2001, stated:

> The brief and additional evidence will be submitted within 30 days which demonstrates beneficiaries [sic] qualifications as a skilled worker. The letter dated December 20, 2000 [sic] is currently being amended with specific beginning and ending dates. Additional evidence of experience will also be provided showing that the beneficiary posses [sic] the minimum requirement of two years experience in the position.

The AAO dismissed the appeal on September 19, 2002 because the record contained no further brief or evidence. Counsel countered with a motion to reopen (MTR), received October 15, 2002. It contained a supplement to brief (appeal brief) and pertinent exhibits with confirmation that counsel had previously mailed them on July 5, 2001.

The evidence does not comply with the terms that the RFE exacted. One exhibit was a second letter of EDF (EDF2), dated July 2, 2001. The general manager executed it, but provided dates in general terms "from January 1989 to November to [sic in translation] 1990." In any event, EDF2 still lacked specific beginning and ending

dates. The petitioner gives no account of why EDF2 was not available in response to the RFE. In addition, a letter of Optica Islas (OI) claims employment of the beneficiary from January 2, 1988 to December 31, 1988 as a full time lens cutter and frame fitter. The original and translation do not agree on the capacity of the writer. The Spanish original peculiarly refers to the general manager as *gerente de personal.* The OI letter does not describe the beneficiary's duties.

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.

The OI letter claims that the beneficiary began work with it when he was just 17 years old. The Immigrant Petition for Alien Worker (I-140) omits data for the beneficiary's entry to the United States. Form ETA 750, Part B, item 11, is blank for dates of attendance at school, including trade or vocational training facilities. The record does not establish that the beneficiary could have worked full time at the dates OI alleges.

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.

Regulations in 8 C.F.R. § 103.2 (b) state in part:

> *Evidence and processing* – (1) *General.* An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instruction on the form. Any evidence submitted is considered part of the relating application or petition.

When additional evidence is requested, 8 C.F.R. § 103.2(b)(8) prescribes:

> In such cases, the applicant or petitioner shall be given 12 weeks to respond to a request for evidence. Additional time may not be granted. Within this period the applicant or petitioner may:
>
> Submit all the requested initial or additional evidence;
>
> Submit some or none of the requested additional evidence; or
>
> Withdraw the application or petition.

The RFE specifically exacted the beginning and ending dates and the description of duties for experience, but the petitioner provided only EDF1 in the time to respond. EDF1, EDF2, and OI, taken together, prove no period of two (2) years for which the writer has given the beginning and ending dates of employment and a description of the duties. Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before Citizenship and Immigration Services (CIS), formerly the Service or INS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

Provisions of 8 C.F.R. § 103.2(b) mandate that:

> (13) *Effect of failure to respond to a request for evidence or appearance.* If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form ETA 750, block 14, indicated that the position of precision lens centerer and edger required two (2) years of experience in the job offered. The petitioner has not established that the beneficiary had such experience. Therefore, the petitioner has not overcome this portion of the director's decision.

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.