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U.S. Department of Homeland Security

Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass. 3/F
425 I Street N.W.
Washington, D.C. 20536

[redacted]

B6

MAR 17 2004

File: WAC 02 223 50244 Office: California Service Center Date:

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]

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

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 sustained.

The petitioner is a construction firm. It seeks to employ the beneficiary permanently in the United States as an administrative analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL), accompanies the petition. The director determined that the beneficiary did not have the required two years experience as required by the labor certification.

On appeal, counsel argues that the beneficiary meets the educational and experience requirements specified as of the date of the filing of the ETA 750.

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.

Furthermore, 8 CFR 204.5(l)(3)(ii) states, in pertinent part:

> (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.

Eligibility in this matter hinges upon whether the beneficiary has the requisite two years experience as of the petitioner'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 petitioner's priority date in this instance is October 22, 1999.

With the petition counsel submitted an ETA 750 indicating that the proffered position required a bachelor's degree, a copy of the beneficiary's bachelor's degree from the University of Oklahoma, a statement from a previous employer showing she had worked as an administrative analyst from September 1991 to December 1992, and a statement from petitioner stating the beneficiary had worked for it from 1997 to present.

In a request for evidence (RFE) dated October 24, 2002, the director requested evidence that the beneficiary possessed the experience listed on the Form ETA 750 and proof that the beneficiary had been working for the company from 1997 to present. In response, counsel submitted another letter from the same previous employer indicating this time that the beneficiary was employed from September 1990 to December 1992. Counsel also submitted copies of the beneficiary's W-2, Wage and Tax Statements, for 1999, 2000 and 2001 showing the wages the petitioner paid the beneficiary during the relevant years.

The director determined that the beneficiary did not meet the experience requirement of the labor certification because the experience gained must occur after the attainment of the bachelor's degree. He further determined that the evidence submitted by the previous employer was contradictory because the initial statement indicated the beneficiary began working in 1991 while the later statement indicates that she began working in 1990.

There is nothing in the statute or regulation that requires the requisite experience to be acquired after the bachelor's degree. The director's determination to the contrary is without basis. The beneficiary's experience, both before and after attaining a bachelor's degree is acceptable for purposes of § 203(b)(3)(A)(i) of the Act.

It is noted, however, that the statements submitted by the beneficiary's previous employer disagree with each other regarding the tenure of her employment. On appeal, counsel asserts that the second letter reflected a typographical error, and the date the beneficiary began her employment was 1991. Counsel does not include an explanation of this error from the prior employer. Assertions by 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). It is the petitioner's responsibility 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 actually lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592.

Nonetheless, the evidence reflects that the beneficiary began working for the petitioner as an administrative analyst in February 1997 and continued through the date of the filing of the ETA 750 in October 1999. The petitioner has therefore established that the beneficiary had the experience required by the labor certification as of the priority date.

Upon review, it is determined that the petitioner has provided sufficient evidence to overcome the findings of the district director in his decision to deny the petition. The petitioner has established eligibility pursuant to § 203(b)(3)(A)(i) of the Act and the petition will be sustained.

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 met that burden.

ORDER: The appeal is sustained.