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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC-02-168-50124 Office: VERMONT SERVICE CENTER Date: MAR 22 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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.

Helen E Crawford for
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a garments manufacturer. It seeks to employ the beneficiary permanently in the United States as a sample maker. 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.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered 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 November 19, 1999. The beneficiary's salary as stated on the labor certification is $17.88 per hour or $37,190.40 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated July 27, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage. The RFE included the statement, "Submit additional evidence to establish that the employer had the ability to pay the proffered salary of $37,190.40 as of November 19, 1999, the date of filing and continuing to the present."

In response to the RFE counsel submitted a letter dated August 16, 2002 accompanied by copies of the petitioner's Form 1120 U.S. corporate income tax return for 1999, including Schedule L, and the petitioner's New York State corporate tax return for 1999 with other attached New York State tax forms.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date. The director also found that because of an inconsistency in dates on documents pertaining to the beneficiary's work experience abroad and date of arrival in the United States the evidence did not establish that the beneficiary possessed the experience required for the job. The director therefore denied the petition.

On appeal, counsel submits no brief, but submits additional evidence pertaining to both of the issues cited by the director as grounds for denying the petition.

The AAO will first consider the decision of the director, based on the evidence submitted prior to the director's decision. The AAO will then consider the evidence newly submitted on appeal.

The petitioner's Form 1120 U.S. corporate tax return for 1999 shows taxable income before the net operating loss deduction and special deductions as -$2,251. The director correctly found that because of this loss, the petitioner's income failed to establish its ability to pay the proffered wage in 1999. The Schedule L for 1999 shows total current assets of $10,000 and total current liabilities of zero, yielding net current assets of $10,000. The director also correctly found that the petitioner's net current assets were insufficient to establish its ability to pay the proffered wage at the time of filing.

The director's finding that the petitioner's evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date is a sufficient ground for denying the petition. The director did not mention in his decision the petitioner's ability to pay the proffered wage for the period after the priority date and continuing to the present. The AAO notes that despite the explicit statement by the director in the RFE of the need for evidence on that issue for the date of filing and "continuing to the present" the petitioner submitted evidence only for the year 1999, the year of the priority date. As of the July 27, 2002 date of the RFE, tax and other financial information for the years 2000 and 2001 should have been available to the petitioner. Counsel has offered no explanation for the absence of evidence of the petitioner's ability to pay the proffered wage during 2000 and 2001.

With regard to the beneficiary's qualifications, a letter dated January 31, 2002 from a firm Sastreria El Elegante, S.A.C., of Quito, Ecuador, states that the beneficiary was employed by that firm from April 1986 until September 1989. The ETA 750 also states that the beneficiary was employed by that same firm during that same time period. The Form I-140, however, states the beneficiary's date of arrival in the United States as "---88." The I-140 form asks for the month, day and year of arrival. The petitioner offers no explanation for the absence of information on the month and day of the petitioner's arrival. The director noted the inconsistency between the beneficiary's claimed work experience until September 1989 and the stated year of the beneficiary's arrival of 1988. The director found that because of this inconsistency the letter from Sastreria El Elegante was not a credible document. Therefore the director found that the record lacked credible evidence that the beneficiary had two years of experience as a sample maker as required by the job offer. The director's analysis of the evidence in the record before him was correct.

On appeal counsel submits additional evidence, all of which is submitted for the first time on appeal. The evidence consists of the following: a letter from the president of the petitioner stating that the beneficiary will be replacing two part-time workers; copies of W-2 forms for 1999 for the two employees who the president states will be replaced; and an affidavit from the beneficiary stating that he entered the United States in November 1989.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

> Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

Matter of Soriano, 19 I & N Dec. 764 (BIA 1988).

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage and to the beneficiary's experience. The petitioner was put on notice of the need for evidence on these issues by regulations which specifically address each issue.

Concerning the ability of the petitioner to pay the proffered wage the applicable regulation is quoted on page two above 8 C.F.R. § 204.5(g)(2).

Concerning the experience of the beneficiary the regulation at 8 C.F.R. § 204.5(g)(1) states:

> *(g) Initial evidence -- (1) General.*
>
> . . .
>
> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

In addition to the regulations, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the Administrative Appeals Office and its predecessor agencies, including *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Moreover, in the instant case, the petitioner was put on notice by the director in the RFE dated July 27, 2002 that the evidence which it submitted with its I-140 petition was insufficient concerning the petitioner's ability to pay the proffered wage.

The RFE did not mention any of the newly-submitted documents by name or category. But the director would have had no way of knowing of the existence or the relevance of specific documents prior to receiving them as evidentiary submissions. Therefore the fact that the RFE did not mention by name certain documents or types of documents, such as W-2 forms for employees who were to be replaced by the beneficiary, does not relieve the petitioner from its burden of proving its case before the director. The RFE was sufficiently detailed to put the petitioner on notice of the types of evidence needed.

The petitioner therefore was given reasonable notice by regulation, by case law, and by the RFE in the instant case of the need for evidence concerning the petitioner's ability to pay the proffered wage and concerning the beneficiary's experience.

The AAO finds that the newly-submitted evidence pertaining to the petitioner's ability to pay the proffered wage is precluded from consideration on appeal by *Matter of Soriano, supra.* Therefore the letter from the president of the petitioner stating that the beneficiary will be replacing two part-time workers and the copies of W-2 forms for 1999 for the two employees who the president stated will be replaced will not be considered for any purpose on appeal. With regard to the newly-submitted evidence pertaining to the beneficiary's qualifications, however, the AAO finds that this evidence is not precluded from consideration on appeal by *Matter of Soriano, supra.* The only notice given by the director to the petitioner concerning the inconsistency in dates noted by the director was in the decision itself. Therefore the AAO finds that evidence specifically addressing this inconsistency is not precluded from consideration on appeal.

The newly-submitted evidence on the beneficiary's qualifications consists of an affidavit from the beneficiary in which he states that he entered the United States in the month of November 1989. This affidavit is offered to correct what counsel in the notice of appeal describes as a typing error on the ETA 750B. 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). Moreover, the inconsistency cited by the director did not involve the ETA 750B, but rather the I-140 petition, where the date of the beneficiary's arrival in the United States is stated as "---88."

The record lacks any evidence that the error on the Form I-140 was due to a typing error and lacks any other explanation for the 1988 year which is stated as the beneficiary's year of arrival in the United States. The I-140 was not signed by the beneficiary, but it was submitted well after the November 20, 2001 date of a G-28 entry of appearance by counsel on behalf of the beneficiary, a form which was signed by the beneficiary. A separate Form G-28 also dated November 20, 2001 shows an entry of appearance by counsel on behalf of the petitioner, a form which was signed by the president of the petitioner. Therefore it must be presumed that the petitioner and counsel had full access to the beneficiary at the time the I-140 petition was prepared. The AAO therefore finds that the affidavit of the beneficiary, which lacks any explanation for the inconsistent date of arrival information appearing on the I-140 petition, is insufficient to resolve the credibility concerns raised by the director about the letter from the firm Sastreria El Elegante of Quito, Ecuador stating that the beneficiary worked with that firm from April 1986 until September 1989.

For the foregoing reasons, the evidence submitted on appeal fails to overcome the decision of the director.

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.