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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 99 142 50814 Office: VERMONT SERVICE CENTER Date: 11 APR 2002

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Petition to Classify Preference Status of Alien on Basis of Occupation Pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)(A)(iii)

IN BEHALF OF PETITIONER:

[redacted]

Public Copy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which 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 which 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 the Service 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 which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Helen E Crawford for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Associate Commissioner, Examinations. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted, the previous decisions of the director and the Associate Commissioner will be affirmed and the petition will be denied.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that the beneficiary had met the petitioner's qualifications for the position as stated in the labor certification at the time of the filing date. The Associate Commissioner affirmed this determination on appeal.

On motion, counsel submits a brief.

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.

Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

A labor certification is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's filing date. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is November 20, 1995.

The Application for Alien Employment Certification (Form ETA 750) indicated that the position of cook required two years of experience in the job offered.

The Associate Commissioner affirmed the director's decision to deny the petition, noting that the petitioner had not established that the beneficiary had the required two years of experience.

On motion, counsel argues that:

The Administrative Appeals Office (AAO) denied the petition stating:

> **As the record does not contain an employment history from the beneficiary's previous employer, Luigi's Restaurant, it cannot be determined if the beneficiary had two years of experience in the job offered as of filing date of the petition. Consequently, the petition may not be approved.**
>
> The ETA 750 Part B is part of the record. A copy of the ETA750 Part A & B is attached.
>
> Moreover, in order for the U.S. Department of Labor to certify the ETA 750 Parts A & B, a job requiring two (2) years experience, [the beneficiary] had to show he had at least two (2) years experience, which he did.
>
> The requirement of the two (2) years experience was already proven and accepted by the US DOL.

Although the advisory opinions of other Government agencies are given considerable weight, the Service has authority to make the final decision about a beneficiary's eligibility for occupational preference classification. The Department of Labor is responsible for decisions about the availability of United States workers and the effect of a prospective employee's employment on wages and working conditions. The Department of Labor's decisions concerning these factors, however, do not limit the Service's authority regarding eligibility for occupational preference classification. Therefore, the issuance of a labor certification does not necessarily mean a visa petition will be approved.

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 sustained that burden.

ORDER: The Associate Commissioner's decision of May 9, 2001, is affirmed. The petition is denied.