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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 02 008 52476 Office: VERMONT SERVICE CENTER Date: JAN 24 2003

IN RE: Petitioner: [redacted]

Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN 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 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

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 Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

The director determined that the petitioner had not established that the beneficiary met the petitioner's qualifications for the position as stated in the labor certification. The director requested additional evidence on November 19, 2001. The petitioner provided evidence as to the ability to pay the proffered wage, namely, the 2000 Form 1120S Income Tax Return for an S Corporation of Sesame Inn South Corp. No evidence, however, was submitted to establish that the beneficiary met the qualifications as stated on the labor certification.

After the request for evidence, the director took issue only with whether the beneficiary met the petitioner's qualifications for the position as of the priority date, April 27, 2001.

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.

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 priority date. Matter of Wing's Tea House, 16 I & N Dec. 158 (Act. Reg. Comm. 1977).

The Application for Alien Employment Certification (Form ETA 750) indicated that the position of Chinese cook required two (2) years of experience with an authentic Szechuan/Hunan restaurant preparing authentic Szechuan/Hunan dishes.

The director requested evidence of qualifying employment and

training in the form of letters from current or former employers or trainers. Counsel responded that the beneficiary relied on his previous employment experience without reference to that with the petitioner and produced no further evidence of experience. The director denied the petition.

On appeal, counsel's brief offers the menu of Hong Kong Chinese Express in Monroeville, Pennsylvania, its Articles of Incorporation naming the beneficiary as an incorporator, and its business licenses for 1994-1997, inclusive, said to verify his employment at the restaurant.

On appeal, counsel argues that:

> Counsel's records reflect that information establishing the Beneficiary's required experience (2 years as a Chinese cook) was submitted to the INS with the original I-140 filing. Therefore, the information was not subsequently provided to the INS pursuant to it's [sic] request of November 19, 2001. As a result, the INS has denied the I-140 petition filed on behalf of the Beneficiary by Sesame Inn North Corp. t/d/b/a Sesame Inn Chinese Restaurant. The basis of the appeal herein is to provide the INS with the requested information.
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> As noted on the ETA750B, the beneficiary has had extensive experience as a Chinese Cook. Several years of that experience resulted from the beneficiary's own Chinese restaurant business, Hong Kong Chinese Express, wherein he served as the manager. His duties and responsibilities included: managing and supervising the general operations of the authentic Szechuan/Hunan restaurant including preparation of authentic Szechuan/Hunan recipes and dishes and attending and serving in the restaurant.

Counsel's argument is not persuasive. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I 7 N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I & N Dec.503, 506 (BIA1980). The menu mentions some Hunan and Szechuan dishes incidental to a Hong Kong Chinese express, identified as an "eat in & take out" operation. The Articles of Incorporation and business licenses do not strengthen the beneficiary's experience in authentic Szechuan and Hunan specialty dishes of an authentic Szechuan and Hunan restaurant.

The submissions on appeal still did not satisfy the request for evidence of the beneficiary's qualifying training and experience.

In particular, the evidence leaves open to question whether the beneficiary was a Szechuan and Hunan specialty cook in a restaurant setting for the requisite two years. See Elatos Restaurant Corp. v. Sava, 632 F. Supp. 1049, 1055 (S.D.N..Y. 1985). The petitioner bears the burden of establishing the eligibility in terms of the minimum requirements to perform the job. *Ibid.*, at 1053.

The beneficiary did not establish that he met all of the requirements stated by the petitioner in blocks #14 and 15 of the labor certification as of the priority date. Therefore, the petitioner has not overcome this portion of the director's decision.

Beyond the director's decision, doubt remains of the petitioner's ability to pay the proffered wage. The petitioner's 1999 federal tax return admittedly did not show it, as the ordinary income of $15,654 did not establish the ability to pay the proffered wage of $23,000 a year. Counsel offered a 2000 federal income tax return from a third party, whose name, address, and employer identification number differ from the petitioner's. It fails to establish the petitioner's ability to pay.

The corporation is a separate and distinct legal entity from its owners or stockholders. Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See Matter of M, 8 I & N Dec. 24 (BIA 1958), Matter of Aphrodite Investments, Ltd., 17 I & N Dec. 530 (Comm. 1980), and Matter of Tessel, 17 I & N Dec. 631 (Act. Assoc. Comm. 1980).

Finally, counsel claims to file the appeal on behalf of the beneficiary. Only the petitioner may authorize counsel to appear. 8 CFR 292.4(a). The petitioner executed the prescribed form initially. Hence, the petitioner and counsel will receive notice of the decision on appeal. 8 CFR 292.5(a).

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.