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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

[redacted]

File: WAC 01 278 51146 Office: California Service Center Date: NOV 0 3 2003

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 the 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 on appeal. The appeal will be sustained.

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 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 minimum requirements for the job as of the date the request for labor certification was filed, and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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(l)(3)(ii) states in pertinent part:

> (ii) *Other documentation* -- (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (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.... The minimum requirements for this classification are at least two years of training or experience.

The Application for Alien Employment Certification (Form ETA 750), filed with the Department of Labor on April 9, 2001, indicates that the minimum requirement to perform the job duties of the proffered position is two years of experience in the job offered.

The petitioner must demonstrate that the beneficiary meets the requirements of experience or training 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

On initial submission of the petition, the petitioner furnished a letter, dated August 9, 2001, in which he states that the beneficiary "was employed as a cook of Korean dishes at this restaurant from May, 1998 to the present.

The director found the letter from the petitioner to be unsatisfactory, and on January 8, 2002, requested additional proof of the beneficiary's employment history to include pay statements or Forms W-2.

The petitioner responded to the director's request with another letter, dated February 15, 2002, in which he reiterated the information supplied in the earlier letter, and added:

> During her employment with our restaurant, Ms. [redacted] was never issued a Social Security number. Consequently, our restaurant was unable to issue pay statements or W-2 forms to Ms. [redacted] during the course of her employment. Instead, our restaurant renumerated Ms. [redacted] solely on a cash basis for her work since the beginning of her employment in May 1998.

The director acknowledged the written statements of the petition, but found that neither the petitioner nor the beneficiary could supply any documentation "to show that the beneficiary has the required minimum of two year (sic) experience as required by the ETA-750." The director also commented that the petitioner had violated immigration laws by employing an undocumented alien, and perhaps state and federal laws because of the method of payment.

The documentation submitted by the petitioner, on initial submission and pursuant to the director's request, to establish the qualifications of experience of the beneficiary meets the requirements of the regulation. The petitioner's explanation of why he could not furnish the additional documentation requested by the director is plausible. The director's decision to deny the petitioner is without foundation in law or regulation. There is no law, precedent case law, or policy of CIS which precludes experience gained in the United States in an unauthorized capacity from satisfying the experience requirements of a labor certification, and said alien from qualifying for status as an

employment-based immigrant.

If the director had reason to suspect the authenticity of the employment verification provided by the petitioner, he should have referred the case for interview and/or investigation. Illegal employment of a beneficiary by a petitioner is germane to section 274A of the Act, and not to these proceedings. The director's statement about possible violation of state and federal laws is inappropriate to these proceedings.

Accordingly, after a review of the evidence of record, it is concluded that the petitioner has established that the beneficiary had the requisite experience as of the priority date.

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 sustained, and the petition is approved.