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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship and Immigration Services



BP

FILE: [Redacted]

Office: NEBRASKA SERVICE CENTER

Date: JUL 29 2004

LIN 02 200 52060

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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: SELF-REPRESENTED

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.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The petition will be remanded to the director to request additional evidence and for entry of a new decision.

The petitioner sought to classify the beneficiary as an employment based immigrant on the Immigrant Petition for Alien Worker (I-140) pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker or professional. The petitioner is a donut shop and bakery. It sought to employ the beneficiary permanently in the United States as a specialty baker and manager. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor (DOL). The director determined that the petitioner had failed to establish that the beneficiary possessed the necessary qualifications required by the terms of the approved labor certification and denied the petition.

On appeal, the petitioner asserts that the DOL had previously approved the requisite corrections to the approved labor certification in order to conform to the position's actual requirements.

Section 203(b)(3)(A)(i) of 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, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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) also 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 [Citizenship and Immigration Services (CIS)].

Eligibility for approval in this case is based, in part, on the petitioner's ability to establish that the alien beneficiary possesses the required education, training, and employment experience specified on the labor certification as of the petition's priority date. The petitioner must also demonstrate it has had the continuing ability to pay the proffered wage as of the priority date. The filing date or priority date of the petition is the initial receipt of Form ETA 750 by any office within the DOL's employment service system. 8 C.F.R. 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is December 16, 1999. The visa petition, filed June 3, 2002, indicates that the petitioner was established in 1966 and has twelve employees. The proffered wage set forth on labor certification is \$12.00 per hour, which equals \$24,960 per year, based on a 40-hour week.

The determination of whether a position should be classified on the Immigrant Petition for Alien Worker (I-140) as one for a skilled worker or professional, or one for any other worker (requiring less than two years training and/or experience), is governed by the description of the occupation, including the required training, education, or experience, set forth by the terms of the ETA-750A.

In this case, the specific qualifications for a specialty baker and manager position are found in item 14 of the ETA-750A. A successful applicant for the job must have completed 8 years of grade school, 4 years of high school, and 4 years of college resulting in an undergraduate bachelor's degree in economics with a major in business management.

Item 14 also shows that 2 years of training in baking is required. Finally, in what appears to be an approved DOL correction, item 14 requires 1 year of experience in the job offered of specialty baker and manager. This correction is initialed as having been approved by DOL regional office on May 6, 2002.

Item 15 provides for other special qualifications. In this case, item 15 shows that the petitioner requires that an applicant have "advanced skill in the production of specialty pastry & special order baking (custom production)."

The record indicates that because the petitioner initially submitted insufficient evidence of the beneficiary's education, training, or experience, on August 14, 2002, the director requested the petitioner to submit additional evidence establishing that the beneficiary possesses the necessary credentials required on the labor certification. The director requested the petitioner to provide evidence that the beneficiary had completed 4 years of college culminating in a degree in economics with a major in business management. The director advised the petitioner that the beneficiary had indicated on Part B of the ETA 750 that he had received a Bachelor of Arts degree from St. Kliment Orthodoxki College in June 1998. The director requested the petitioner to provide an academic equivalency evaluation of the beneficiary's educational credentials at this institution. The director further instructed the petitioner to submit evidence that the beneficiary had completed 2 years of training in baking before December 16, 1999.

In response, the petitioner's owner submitted a letter, dated October 24, 2002, describing his communications with the Michigan employment service agency whereby it had advised him that requiring 16 years of education exceeded the educational requirements for the job of specialty baker and manager. He was instructed to amend the ETA-750A to reflect a 12 year educational requirement. The owner claimed that he amended the ETA-750A

as well as the recruitment advertisement. The petitioner's owner also described his misunderstanding with the beneficiary in obtaining his educational history, resulting in the petitioner mischaracterizing the beneficiary's college attendance and achievements on Part B of the ETA 750. The owner relates that the beneficiary did not obtain a degree but attended college at two different institutions in Macedonia. He includes copies of the beneficiary's college records for informational purposes. They confirm that the beneficiary does not possess a college degree in economics.

Along with these disclosures and college records, the petitioner submitted letters from two of the beneficiary's past employers in Macedonia. Both describe his experience in bakery and restaurant management in Macedonia. Finally, the petitioner's owner provided a copy of a letter from the manager of the Michigan labor certification unit, dated January 23, 2002, relating that it had completed processing of the labor certification and was forwarding the application to the certifying officer in Chicago.

The director found that the approved labor certification had not been corrected to show 12 years of education required for the position, but still revealed that a college degree remained a requirement described in item 14 of the ETA-750A. The director observed that the only DOL approved correction on the ETA-750A was to the amount of experience required for the position of specialty baker and manager. Since it was clear that the beneficiary did not possess a college degree as set forth within the terms of the approved labor certification, the director denied the petition.

The petitioner filed an appeal on January 9, 2003, asserting that the labor certification had been amended by DOL and advising that further confirmation could be obtained from Mrs. Chris Gonzales at a stated telephone number. The petitioner's owner attaches another explanation of his communications with DOL regarding the amendments that he alleges were made to the ETA-750A and attaches a copy of the revised newspaper advertisement for the position. It reflects that the petitioner advertised for applicants for a "specialty baker/manager" position with "12 years of education" and "1 yr exp. in specialty baking."

The record also contains a memo to the file, dated January 30, 2003, from an adjudications officer at the Nebraska Service Center. She confirms that she spoke with [REDACTED] at the Chicago DOL office regarding the alleged amendment to the approved labor certification, reducing the position's academic requirement to 12 years of education. [REDACTED] apparently told her that her office had no record to support the change in the requirement.

Ordinarily, CIS must look to the labor certification to determine the qualifications for the position. It may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In view of the somewhat unusual facts presented in this case, however, and pursuant to the authority granted by section 204(b) of the Act, 8 U.S.C. § 1154(b), to investigate the facts in cases under section 203(b)(3) of the Act and to consult with the Secretary of Labor, this office also contacted Ms. Marie C. Gonzalez by telephone and by

e-mail.¹ Because the record no longer appeared in their database, ██████████ sought additional information from the local Michigan employment service agency and ascertained that two deficiency notices were sent to the petitioner requesting amendments to the labor certification. They requested a correction to item 14 to reflect 12 years of education and 1 year of experience. ██████████ confirms that "this combination of education and work experience would be the most that could be required of the Alien/U.S. worker based on the [specific vocational preparation] identified above." ██████████ states that "the employer did amend his application to reflect 1 year of experience in the job offer. However, still remaining in Item 14 was the educational requirement of a Bachelor's Degree and 'added' was the requirement of 2 years of training in baking."

██████████ concluded that the analyst simply mistakenly approved the labor certification without the necessary corrections. She expressed a willingness to consider a post-certification amendment by her office² because the U.S. recruitment was accomplished with the correct requirements (12 years of education and 1 year of experience). She asked if it were possible to request the original labor certification temporarily to complete this process.

In view of the DOL oversight in approving the ETA-750A with incorrect educational and training requirements, the director's decision will be withdrawn and the case will be remanded to allow this post-certification amendment of the original labor certification to take place if the petitioner wishes to pursue this remedy in consultation with the director. As the resulting corrections to the terms of the ETA-750A will mean that the beneficiary's visa classification on the I-140 must be adjudicated as an "other worker," requiring less than two years of training and/or experience, pursuant to section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. 203(b)(3)(A)(iii), the director is directed to treat the petitioner's request for such an amendment to the I-140 favorably.

Beyond the decision of the director, it is noted that the record contains no financial documentation of the petitioner's ability to pay the proffered annual wage of \$24,960 beginning as of the priority date of December 16, 1999 and continuing until the present, other than a copy of the petitioner's 2001 corporate tax return. It indicates that the petitioner uses a standard calendar year to file its taxes.³ The director failed to address this aspect of the petition in the request for additional evidence from the petitioner or his final decision.

Therefore, in view of the foregoing, the director's decision is withdrawn. The petition is remanded to the director consistent with the above, in requesting further evidence from the petitioner, pursuant to 8 C.F.R. § 204.5(g)(2), relating to its ability to pay the proffered wage, and in facilitating a DOL post-certification correction to the ETA-750A, that the petitioner may want to pursue. The director may request any additional evidence deemed necessary. Similarly, the petitioner may also provide any further pertinent evidence within a reasonable time to be determined by the director. Upon receipt of all evidence, the director will review the

¹ Copies of the May 2004 e-mail have been placed in the file.

² DOL policy generally bars amendments of the approved labor certification except to correct mistakes made by the certifying officers, e.g., in spelling of the employer or alien's name. The only amendment to the substantive elements that may be made by a certifying officer is where the amendment was approved prior to the issuance of certification. See DOL Field Memorandum No. 47-92, dated May 7, 1992, published in 57 Fed. Reg. 31219 (1992).

³ Neither the petitioner's net income of \$10,330, nor its reported net current assets of \$20,903, shown on the attached Schedule L, appears to be sufficient to cover the proffered wage.

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record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.