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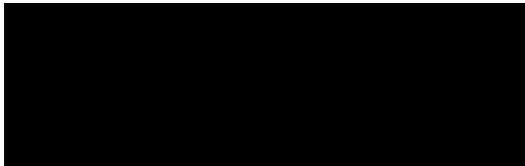
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FILE: WAC 02 285 50448 Office: CALIFORNIA SERVICE CENTER Date: APR 01 2005

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:



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, 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 (AAO) on appeal. The petition will be remanded to the director for further investigation and entry of a new decision.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had failed to establish that the beneficiary had the requisite four years of experience as required by the offered position.

On appeal, counsel submits additional evidence and asserts that it establishes the beneficiary's eligibility for the position offered.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), 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 nature, for which qualified workers are not available in the United States.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 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 March 30, 2000.

The visa petition, filed September 23, 2002, indicates that the petitioner was established in 1993 and currently employs seven workers. On Part B of the ETA 750, originally signed by the beneficiary on March 20, 2000 and subsequently amended by the beneficiary in May 2000, the beneficiary claims to have worked 40 hours per week for the petitioner from April 1995 until March 1997. The beneficiary also states that he worked for "Restaurant Karina" in Pico Rivera, California from May 1995 until December 1999. From January 2000 until the present, he states that he has been employed at the "Paramount Swap Meet."

As noted on Part A, item 14 of the approved labor certification (ETA-750), the beneficiary must have four years of experience in the job offered as a cook.

The regulation at 8 C.F.R. § 204.5(g)(1) provides that "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.

The regulation at 8 C.F.R. § 204.5(l)(3) also provides in relevant 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.

With the petition, the petitioner initially submitted no documentation from previous employers corroborating his experience as a cook.

The director requested additional evidence from the petitioner on March 28, 2003. The director instructed the petitioner to submit evidence verifying the beneficiary's qualifying prior experience as specified on the ETA 750A. The director advised the petitioner that the evidence of prior experience should be provided on the employer's letterhead, showing the title and name of the author, as well as the beneficiary's job title, duties, dates of employment and hours worked per week.

In response, the petitioner provided a copy of a letter, dated May 2, 2003, from Eugenio Osoria Palomera, the owner of "El Herradero," a restaurant located in Talpa de Allende, Jalisco, Mexico. The English translation states that the beneficiary worked for [REDACTED] as a cook from February 2nd until March 20, 1995. The Spanish version of the letter, however, states that the beneficiary worked from February 2, 1992 until March 20, 1995.

In denying the petition on June 4, 2003, the director concluded that the petitioner had not established that the beneficiary possesses the requisite four years of experience in the job offered. The director determined that the letter from Mr. Palomera showed only that the beneficiary had worked as a cook for a period of three years and a little more than a month and that he had not met the minimum requirements of four years of relevant experience as set forth in the approved labor certification.

On appeal, counsel submits a copy of a letter from Ramon Garibay Bravo, owner of "Restaurante La Huerta," in Talpa de Allende, Jalisco, Mexico, dated June 27, 2003. Mr. Bravo claims that the beneficiary worked as a cook at his restaurant from February 10, 1990 until January 15, 1992 an average of 60 hours per week. Counsel also resubmits Mr. Palomera's letter with a corrected translation, as well as an affidavit from the beneficiary. The beneficiary states that Karina's Restaurant in Pico Rivera, California refused to give him a letter, but that he was employed there for four years from May 1995 until December 1999, "working 40 hours per week."

Counsel asserts on appeal that these letters establish that the beneficiary possesses the requisite four years of experience as a cook. As a letter verifying the beneficiary's experience could not be obtained from Karina's Restaurant, another letter from Mexico was solicited.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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).

It is incumbent upon the petitioner to establish that the beneficiary obtained the requisite experience as of the visa priority date of March 30, 2000. As noted above, the letters from Mr. Palomera and Mr. Bravo appear to confirm that the beneficiary accrued over four years of experience as a cook prior to the visa priority date.

The director's decision did not explicitly address the petitioner's continuing financial ability to pay the proffered salary. As the AAO reviews appeals on a *de novo* basis, it is noted the evidence contained in the underlying record does not fully establish the petitioner's continuing ability to pay the certified salary. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

This case will be remanded to further investigate and clarify the petitioner's continuing ability to pay the beneficiary's proffered wage pursuant to the requirements set forth in 8 C.F.R. § 204.5(g)(2). The beneficiary's proposed wage offer is \$11.62 per hour, which amounts to \$24,169.60 per year. The petitioner must establish the ability to pay this proposed wage as of the visa priority date and continuing until the beneficiary obtains lawful permanent resident status. A brief review of CIS electronic records shows that the petitioner may have filed at least eighteen other preference petitions since 2001. They have been filed under the various names including "El Atacor Mexican Restaurant 2," "El Atacor Mexican Restaurant 4," "El Atacor Mexican Restaurant 3," "El Atacor Mexican Restaurant 6," "El Atacor Mexican Restaurant 9," "El Atacor Mexican Restaurant 10," "El Atacor Mexican Restaurant 11," "El Atacor Restaurant 2," "El Atacor Restaurant 9," and "El Atacor Mexican Restaurant." "Taqueria El Atacor" 2, 3, 4, 6, 7, and 10 are also variously listed on the individual and partnership tax returns in the record of the instant case as sole proprietorships or partnerships.

Although the petitioner's tax returns show substantial adjusted gross income, the director should ensure that it represents a sufficient level to pay the proposed wage of the beneficiary beginning at his individual priority date measured against other alien beneficiaries with relevant consideration for the petitioner's individual living expenses, if a sole proprietorship is involved. If the petitioner is basing its ability to pay on the same financial information, it must establish that it has the ability to pay the proffered wage for each alien. Further investigation and inquiry, including file retrieval, may be necessary to establish how many and which petitions may be eligible for approval.

In view of the foregoing, the director's decision is withdrawn. The petition is remanded to the director to conduct further inquiry relevant to the petitioner's ability to pay the proffered wage. The director may also request additional documentation related to the petitioner's ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2). 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 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.