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JAN 27 2005

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:
WAC 03 030 52270

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 service center director denied the employment-based visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 not established that the beneficiary had the required work experience as outlined in Form ETA 750. Accordingly, the director denied the petition.

On appeal, counsel submits new documentation to establish that the beneficiary has the requisite work experience.

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 nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(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 worker.* If the petitioner 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, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least the two years of training or experience.

With regard to the beneficiary's qualifications, Form ETA 750 indicates that the beneficiary needed two years of work experience to qualify for the position. The petitioner did not indicate any training or educational requirement beyond a sixth grade education. A petitioner must establish the elements for the approval of the petition as of the priority date. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Thus, the beneficiary had to have the requisite work experience prior to the priority date of the ETA 750, namely, August 15, 2001.

On the Form ETA 750, the beneficiary stated that she had worked for [REDACTED] from December 1988 to June 2001. The petitioner submitted a letter from Ms. [REDACTED] that stated the beneficiary had worked for her from December 1998 to June 2001 as a cook and described the beneficiary's duties.

In his request for further evidence, the director noted that the letter previously submitted by the petitioner from Ms. [REDACTED] did not state the amount of hours worked on a weekly basis by the beneficiary. The director further stated that IRS W-2 forms, pay stubs, or the foreign equivalent of such documents should be submitted to corroborate the stated work experience.

In response, the petitioner submitted a letter dated May 29, 2003 from the beneficiary that stated she worked for [REDACTED] on a fulltime basis from December 1998 to June 2001 as a cook. The beneficiary also stated that she did not obtain a W-2 Form during that period of time because she was paid in cash.

In his decision, the director determined that the affidavit submitted by the beneficiary, without secondary evidence, was not sufficient to establish the beneficiary's qualifications. Accordingly, he denied the petition.

On appeal, counsel submits copies of the beneficiary's 2000 and 2001 federal income tax returns, and states that these documents reflect the beneficiary's wages earned as a cook. In addition, counsel submits further correspondence dated September 15, 2003, that contains five letters from the following individuals:

[REDACTED] and [REDACTED] TV-80 California LTD, Los Angeles, California. The Hardts state that the beneficiary worked for them as an independent contractor on a part time basis for 20 hours a week from November 1997 to December 1998. The Hardts further state that they were also clients of the beneficiary while she worked with Ms. [REDACTED] mainly for catered events.

[REDACTED] and [REDACTED] California. The [REDACTED] stated that they were aware of the beneficiary's work since at least 1997, and later when the beneficiary was working with Ms. [REDACTED]

Mr. [REDACTED] Inc. Los Angeles, California. Mr. [REDACTED] states that he employed the beneficiary in 1997 for special events in his business and home.

[REDACTED] Productions, Santa Monica, California. Ms. [REDACTED] states that the beneficiary catered many meals for her in 1997, and then went to work with Ms. [REDACTED] in December 1998, until Ms. [REDACTED] left California in 2001.

[REDACTED] Los Angeles. Mr. [REDACTED] states that he was an occasional client of Ms. [REDACTED] and attended several functions catered by her and the beneficiary. In addition, he recalls attending several dinner parties in 1997 in which the beneficiary provided all the food preparation.

Upon review of the record, the petitioner has not established that the beneficiary has the requisite two years of work experience, as outlined in the regulations. With regard to the federal income tax returns, both returns technically would have been submitted to the Internal Revenue Service by April 15, 2001 and April 15, 2003, respectively. Both of these dates are prior to the date of filing the instant petition; however, the documents in question are both dated May 20, 2003. Neither counsel nor the petitioner provides any explanation as to the late submission of these documents, which diminishes the evidentiary weight to be given them. Furthermore,

if the income tax documents had been given full weight in this proceeding, the beneficiary's adjusted gross income for both years as a cook does not establish full time employment. The beneficiary's 2000 federal income tax return shows that the beneficiary had an adjusted annual gross income of \$5,483, while the 2001 tax return indicates an adjusted annual gross income of \$6,041.

Although the letter from TV-80 California states that the beneficiary worked part-time for 13 months for another employer in 1997, this claim of employment is not substantiated with any secondary evidence, such as pay stubs, or W-2 forms. While the remaining letters submitted by counsel are supportive of the beneficiary's skills, and indicate the beneficiary's periodic employment prior to her employment with Ms. [REDACTED] the letter writers do not present enough evidentiary documentation to substantiate their employment of the beneficiary, and as a consequence, beneficiary's requisite two years of prior work experience as a cook. In addition, the evidence submitted on appeal does not counter the director's finding that the letter from the [REDACTED] did not contain enough information to document the beneficiary's duration of experience. Without more persuasive evidence, the petitioner has not established that the beneficiary had two years of work experience as of the priority date of August 15, 2001.

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 appeal is dismissed.