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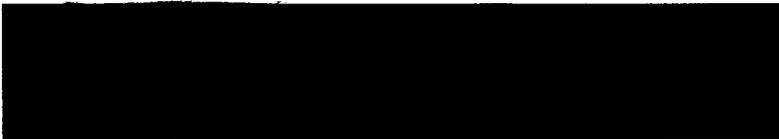
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U.S. Department of Homeland Security
20 Mass Ave. NW, Rm. A3042,
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6



FILE: WAC 02 288 51234 Office: [REDACTED] Date: **JUL 13 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: 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, 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 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 failed to establish that the beneficiary had the requisite two years work experience required by the offered position.

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

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.

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. 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 February 13, 2001. The visa petition indicates that the petitioner was established in 1970 and has forty employees. The visa petition also indicates that the beneficiary arrived in the United States in 1995.

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

On the ETA 750B, signed by the beneficiary on January 18, 2001 and amended by an attachment signed on January 19, 2001, the beneficiary claims that the petitioner has employed him since December 1996 to the present as cook. He also states that he was employed by the Chimayo Mexican Grill in Newport Beach, California as a full-time cook from January 1, 1994 to December 12, 1996. From January 1995 until December 12, 1995, the beneficiary claims that he was employed part-time as a cook at a restaurant in Costa Mesa, California, called the Il Formaggio.

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

(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, 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 two year of training or experience.

Because the record did not initially contain sufficient documentation in support of the petitioner's continuing ability to pay the proffered wage, as well as evidence to establish that the beneficiary possesses the employment experience specified on the labor certification, the director requested additional evidence on December 26, 2002.

The director requested the petitioner to provide evidence of the beneficiary's qualifying work experience as a cook consisting of previous employment letters provided on the employer's letterhead, showing the name and title of the person verifying the information. The director instructed the petitioner that these documents must state the beneficiary's title, duties, dates of employment and number of hours per week that the alien worked for the employer.

In response, the petitioner submitted a letter, dated March 1, 2003, signed by the beneficiary [REDACTED]. Mr. [REDACTED] states that neither the Chimayo Mexican Grill nor Il Formagio could give him letters of experience because "they only keep employees records for the last three years." The beneficiary states that he worked full-time at the Chimayo Mexican Grill from January 1994 to December 1996, and from January 1995 until December 1995. He claims that he worked part-time at Il Formagio. The beneficiary further states that he used "the first name Sabino for tax purposes."

In support of this statement, copies of Wage and Tax Statements (W-2s) from 1996 through 2002 have also been provided. [REDACTED] issued the 1996 W-2 to [REDACTED], " with a social security number of [REDACTED] showing wages paid of \$2,303.53. The 1997 W-2 was issued by [REDACTED] LLC to [REDACTED] with the same social security number as shown for 1996. This W-2 shows wages paid of \$822.06. In 1998, [REDACTED] W-2 shows that the [REDACTED] paid him \$15,464.98 in wages. In 1999, the W-2 of [REDACTED] reveals that [REDACTED] paid him \$11,356.75 in wages. This W-2, however, shows the social security number of [REDACTED] to be [REDACTED]

A 2002 W-2 issued to [REDACTED], that is superimposed upon the first page of an individual joint tax return filed by [REDACTED] also been offered. This W-2 was issued by the petitioner, [REDACTED] and shows that it paid [REDACTED] \$16,851.45 in 2002. The social security number used on the tax return is different from the one shown on any of the W-2s for [REDACTED]

On May 21, 2003, the director denied the petition. He noted the petitioner's failure to provide letters from previous employers verifying the beneficiary's past work experience as a cook. The director further questioned whether the level of wages appearing on the W-2s represented sufficient prior employment to be considered as part of required experience. The director discussed the discrepancies between the names and social security numbers appearing on the submitted documents and concluded that the failure to credibly resolve these questions cast doubt upon whether the beneficiary had obtained the required two years of experience as a cook.

On appeal, the petitioner submits an unsigned letter to the director. It is typed with the petitioner's secretary's name, [REDACTED]. This letter states that the beneficiary worked part-time at Fresca's at the same time as the petitioner has employed him. Mr. [REDACTED] further states that the difference in tax numbers appearing on [REDACTED] tax returns and W-2s is because the Mr. [REDACTED] uses one for "tax purposes and one for work purposes." Apparently the third social security number is also used for work purposes.

In support of the appeal, the petitioner submits an "affidavit of identity." As it is not notarized, it cannot be considered an affidavit. *See Black's Law Dictionary* 58 (7th Ed. West 1999). Rather, it is merely a statement by Mr. [REDACTED] that [REDACTED] and [REDACTED] are known to him as the same person. A photograph of the person known as [REDACTED] a/k/a [REDACTED] is stapled to the left corner of this statement and a signature appearing as [REDACTED] is written over the photograph.

The petitioner also submits a copy of a 1996 marriage license issued to the beneficiary, [REDACTED] and [REDACTED]. It is noted that the beneficiary's occupation listed on the marriage license is that of a restaurant maintenance person. With this document, the petitioner includes copies of W-2s issued to [REDACTED] as well as the corresponding joint individual tax return. In 1995 [REDACTED] a/k/a [REDACTED] received W-2s from seven employers, including one from Chimayo Restaurants, Inc. showing that he was paid \$6,078.16. Three other W-2s appear to have been issued by restaurants or food catering businesses showing that Mr. [REDACTED] earned a few hundred dollars to over \$1,400 from another. A 1996 W-2 shows that Chimayo Restaurants paid [REDACTED] \$9,342.42 that year.

For the first time on appeal, the petitioner submits a copy of a letter on letterhead identifying it as "Chimayo at the beach." The letter is signed by [REDACTED] Executive Chef." This letter is undated and states that its purpose is to verify employment of [REDACTED]. Mr. [REDACTED] states that he worked for Chimayo Grill, Newport Beach, California, from January 1994 to December 1996. He claims that Mr. [REDACTED] worked in the capacity as a cook.

The regulation at 8 C.F.R. § 204.5(g)(1) provides that if evidence consisting of employer letters verifying the specific job held by the alien or the training received is unavailable, other documentation relating to the alien's experience or training will be considered. CIS cannot accept, however, a miscellaneous collection of W-2s that show wages paid to the alien but with no other verification of what services were rendered, how many hours per week, and the duration of time that they were provided. While the evidence seems to establish that the beneficiary is also known as [REDACTED], who is married to [REDACTED], the evidence fails to clearly establish that the beneficiary has compiled two years of full-time experience as a cook, with responsibilities substantially similar to the ones listed on the approved labor certification, and that this experience was attained as of the visa priority date of February 13, 2001. Mr. [REDACTED] letter suggests that the beneficiary worked at the Chimayo Grill from 1994 to 1996, however, the 1995 and 1996 W-2s issued by this employer do not clearly demonstrate that the wages paid, particularly in 1995, represented two years of full-time employment as a cook, rather than a lesser period of time. It is again noted, that on the beneficiary's 1996 marriage license, his occupation was described as a restaurant maintenance person, not a cook. It is incumbent on the petitioner to credibly resolve any inconsistencies in the record by independent objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

As the record currently stands, the AAO fails to find the evidence sufficiently convincing to credibly establish that the beneficiary has accrued at least two full years of employment experience as a cook as contemplated by the terms of the labor certification. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As the petitioner has not established that the beneficiary meets the requirements of the approved labor certification, the petition may not be approved.

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.