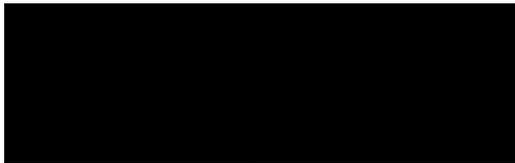


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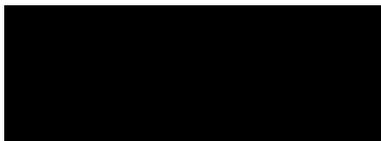
Be

FILE: LIN 03 152 50942 Office: NEBRASKA SERVICE CENTER Date: NOV 07 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, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese cuisine cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition and denied the petition accordingly.

On appeal, the counsel submits 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 nature, for which qualified workers are not available in the United States.

The regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(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 years of training or experience.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 30, 2002. The proffered wage as stated on the Form ETA 750 is \$9.34 per hour (\$19,427.20 per year). The Form ETA 750 states that the position requires four years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The issue to be discussed in this case is whether or not the petitioner had established that the beneficiary has the requisite experience as stated on the certified Alien Employment Application. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the priority date. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The employer, who is the petitioner here, has prepared the above ETA 750 A as an essential part of the labor certification process used to support preference visa petitions that are employment based. An employer who

desires to employ an alien in the United States must undertake a multiple step process as directed by the United States Department of Labor (USDOL) which, once approved, certifies the Alien Employment Application for the occupation based upon the above criteria specified by the employer although the USDOL may cause the employer to modify the Form ETA 750 as submitted to bring the application into compliance with its regulations as a condition to certification. Here according to counsel, USDOL required that the occupation's criteria include four years of experience, as a Chinese cuisine cook as that criterion was amended in the certification process as is evident on the certificate that includes this amendment.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of a Chinese cuisine cook.

Item 14 describes the requirements of the proffered position as follows (the petitioner's responses are underlined):

- 14. Education
 - Grade School Blank
 - High School 4
 - College Blank
 - College Degree Required Blank
 - Major Field of Study Blank
 - Training
 - Experience
 - Job Offered
 - Years/Mos. 4
 - Related Occupation
 - Years/Mos. Blank

In the instant case, the Application for Alien Employment Certification, Form ETA-750B dated January 1, 2003, in item 15, sets forth work experience that the beneficiary listed for the position of Chinese cuisine cook.

15. WORK EXPERIENCE

- a. NAME AND ADDRESS OF EMPLOYER
 - Kow Kee Barbecue Restaurant, Front of New Market Sha Guang, Chang An Town, Dong Guang City, [PR China]
 - NAME OF JOB
 - Second Chef
 - DATE STARTED
 - Month – August Year - 2002

DATE LEFT

Month – Present

KIND OF BUSINESS

Restaurant

DESCRIBE IN DETAIL DUTIES...

Small restaurant specializing in soups and noodles, breakfast, lunch, dinner & late night. Handmade items, not a lot of machinery. Responsible for all aspects of cooking, using woks, ladles, spatulas, barbecue oven and hooks, knives and stovetop.

NO. OF HOURS PER WEEK

60

b. NAME AND ADDRESS OF EMPLOYER

Du Jin Shan Hai Xian Shan Zhen Turtle Hotel, Guang Zhou City, [PR] China

NAME OF JOB

Cook

DATE STARTED

Month – July Year - 2001

DATE LEFT

Month – July Year - 2001

KIND OF BUSINESS

Hotel restaurant

DESCRIBE IN DETAIL DUTIES...

Responsible for cooking, used woks, ladles, spatulas, stovetop, hoods and lights

NO. OF HOURS PER WEEK

60

c. NAME AND ADDRESS OF EMPLOYER

Jia Hao Hotel, Sha Gang Chang An Town, [PR] China

NAME OF JOB

Cook

DATE STARTED

Month – March Year - 2000

DATE LEFT

Month – April Year - 2001

KIND OF BUSINESS

Hotel restaurant

DESCRIBE IN DETAIL DUTIES...

Used woks, ladles, spatulas, strainer, stovetop, hoods and lights. Moved to Guang Zhou City to enter a Trade School. See attached sheet for related experience 1995-1999 as cook.¹

NO. OF HOURS PER WEEK

60

¹ There is no supplemental sheet in the record of proceedings with the Form ETA 750 but there is a recitation in Item 12 of ETA Part B that states: "Guorong has worked as a Chinese cook in hotels in Shamei Town, 1994 1995; Dongguan City; 1995-1999; Changan Town, 2000-2001; at Guangzhou City July 2001 to July 21, 2001; Kowkee Barbecue Rest since 8/1/2002."

With the petition counsel submitted copies of documents that included a job offer letter, and relative to the beneficiary's qualifications, included a resume of job and education experience as well as a "Notarial Certificate of Experience," a certificate issued by the "Occupational Testing Authority of the Ministry of Labor and Social Security" as well as other documents.

In this case the "Notarial Certificate of Experience," was submitted to prove the beneficiary's work experience as a Chinese cuisine cook. According to the Service Center "... [It was] not submitted by the alien's employer nor was it accompanied by any supporting documentary evidence of the alien's work experience by their [sic] employer."

A Request for Evidence was issued by the Service Center consistent with the requirements of 8 C.F.R. 204.5 § (1)(3)(ii). It requested that evidence of the beneficiary's four years experience in the job (i.e. occupation of Chinese cuisine cook) before January 30, 2002, the priority date of the certified Alien Employment Application. It specifically requested the letters be from current or former employers.

In response to the above, counsel submitted a cover letter and the following copies of documents:

- Employment verification letter from the owner of the [REDACTED] restaurant, [REDACTED] [REDACTED] dated February 22, 2004 (duration of employment 1997 to May 1999).
- Employment verification letter from the restaurant manager of the [REDACTED] Restaurant, [REDACTED] dated February 2, 2004 (duration of employment March 2000 to April 2001).
- A letter from the beneficiary declaring that he "... worked as a cook at Du Jin Shan Seafood Restaurant ... from July 1-21, 2001"

The director denied the petition on May 3, 2004, finding that the evidence submitted did not establish that the beneficiary met the minimum condition of the certified Alien Employment Application that is "four years of experience in the offered job as a Chinese cuisine cook."² The director found that the beneficiary's resume of job experience and the above mentioned letter were not "... reliable evidence of their [sic] job experience." Further, it found that the two letters recounted employment experience of only three years and six months and not all the employment experience was in the occupation of Chinese cuisine cook.

On appeal, counsel contends:

The four years experience on the ETA-750 was intended to include all experience as a Chinese Cook, including as a line cook and cook's helper, not just a Chief or Head Cook. The service itself only requires 2 years experience as a Head Cook which was met prior to the filing date and the advertisements included preparation and cooking, which is included in ... [the beneficiary's] experience as a line cook and earlier as a cook's helper.

In his brief in the matter, counsel asserts that the beneficiary's vocational training to become a cook, recounted by the beneficiary, should be included and counted against the four years of occupational experience required by the certified Alien Employment Application. We are unpersuaded that the beneficiary's vocational education

² We note that there was no employment verification submitted of the beneficiary's present employment as a cook.

renders him classifiable as a skilled worker in the occupation of Chinese cuisine cook, which according to the certified Alien Employment application requires four years of job experience.

Without documentary evidence to support the claim and support from regulation, the assertions of counsel that a combination of vocational training and work experience will satisfy the regulations will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In summary, according to a roster of employees dated November 3, 2002, the beneficiary has been a "second chef" since August 1, 2002 at the Kow Kee Barbecue Restaurant, located at Front of New Market, [REDACTED]. The roster submitted is not a satisfactory job verification letter.

Likewise since there is no supplemental sheet in the record of proceedings with the Form ETA 750 as counsel asserts but there is a recitation in Item 12 of ETA Part B that states the beneficiary worked in "... Guorong; [the beneficiary] has worked as a Chinese cook in hotels in Shamei Town, 1994 1995; Dongguan City; 1995-1999; Changan Town, 2000-2001." Employment verification letters from owners or trainers at these locations would also suffice to give the beneficiary the four years required work experience.

According to the regulation cited above, the letters submitted should be from "... 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." As an aid to substantiating the identity of the maker of the letter, his or her name and address should be included and the letter signed in the presence of a public notary and stamped or sealed by the public notary.

The evidence submitted does not demonstrate that the beneficiary has the requisite four years of experience. The present record of proceedings only demonstrate satisfactory employment verification letters from the owner of the [REDACTED] Restaurant, dated February 22, 2004, evidencing two years and five months employment, and, from the restaurant manager of the [REDACTED] Restaurant, dated February 2, 2004 evidencing one year and one month employment. The total for these two locations is three and one-half years. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position based upon a labor certification that requires four years of experience in the occupation.

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.