

identifying information related to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6

FILE:

[REDACTED]
LIN 03 160 50568

Office: NEBRASKA SERVICE CENTER

Date: OCT 19 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:

[REDACTED]

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 (AAO) on appeal. The appeal will be dismissed.

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

On appeal, the counsel submits a brief.

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.

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 March 20, 2001. The proffered wage as stated on the Form ETA 750 is \$350.00 per week. The Form ETA 750 states that the position requires two 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, income tax returns of petitioner, and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The I-140 petition is dated December 24, 2002. A Request for Evidence was issued to the petitioner on August 8, 2003. In that request the Service Center requested the beneficiary's W-2 Wage and Tax Statements for the years 1996 through 2000.

In response to the above request, the petitioner transmitted the beneficiary's joint United States federal income tax returns for the years 1996 through 2000. No W-2 statements were submitted. The petitioner in a cover letter stated that the beneficiary was employed as an independent contractor, and, she was paid in cash for her work.

The director denied the petition on February 11, 2004. The petitioner appealed and asserted that the reasons for the denial were that the beneficiary "failed to list place of work" on her income tax return, and, that the investigation conducted did not find evidence of the beneficiary's employment since the business was sold.

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 labor certification petition. To be eligible for approval, a beneficiary must have the education¹ and experience specified on the labor certification. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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-750 B, item 15, sets forth work experience that an applicant listed for the position of cook, Chinese specialty:

15. WORK EXPERIENCE

a. NAME AND ADDRESS OF EMPLOYER

Odd Jobs

NAME OF JOB

DATE STARTED

Month - 04 [April] Year - 2000

DATE LEFT

Month - Present

KIND OF BUSINESS

DESCRIBE IN DETAIL DUTIES...

NO. OF HOURS PER WEEK

b. NAME AND ADDRESS OF EMPLOYER

Cook, Chinese Specialty

DATE STARTED

Month - 08 [August] Year - 1996

DATE LEFT

¹ In the present case no education was required by the labor certification, and, there was no educational attainments stated in the certified Alien Employment Application.

Month – 03 [March] - 2000

KIND OF BUSINESS

Chinese Buffet restaurant

DESCRIBE IN DETAIL DUTIES...

Prepared and cooked Chinese dishes such as: Shrimp with Lobster Sauce, General Tso's Chicken and Sweet & Sour Pork.

NO. OF HOURS PER WEEK

40

In this case a job verification letter was submitted to prove the beneficiary's work experience as a cook, Chinese specialty. The letter dated March 5, 2004 stated that the letter writer was the former owner of the [REDACTED] above mentioned, and, that from August 1, 1996 through March 31, 2000, the beneficiary worked in that restaurant as a cook.

According to the Decision in this case, the adjudicating officer from the Service Center spoke to a [REDACTED] manager of that restaurant who did not know the beneficiary as an employee in that restaurant.

Upon appeal, a [REDACTED] stated in a letter dated March 4, 2004, he is the present owner of the restaurant, and contrary to [REDACTED] statement, knew of the beneficiary as a cook. He said he worked there from November 1977 "until the time of sale." He goes on further to say, "I had known ... [the beneficiary] when I started to work there until she left in March 2000." As set forth above, the beneficiary's start date at the restaurant was August of 1996 not 1977. There is no retraction or modification in the record of proceedings by [REDACTED] of his statement.

In the March 5, 2004, letter from [REDACTED] the former owner of the business petitioner had acquired, he indicated that he and his brother sold the restaurant to the same [REDACTED] mentioned above who gave a statement to the adjudicating officer. In that letter [REDACTED] said that [REDACTED] "... used to work with me at the same restaurant." Therefore from the evidence [REDACTED] pre-dated the sale of the restaurant and, contrary to counsel, would have met the beneficiary there.

In a March 6, 2004 affidavit made by the beneficiary she worked part-time for the [REDACTED] contrary to the above-recited Form ETA Part B, item 15 information, during the period June 1999 through March 2000. She also stated "her employer let her work hours of her choice." She said she was hiding this work from her husband, who was against her working. The beneficiary indicated in an affidavit notarized March 6, 2004, that she worked part-time for the petitioner from June 1999 through March 2000. However, a letter dated March 5, 2004, from the original owner of the restaurant stated that the beneficiary worked six days a week from 11:00 AM until 5:00 P.M.

No letter submitted by petitioner describes the beneficiary's training or duty responsibilities, and, there is no information whatsoever of how the beneficiary attained the skills to practice the occupation. The beneficiary's personal joint federal income tax return submitted does not show differentiate between income received by the beneficiary or her spouse, and, there is no Forms W-2 or 1099 submitted. Also, there is no information substantiating the training received by the alien beneficiary.

The AAO finds the totality of the evidence submitted by the petitioner to show beneficiary's work experience not credible.



The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The petitioner has not met that burden.

ORDER: The petition is dismissed.