



U.S. Citizenship
and Immigration
Services

identifiers deleted to
prevent disclosure of unclassified
information of national interest

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OCT 20 2005

FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date:

LIN 03 255 50093

IN RE:

Petitioner:

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]

PUBLIC COPY

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 employment-based immigrant visa petition was denied by the Acting Director (director), Nebraska Service Center. The matter is now before the AAO on appeal. The appeal will be dismissed

The petitioner is a restaurant. It seeks to employ the beneficiary as an executive chef. As required by statute, the petition was accompanied by certification from the Department of Labor (DOL). The director denied the petition because he determined that the petitioner failed to demonstrate that the beneficiary had the required educational credentials as stated on the approved labor certification. The director concluded that the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On appeal, counsel submits additional evidence and asserts that the beneficiary has the necessary educational credentials to meet the qualifications set forth in the approved labor certification.

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, training, and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the date of the initial receipt in the Department of Labor'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 April 27, 2001.

To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification Form ETA-750A, items 14 and 15 set forth the minimum education, training, and experience that an applicant must have for the position of a sales director. In the instant case, item 14 shows the following requirements:

14. Education	
Grade School	8
High School	4
College	0
College Degree Required	no college required
Major Field of Study	n/a
Training	
No. Yrs.	2
Type of Training	Culinary School
Experience	
Job Offered	2 yrs

The petitioner initially submitted no evidence establishing the beneficiary's qualifying education, training, or employment experience. On March 24, 2004, the director requested evidence pertinent to these issues.

Specifically, the director requested that the petitioner provide evidence that the beneficiary had completed four years of high school and two years of culinary school, as well as documentation showing that he had accrued two years as an executive chef by the priority date of April 27, 2001.

In response, along with employment verification letters from previous employers attesting to his qualifying experience as an executive chef, the petitioner, through counsel, submitted copies of two documents in Italian as evidence of the beneficiary's formal education and training. They were each accompanied by a certified English translation. One document was the beneficiary's middle school diploma (Diploma di Licenza Della Scuola Media) issued on October 10, 1985, by the Middle School of Fermi in Osio Sotto for the 1984-85 school year, on behalf of the Ministry of Education, Certificate No. [REDACTED]. The other document is an "Attestation of Professional Qualification" from the Lombard Region, Giunta Region-Academy of Instruction, dated June 5, 1987, certificate [REDACTED]. It attests to the beneficiary's professional qualifications from the Culinary Commission. The document also indicates that the certificate signified the completion of a two-year course of training.

The director denied the petition on July 20, 2004. The director determined that the beneficiary did not possess the requisite educational requirements because he had not completed four years of high school as required by the terms of the labor certification. Based on a comparison of the beneficiary's date of birth on August 19, 1971, and his middle school diploma, the director concluded that the beneficiary's Italian diploma from the Middle School of Fermi represented the equivalent of a diploma from an American middle school or junior high school diploma because the beneficiary would have been only thirteen years of age at the end of the 1984-85 school year. The director also found that the culinary school certificate failed to signify two full years of culinary school training, noting that the diploma represented that the training was completed in June 1987, several months short of two years.

On appeal, and in response to an inquiry from this office, counsel has recently submitted additional evidence by facsimile, in support of his contention that the petitioner has shown that the beneficiary has the qualifying credentials. With one facsimile, a letter is included, dated September 30, 2005, signed by [REDACTED] and directed to Senator [REDACTED] office. [REDACTED] describes herself as a friend of the beneficiary. Ms. [REDACTED] summarizes the beneficiary's work experience and history of the petition and the communications between the beneficiary and his attorney. She also describes the educational requirements that are set forth on the approved labor certification, as an "administrative error." She further vouches for the beneficiary's character and elaborates on the request for expeditious handling of his appeal.

In a second letter, dated October 1, 2005, which is very similar to the first letter, except omitting the comment about administrative error, [REDACTED] asserts that she has summarized the Italian educational system in an attached document and claims that the beneficiary has met the terms of the labor certification. Her summary of the beneficiary's educational attainments are noted as relating to the accompanying exhibits 1 through 5. These will be discussed below.

At the outset, however, it is noted that the director did not deny the petition based on the lack of qualifying experience, but rather on his training and educational credentials. The AAO concurs with the director's conclusion that the petitioner sufficiently established that the beneficiary possessed the requisite work experience as an executive chef as of the priority date of April 27, 2001, through the appropriate employment letter(s) actually stating that he had been an executive chef as required by the labor certification, but would note that on the ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary consistently

described every previous position that he had held as being that of an "executive chef," while two of the corresponding employment verification letters submitted only described his position as that of a "chef" or "sous chef."¹

With reference to the beneficiary's training, the terms of the labor certification, as mentioned above, require two years of culinary school. The AAO finds that the beneficiary's two-year course as described on the diploma of the Giunta Region-Academy of Instruction sufficiently fulfills this requirement. Although it may not represent two full calendar years, the labor certification specifies culinary school training and the description of the course signified by the diploma represents a reasonable interpretation of the terms of the labor certification.

It is noted that CIS, has the final authority with regard to determining an alien's qualifications for preference status and the authority to investigate the petition under section 204(b) of the INA, 8 U.S.C. § 1154(b). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by the Dept. of Labor. *Madany 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 v. Coomey*, 662 F.2d 1 (1st Cir. 1981); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984).

In evaluating the beneficiary's qualifications, CIS reviews the job offer portion of the labor certification to determine the required qualifications for the position. CIS may, in its discretion, use advisory opinions such as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). 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).

In this case, the minimum educational requirements set forth in item 14 of the labor certification clearly require four years of high school. The AAO notes that this does not involve any technicalities of the law or a basis to question the terms of the ETA 750-A; rather it relates to applying the meaning of the plain language of the ETA 750-A. The AAO further finds that [REDACTED] interpretation of the beneficiary's educational diploma is not persuasive, because it is not supported by her credentials as an expert on the Italian educational system, does not comport with the facts, and includes documents in Italian unaccompanied by any certified English translation, which fail to comply with the regulation at 8 C.F.R. § 103.2(b)(3).² Ms. [REDACTED] description of the Italian educational system mentions three separate divisions, but omits the description of the third. It is noted that these three levels are represented as follows:

¹ Sous chef means being an "assistant" or "under" according *Webster's Ninth New Collegiate Dictionary* 1128 (Merriam-Webster Inc., 1990).

² This regulation requires that any document in a foreign language must be submitted with an English language translation, which has been certified to be accurate and complete by a translator who has attested to his or her competence to translate the foreign language into English.

The first, *scuola elementare*, begins at age six and lasts for five years. Upon completion, students move on to the *scuola media*. This is most comparable to the three years of study in American middle schools. If the students have performed satisfactorily, they receive a *Diploma di Licenza di Scuola Media*, with the opportunity to continue their education at a *scuola superiore* after age 14. Mandatory schooling ends with graduation from a *scuola media*.

The length of study at a *scuola superiore* is four or five years, depending on the type of school and program in which the student is enrolled. Students may choose among different high schools, known as *licei*, for specific courses of study in the arts, sciences, linguistics, and what is known as a classical education. Other institutes (*istituti*) offer students preparation for teaching at the elementary school level and for technical, industrial, and commercial careers.

After completion of their chosen courses of study in a *scuola superiore*, students must pass a state examination to earn a *Diploma di Maturita* and the ability to continue their studies at a university. (Original Emphasis). *The Italian Cultural Institute of Washington, D.C.*, <http://www.italcultusa.org/DCeducation-intro.html>.

Age groups and educational terms are also described at *The Italian Cultural Institute of Washington, D.C.* website and at a similar website based on the Italian Ministry of Public Education (<http://www.istruzione.it/>).

Up to Age 3: Day nursery (Nidi d'infanzia)

Ages 3 to 6: Nursery school (Scuola materna)

Ages 6 to 10: Elementary school (Scuola Elementare)

Ages 11 to 14: Middle school (Scuola media)

Ages 15 to 19: High school/Secondary School (Scuola secondaria di II grado):

Exhibit 1 is described by [REDACTED] as evidence that the beneficiary received an elementary school diploma. Exhibit 1 consists of an Italian document appearing to be from [REDACTED] and describing the beneficiary's attendance at a "scuola elementare," ending with 1982, which would have been when the beneficiary was eleven years old. [REDACTED] describes Exhibit 2 as the beneficiary's diploma for middle school, which equates to a US high school diploma. Her description is clearly not persuasive based on the above information. The diploma represents attendance at middle school (*scuola media*), not high school. The English phrase appearing on the last line of an uncertified English translation of Exhibit 1, purporting to claim that the Italian document states that the beneficiary was "promoted to high school" in 1982 is not credible as it omits any mention of high school. It is further noted that the uncertified English translation of the duplicate of the beneficiary's earlier submitted middle school diploma also conflicts with the earlier submitted certified English translation of this same diploma and appears to include misspelled English phrases of "High School: High Scool." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The director's denial of the petition based on the inferences drawn from the evidence submitted is supported by the facts and by other available information. A petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed. *See* 8 C.F.R. § 103.2(b)(12). Here, the evidence fails to demonstrate that the beneficiary completed four years of high school. Thus, he does not meet the terms of the approved labor certification. In order to sustain the petitioner's appeal, CIS would have to alter the requirements of the ETA 750-A, something that the case law does not allow. *See Matter of Silver Dragon Chinese Restaurant, supra*. In this case, the petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Since that was not done, it cannot be concluded, based on the evidence submitted, that the petitioner has established that the beneficiary possesses the requisite educational credentials as required by the terms of the labor certification. Therefore, the beneficiary is not eligible for the visa classification sought.

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.