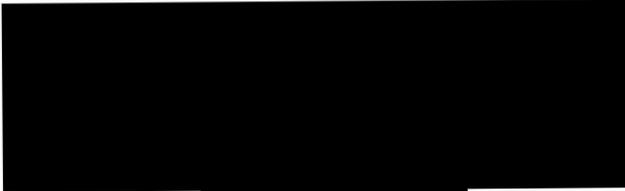


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Office: VERMONT SERVICE CENTER

Date: **AUG 29 2006**

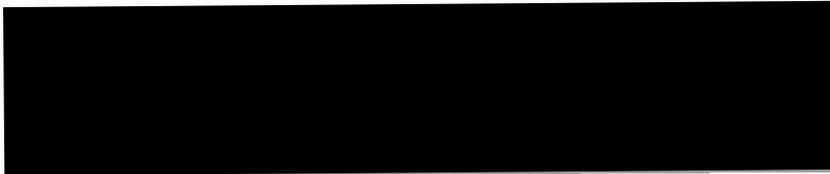
IN RE:

Petitioner:
Beneficiary:



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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a private household. It seeks to employ the beneficiary permanently in the United States as a cook (household) live-in. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. 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.

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(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

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 the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also 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 April 23, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$605.82 per week² (\$31,502.64 per year). The Form ETA 750 states that the position requires two years experience.

On appeal, counsel submits a legal brief and additional evidence.

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

The director denied the petition on November 19, 2004, finding that the evidence submitted did not establish that the petitioner that the beneficiary has the requisite experience as stated on the labor certification petition.

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 education 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-750A, item 14 sets forth the minimum education, training, and experience that an applicant must have for the position of a cook (household) live-in.

In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education
- Grade School 6
- High School 4
- College Blank
- College Degree Required Blank
- Major Field of Study Blank
- Training Blank
- Training

¹ It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states “The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work.”

² 44 hour/week.

Experience
 Job Offered
 Years/Months 2/Blank
 Related Occupation
 Years/Months 2/Blank
 Related Occupation (specify) Restaurant cook

In the instant case, the Application for Alien Employment Certification, Form ETA-750B, item 15, sets forth work experience that an applicant listed for the position of cook (household) live-in.

15. WORK EXPERIENCE

a. NAME AND ADDRESS OF EMPLOYER

[REDACTED]

NAME OF JOB

Cook

DATE STARTED

Month – June Year - 1998

DATE LEFT

Month – Dec. Year - 1998

KIND OF BUSINESS

Hotel & Restaurant

DESCRIBE IN DETAIL DUTIES...

Prepared, seasoned & cooked meals according to menu & number of persons served,

NO. OF HOURS PER WEEK

40

15. WORK EXPERIENCE

b. NAME AND ADDRESS OF EMPLOYER

[REDACTED]

NAME OF JOB

Cook

DATE STARTED

Month – April Year - 1997

DATE LEFT

Month – April Year - 1998

KIND OF BUSINESS

Restaurant

DESCRIBE IN DETAIL DUTIES...

Prepared, seasoned & cooked meals according to menu & number of persons served,

NO. OF HOURS PER WEEK

40

Therefore, the prior job experiences stated above are less than two years.

In this case the job verification affidavit that the petitioner submitted with the petition to prove the beneficiary's work experience as a cook did not conflict with the Form ETA 750, Part B. The letter statement on [REDACTED] stationery dated April 10, 2001, stated the employment duration was June 8, 1998 to December 31, 1998.

A statement dated April 10, 2001 from [REDACTED] of [REDACTED] stated the beneficiary's employment duration was April 1997 to April 1998.

Counsel, upon appeal, states that the petition was denied without benefit of additional evidence (meaning that a request for evidence was not issued by the director). The AAO reviews appeals on a de novo basis. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) It is worth emphasizing that that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Each case has its own particular factual situation and merits.

In the above regard, counsel desires to introduce at this stage of the proceeding other employment certifications not found in the record of proceeding until its introduction by counsel's letter dated January 18, 2005. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In the present matter, the petitioner has not been put on notice of a deficiency in the evidence and therefore it has an opportunity to respond to that deficiency. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

A statement, that is undated, on the restaurant "Jollibee" stationery was introduced on appeal. This restaurant is located at 142 Bicutan, Taguig, Metro Manila, Philippines. In it, [REDACTED] manager, states that the beneficiary was employed there as crew & cook from September 1995 to March 1996.

A statement, that is undated, on the restaurant [REDACTED] computer generated stationery was introduced. This restaurant is located at 1123 Bambang Street, Sta. Cruz, Manila, Philippines. In it, [REDACTED] manager, states that the beneficiary was employed there as a cook from June 1996 to March 1997.

We find the above additional statements of the beneficiary's work experience 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 established that the beneficiary has the requisite two years experience as a cook (household) live-in stated on the labor certification petition. The petitioner has met that burden.

ORDER: The petition is sustained.