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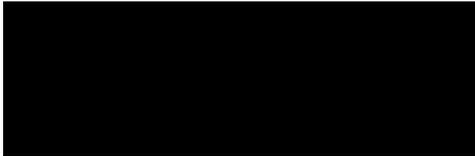
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
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U.S. Citizenship
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FILE: [REDACTED]
EAC-05-094-52950

Office: VERMONT SERVICE CENTER

Date: MAY 03 2006

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

The petitioner is an Italian 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 not established that the beneficiary had the requisite experience as required on the Form ETA 750 and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 30, 2005 denial, the single issue in this case is whether or not the petitioner has the required experience as of the priority date.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 25, 2001.¹

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal². No evidence was submitted on

¹ The director erred in stating that the priority date is May 12, 1988.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

appeal.³ Relevant evidence in the record includes a letter [REDACTED] August 22, 2005, a Form G-325A Biographic Information signed by the beneficiary on January 16, 2004,⁴ and a letter from the [REDACTED] dated April 6, 2001.⁵ The record does not contain any other evidence relevant to the petitioner's experience.

Counsel states on appeal that the experience letter from [REDACTED] genuine and the preparer of the Form ETA 750 erred in not including the correct information.

To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, 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, blocks 14 and 15, sets forth the minimum education, training and experience that an applicant must have for the position of a cook. On the ETA 750A submitted with the instant petition, block 14 describes the experience requirement of the offered position as follows:

Experience	
Job Offered	2 Yrs
Related Occupation	
Related Occupation (specify)	

On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary claimed to have worked for the petitioner for 40 hours per week beginning in August 1998 and continuing through the date of the Form ETA 750B. No other previous employment information appears on the Form ETA 750B. On the Form G-325A Biographic Information signed by the beneficiary on January 16, 2004, the beneficiary also claimed to have worked for the petitioner from August 1998 through the date of the Form G-325A and did not claim to have worked for any other employer. The beneficiary's employment at [REDACTED] corroborated by a letter from [REDACTED] dated April 6, 2001 stating that "[the petitioner] employed [the beneficiary] . . . from 08-16-1998 to present. He worked six [d]ays a week." This letter, alone, would have satisfied the experience requirement.

However, the record also contains a letter [REDACTED] August 22, 2005. According to the letter, "[the beneficiary] was employed as a [c]ook from January 8, 1998 to February 15, 2000 with [REDACTED] . . . [the beneficiary] worked 8 hours a day [and] 40 [h]ours a week." The information in this letter is inconsistent with the information in the petitioner's Form ETA 750 and the beneficiary's Form G-325A because there is no mention of the beneficiary's employment [REDACTED] in both forms. *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.

³ On the Form I-290B, which the director received on October 31, 2005, counsel checked the block indicating that he would be sending a brief and/or evidence to the AAO within 30 days. However, no further documents related to the petitioner's immigrant visa petition have been received by the AAO to date.

⁴ The director erred in stating that the Form G-325A "was dated January 16, 2005."

⁵ The letter from [REDACTED] was submitted along with another I-140 petition that was previously denied.

Counsel states on appeal that “[t]he experience letter [REDACTED] is genuine; the preparer of [the] Form ETA 750B erred by not including experience information given by the beneficiary.”

Counsel’s assertion that the experience letter is genuine and his assertion that the preparer erred in filing out the Form 750B do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, no evidence was submitted on appeal, and going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In addition, counsel gives an explanation as to why the information on the petitioner’s Form ETA 750 might have been incorrect, but counsel is silent on why the information on the beneficiary’s Form G-325A is inconsistent with the letter [REDACTED] though the director specifically pointed to the Form ETA 750 and the Form G-325A in his denial.

Moreover, based on counsel’s assertions, the beneficiary would have worked at both [REDACTED] for 40 hours per week and [REDACTED] 40 hours per week from August 1998 to February 15, 2000. While it is possible that the beneficiary had two full time jobs at two different restaurants, worked as a cook at both restaurants, and worked a total of 80 hours a week, the AAO would need more evidence showing that this is indeed the case.⁶ No such evidence exists in the record. The AAO would also need documentary evidence showing that the beneficiary was employed [REDACTED]. According to the regulation at 8 C.F.R. § 204.5(g)(1), the evidence “shall be in the form of letter(s) from current or former employer(s) or trainer(s) . . . If such evidence is unavailable, other documentation relating to the alien’s experience or training will be considered.” According to the letter [REDACTED] “was running [REDACTED] [REDACTED].” Thus, the letter does not meet the regulation’s requirements, and the record does not contain any evidence explaining why a letter from the beneficiary’s former employer or trainer at Pines of Florence is unavailable.

After a review of the evidence, it is concluded that the petitioner has not established that the beneficiary had the required experience as of April 25, 2001. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

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.

[REDACTED] is open for lunch and dinner. [REDACTED] based on information from the Internet, is also open for lunch and dinner. The fact that both restaurants are only open for lunch and dinner would make it really difficult for the petitioner to show that the beneficiary worked at both restaurants for a total of 80 hours a week.