



U.S. Citizenship
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **MAY 16 2006**

WAC-03-211-53282

IN RE:

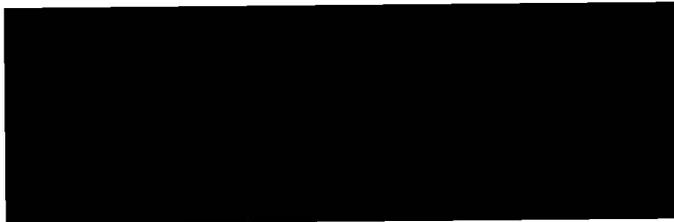
Petitioner:



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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner processes produce. It seeks to employ the beneficiary permanently in the United States as a food service manager. 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 is qualified to perform the duties of the proffered position with two years of qualifying employment experience. The director 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 29, 2004 denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The director noted inconsistencies in information pertaining the beneficiary's employment experience and found it doubtful that the beneficiary could engage in a supervisory capacity at the age of fourteen.

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 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 April 24, 2001.

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 appeal¹. On appeal, counsel submits notarized affidavits, reports on child labor in Mexico, and translated documents pertaining to the beneficiary's educational achievements. Including the evidence submitted on appeal, other relevant evidence in the record includes a letter from the beneficiary's prior employer. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that it is common for children to work from the age of ten onwards, especially in rural communities in agricultural industries, and the beneficiary was exceptional since he worked since ten, was promoted to a supervisory capacity at the age of fourteen, and worked full-time while attending an agricultural technical school.

¹ 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and 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, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of food service manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|-------------------------|----------------|
| 14. | Education | |
| | Grade School | NA |
| | High School | NA |
| | College | NA |
| | College Degree Required | Not Applicable |
| | Major Field of Study | Not Applicable |

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has been self-employed working various jobs since June 1989. Prior to that, he represented that Empocadora Dunort, a produce processor in Hidalgo, Durango, Mexico, employed him as a supervisor of six employees from June 1986 through June 1988. He does not provide any additional information concerning his employment background on that form.

The record of proceeding also contains a Form G-325, Biographic Information sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form under a section eliciting information about the beneficiary's last occupation abroad, he represented that he worked as a production supervisor for Empocadora Dunort from June 1986 through June 1988 above a warning for knowingly and willfully falsifying or concealing a material fact.

With the petition, the petitioner submitted a letter from [REDACTED] on Empocadora Dunort letterhead stating that he supervised the beneficiary's full-time employment from 9:00 to 5:00 as a supervisor from June 1986 to June 1988. The record of proceeding also contains another letter from [REDACTED] this time spelling his name as [REDACTED] stating that it is not unusual for children to work early to help support their families and that there are no child labor laws to prevent children from working. [REDACTED] further stated that the beneficiary commenced employment in their production department at the age of twelve "and because of his leadership, in spite of his age, when opportunity arose we did not hesitate to promote him to Supervisor."

On appeal, counsel submits a letter from [REDACTED], Constitutional President of the Municipality of Hidalgo, State of Durango, who states that because their principal economic activity is seasonal agriculture and ranching, they “find ourselves with the necessity to occupy ourselves from a young age (10 years old) in working in these and other legal activities to contribute to the family sustenance, receiving salaries which are very much lower than those established by law.” Additionally, counsel submits declarations from three other residents of Hidalgo who state their general knowledge that children often work in Hidalgo and two declarations from supervisors of Empocadora Dunort who state their knowledge that the beneficiary worked as chief of production from 1986 to 1988 at that business.

On appeal, counsel also submits an Internet article authored by David Bacon asserting that in the Mexican countryside, child labor is growing and school attendance is declining and parents often bring their children with them to work, and an excerpt from “Child Labor in Agriculture” from <http://www.ericdigests.org/1997-4/labor.htm> highlighting that despite the Fair Labor Standards Act in the United States, children often work alongside their parents on their parents’ farms or generally in hazardous jobs within agriculture. Counsel submits translated certificates reflecting that the beneficiary completed secondary education on June 30, 1988 and sixth grade in June 1985. In her appellate brief, counsel stated that he worked and attended school full-time, “working from 7 a.m.[.] to 3 p.m. and attending classes in the late afternoons and early evenings.”

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(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 AAO accessed the U.S. State Department’s “Country Reports on Human Rights Practices - 2005” released by the Bureau of Democracy, Human Rights, and Labor on March 8, 2006. Its excerpt pertaining to child labor stated the following:

Child labor was a problem, particularly among migrant farming families (see section 6.d.).

* * * *

Prohibition of Child Labor and Minimum Age for Employment

The law protects children from exploitation in the workplace, including a prohibition on forced or compulsory labor; however, the government did not effectively enforce such prohibitions. The law prohibits children under age 14 from working, and those between age 14 and 16 may work only limited hours with parental permission, with no night or hazardous

work. UNICEF reported that 16 percent of children age 5 to 14 were involved in child labor activities.

The Secretariat of Labor (STPS) is charged with protecting worker rights. Government enforcement was reasonably effective at large and medium-sized companies, especially in the maquila and other industries under federal jurisdiction. Enforcement was inadequate at many small companies and in the agriculture and construction sectors, and it was nearly absent in the informal sector in which most children work.

During the year STPS, the Secretariat of Social Development, and DIF carried out programs to prevent child labor abuses and promote child labor rights, including specific efforts to combat the commercial sexual exploitation of children (see section 5). UNICEF stated that, despite the government's progress in reducing its incidence over the past 10 years, child labor remained a significant problem.

See <http://www.state.gov/g/drl/rls/hrrpt/2005/62736.htm> (accessed May 4, 2006).

While the AAO finds it plausible that the beneficiary was employed as a child based on the U.S. State Department report, it is not plausible that the beneficiary worked in a supervisory capacity as a child. Moreover, the record does not address the issue of children working in a supervisory context. Counsel's submission states that children work to contribute to their family's overall income and work alongside parents. The appellate submissions speak about child labor generally and not about the beneficiary specifically. Thus, despite the labor law violations and unlawful exploitation of children, it seems it would be unusual for a child to be so independent to rise to a supervisor by the age of fourteen instead of assuming a more ancillary role to acquire more resources for the family.

Additionally, there are too many inconsistent representations to ignore in this case. Despite counsel's appellate assertion that CIS may not concern itself with the beneficiary's failure to represent his employment with Empocadora Dunort as a regular worker prior to his promotion to supervisor, the AAO finds the omission disingenuous. The beneficiary represented on two different forms his employment at Empocadora Dunort was from 1986 onwards not 1984. Additionally, the experience letters submitted into the record of proceeding only mention the beneficiary's employment as a supervisor, and with the exception of [REDACTED] letter in response to a notice of intent to deny, fail to detail the beneficiary's commencement of employment in a lower-level capacity and rise to managerial status.

Additionally, counsel states that the beneficiary worked from 7:00 a.m. until 3:00 p.m. and then attended school². However, [REDACTED]'s first letter stated that he worked from 9:00 a.m. to 5:00 p.m. Under Item 11 on the Form ETA 750B, the beneficiary did not list any schools under the question eliciting information on all schools attended, including "trade or vocational training facilities." The beneficiary typed "none" under that section but on appeal counsel asserts that the beneficiary did attend and complete vocational training.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof

² Although the assertions of counsel do not constitute evidence according to *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980), the AAO is responding to counsel's appellate arguments.

may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.” *Matter of Ho*, 19 I&N Dec. at 591-592 also 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 AAO thus affirms the director’s decision that the petitioner has not shown by a preponderance of the evidence that the beneficiary acquired two years of supervisory experience from the evidence submitted into this record of proceeding and thus the petitioner has not demonstrated that he is qualified to perform the duties of the proffered position.

ORDER: The appeal is dismissed.