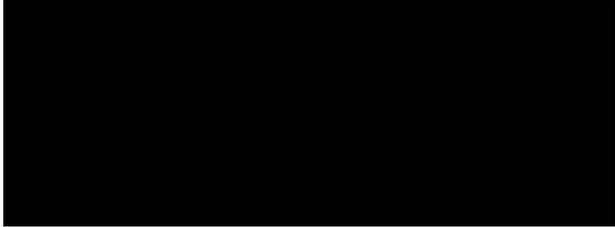


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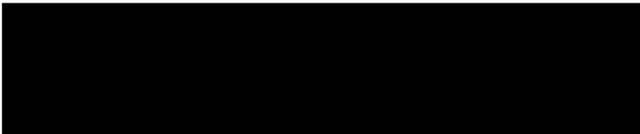
FILE: WAC 04 023 53475 Office: CALIFORNIA SERVICE CENTER Date: SEP 25 2006

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:



PHOTIC 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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based visa petition that is now before the Administrative Appeals Office on appeal. The matter will be remanded for further consideration and action.

The petitioner is a 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 accompanies the petition. The director found that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition and denied the petition accordingly.

On appeal, counsel submits a statement.

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 unavailable in the United States.

The regulation at 8 C.F.R. § 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.

Eligibility in this matter hinges on the petitioner demonstrating 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). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on April 30, 2001. The labor certification¹ states that the position requires two years of experience in the job offered.

The petition in this matter states that the beneficiary entered the United States during May of 1994. With the petition counsel submitted (1) a Form ETA 750, Part B showing the instant beneficiary's employment history,

¹ Although the present beneficiary is not the person for whom the petitioner petitioned on the original Form ETA 750 the present beneficiary has been substituted.

(2) a letter dated July 15, 2003 from a corporate officer of the petitioner, (3) a letter in Spanish dated May 5, 2003 from the owner of the Restaurant Mi Casita in Jalisco, Mexico and an English translation of that document, (4) one page each of the petitioner's California Form DE-6 quarterly wage reports for the first three quarters of 2002, (5) one page of the petitioner's 2002 California Form DE-7 reconciliation, (6) two pages each of the petitioner's California Form DE-938 quarterly adjustment forms for the first three quarters of 2002, (7) time card entries for the two-week pay periods ending March 24, 2003, and (8) a printout of payroll information for the petitioner's employees during the second quarter of 2002 and some other unidentified quarters.

The Form ETA 750B, signed by the beneficiary on August 6, 2003, states that the beneficiary worked for Restaurant Mi Casa from December 1992 to April 1995 and for the petitioner from November 1998 to May 1999, and again from July 2002 through the date of that form. This office notes that because the priority date of the instant petition is April 30, 2001 evidence pertinent to employment after that date is not directly relevant to the beneficiary's employment experience as of that date, or to any other issue material to the instant case.

The July 15, 2003 letter requests the substitution of the instant beneficiary for the original beneficiary named on the Form ETA 750. The letter also states that the beneficiary worked as a cook for Restaurant Mi Casita in Jalisco, Mexico from December 1992 to April 1995, and for the petitioner from June 1989 to the present. This office notes that those two periods of employment overlap. This office believes, however, that the claim that the beneficiary began to work for the petitioner during 1989 is the result of a typographical error. Because employment of the beneficiary beginning during June of any year is inconsistent with the beneficiary's employment history as stated on the Form ETA 750B, however, the period of employment to which the petitioner's corporate officer intended to attest remains unclear, although it clearly conflicts with the beneficiary's version of her employment history.

The May 5, 2003 letter from the owner of the Restaurant Mi Casita states that the beneficiary worked 48 hours per week as a cook in that restaurant from December 1992 to April 1995.

The printout of time card entries list the names of employees, including cooks, but does not contain the beneficiary's name. Further, no company name appears on those printouts.

The portions of the petitioner's Form DE-6 reports provided do not include the pages that would have identified its employees by name and social security number. The Form DE-7 reconciliation does not identify the petitioner's employees. The employer identified on that form is Pick Up Stix Incorporated, but shows a Texas address. Whether that company is identical to the petitioner is unknown to this office.

The DE-938 adjustment forms are from Pick Up Stix Incorporated of Dallas, Texas and identify employees not listed on a previously filed Form DE-6. That form identifies some employees, but does not include the beneficiary's name. The printouts of payroll information identify numerous employees by name and social security number, but do not contain the beneficiary's name.

Because it found that the evidence submitted did not credibly demonstrate that the beneficiary has the requisite two years work experience, the California Service Center, on October 8, 2004, requested pertinent evidence.

Specifically, the service center requested Form W-2 wage and tax statements showing wage payments the petitioner made to the beneficiary during each year since 1989.

In response, counsel submitted 1999, 2000, and 2003 W-2 forms. The 1999 and 2000 forms are in the name of [REDACTED] and were issued by the petitioner. Whether [REDACTED] is an alternative identity of the beneficiary is unknown to this office. The 2003 form is in the name of [REDACTED] a variation of the beneficiary's name, and was issued by Pick Up Stix Builders Incorporated of Carrollton, Texas. Neither of those names appears on the payroll data the petitioner provided. Further, the relationship of that Texas company to the petitioner is unknown to this office. Finally, this office notes that provision of a 2000 W-2 form is inconsistent with the beneficiary's version of her employment history. Whether provision of those W-2 forms is consistent with the version of the beneficiary's employment history contained in the petitioner's employment verification letter is unclear, as the beginning date of that employment history remains unclear.

On March 8, 2005 the Office of the Consulate General in Guadalajara, Mexico, pursuant to a request from the California Service Center, investigated the beneficiary's claim of employment for Restaurant La Casita. The report of that investigation stated,

The Mexican Social Security Institute has no record of the subject or her aka's [sic] as an employee of "restaurant La Casita" [sic] in San Juan de Los Lagos, Jalisco, Mexico.

No other reliable sources to verify employment were available to verify the subject's alleged employment.

On April 13, 2005, the director denied the petition, finding that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient work experience. The petitioner was not previously apprized of the evidence adverse to the beneficiary's claim of qualifying employment experience in Mexico.

On appeal, counsel submitted an additional employment verification letter, dated April 22, 2004, also purportedly from the owner of Restaurant Mi Casita, and an English translation. That letter reiterates that the beneficiary worked at that restaurant from December 1992 to April 1995. That letterhead upon which that second employment verification letter is printed is distinctly different from the letterhead upon which the first employment verification letter was printed. Also, the signatures on those two letters do not appear to match.

On the appeal form counsel noted that the consulate did not attempt to verify the employment with the owner of Restaurant La Casita. Counsel stated that the investigation was therefore deficient.

The root question in this matter is not whether the employment verification letters were actually prepared by the owner of Restaurant La Casita, but whether they accurately reflect the beneficiary's employment history. In declining to contact the restaurant owner the consulate investigator implied that his additional employment verification would not have been convincing in the face of the failure of the Mexican social security system to verify the beneficiary's employment. The investigator further implied this in stating, "No other reliable sources . . . [of information] . . . were available to verify the subject's alleged employment."

The approvability of the instant petition hinges on the claim of employment in Mexico, as the remaining employment claim, that of employment for the petitioner, is insufficient to show that the beneficiary had the requisite two years of qualifying employment experience before the priority date.

When a denial is to be based on adverse evidence of which the petitioner is unaware the petitioner must first be informed of the adverse evidence and afforded an opportunity to rebut the adverse evidence and to present its own evidence. 8 C.F.R. § 103.2(b)(18)(i). In this case, the denial appears to have rested chiefly on the evidence derived from the investigation of the beneficiary's claim of employment in Mexico. The petitioner, however, was not advised of that evidence prior to the decision of denial. The matter must be remanded for compliance with 8 C.F.R. § 103.2(b)(18)(i).

Further, when a [CIS] officer denies an application or petition the officer shall explain in writing the specific reasons for that denial. 8 C.F.R. § 103.3(a)(1)(ii). In this case the director noted some of the evidence in the record but did not specifically state in what way it contradicted the beneficiary's employment claim. On remand, if the petition is to be denied, the director shall make his reasoning explicit. Further, the director shall consider the assertion in the April 22, 2004 letter from the beneficiary's alleged employer's that the Mexican social security administration is unable to confirm the beneficiary's employment because she was paid in cash without deductions.

The record raises additional issues that were not addressed in the decision of denial.

The absence of the beneficiary's name from the various documents pertinent to the petitioner's payroll casts doubt on the claim that the petitioner previously employed the beneficiary. This is especially problematic in view of the fact that the petitioner claims to have issued W-2 forms to the beneficiary in two names, neither of which is included on its payroll.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

On remand the director may, if he wishes, require the petitioner to provide contemporaneous evidence pertinent to both the claim of employment for Restaurant La Casita and the claim of employment for the petitioner.

Further, whether all of the evidence submitted pertains to the petitioner is unclear. Some of the evidence, that from Texas for example, may pertain to a related company, a company with common ownership or an unrelated company. As was noted above, one of the W-2 forms submitted was issued to [REDACTED]. The director may, if he wishes, request additional evidence to show that all of the evidence previously submitted relates to the instant petitioner and the instant beneficiary, that is; the particular corporation that filed the Form ETA 750 and Form I-140 petitions in this matter, and that proposes to employ the beneficiary, [REDACTED].

Further, the dates during which the petitioner claims to have employed the beneficiary are unclear. The director may require the petitioner to state the exact dates during which it employed the beneficiary and address any inconsistencies with previous assertions or evidence.

Finally, although the beneficiary stated that she was working in Jalisco, Mexico from December 1992 to April 1995, the Form I-140 petition in this matter states that she arrived in the United States during May of 1994. The director may, if he wishes, require the petitioner to reconcile that discrepancy.

The director may also initiate further investigation into any of the matters noted above or any other matter pertinent to the approvability of the instant petition. The director shall inform the petitioner of evidence adverse to the approvability of the petition and provide the petitioner an opportunity to respond to that evidence.

The director shall issue a new decision in this matter consistent with the foregoing.

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 matter is remanded for further consideration and action.