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FILE: [REDACTED] Office: VERMONT SERVICE CENTER
EAC-04-035-50975

Date: SEP 28 2008

IN RE: Petitioner: [REDACTED]
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:



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 Acting Center Director (“Director”), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant and seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director’s September 27, 2004, denial, the case was denied based on the petitioner’s failure to demonstrate that the beneficiary met the qualifications required in the labor certification.

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.

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.

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.

In evaluating the beneficiary’s qualifications, the U.S. Citizenship & Immigration Service (CIS) must look to the job offer portion of the alien 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). 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).

To document a beneficiary’s qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(1)(3):

(ii) *Other documentation*—

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).

(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.

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on June 3, 2003. On the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered, as a cook, with job duties including: "plans menus, cooks dishes on menu, desserts, foods according to recipes. Prepares meats, soups, sauces, vegetables, foods prior to cooking. Seasons, cooks, portions, garnishes food according to prescribed method. Serves to waiters. Estimates, requisitions, purchases, selects, orders delivery of food supplies for restaurant from local vendors." The petitioner listed no education requirements in Section 14, and listed only that the individual "must work weekends" as a special requirements for the position in Section 15.

On the Form ETA 750B, signed by the beneficiary on February 5, 2003, the beneficiary listed experience with the following: (1) Grace Waters, Inc., 5 John Street, Bristol, RI 02809, as a cook from April 2002 to present (the date of signature, February 5, 2003); (2) J-D Grenergy, Sayville, NY (no exact street address listed), as a cook, from 1995 to 2001 (no exact months for start or end dates were listed); and (3) Riverview, Oakdale, NY (no exact street address listed), as a cook, from 1993 to 1994 (no exact months for start or end dates were listed).

The labor certification was approved on was approved on September 19, 2003, and the petitioner filed an I-140 petition on the beneficiary's behalf on November 19, 2003. The Service Center issued a Request for Evidence ("RFE") on July 12, 2004, requesting that the petitioner submit evidence regarding the beneficiary's qualifications to include the name, address and title of the writer, and "if eligibility is based on experience or training, letter(s) from current or former employers, or trainer(s) should be duties performed by the alien or of the training received. If such evidence is shown to be unavailable, other documentation related to the beneficiary's experience will be considered."

As evidence to document the beneficiary's qualifications, the petitioner submitted a letter from the Hotel Hilton, Colon, Ecuador, signed by Angelita Herrera Sandoval, the Human Resources Manager, which provided that [REDACTED] "worked in this company as a Chef during the period of May 1989 to November 1991. Period in which he demonstrated honesty, punctuality and responsibility in the commended duties and a great virtue to handle with people, reasons for which he was worthy of the esteem and consideration of all of us who knew him." The petitioner did not submit any other letters to document the beneficiary's experience.

On September 27, 2004, the Service Center concluded that the petitioner had not sufficiently documented the beneficiary's work experience to show that the beneficiary met the requirements of the labor certification. The experience verified conflicted significantly with information contained in a prior filing on behalf of the beneficiary. Counsel appealed.

On appeal, counsel contends “the observations of the Service on the qualifying letter of the beneficiary, leap to a conclusion belied by additional facts to be produced.” Counsel further contends that “based upon a premature conclusion on the bona fides of the beneficiary’s qualifying experience, the Service wrongfully denied the I-140 filed by the petitioner.”

Counsel on appeal, however, has submitted no further evidence of the beneficiary’s experience. We have only the letter from the Hotel Hilton, Colon, Ecuador for consideration. First, we note that the beneficiary did not list any prior experience with the Hotel Hilton on Form ETA 750B. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board’s dicta notes that the beneficiary’s experience, without such fact certified by DOL on the beneficiary’s Form ETA 750B lessens the credibility of the evidence and facts asserted. *Matter of Leung* would, therefore, preclude consideration of the Hotel Hilton letter submitted with the I-140 Petition, but not listed on the certified Form ETA 750B.

Second, we note, as the Service Center correctly noted in the denial, that on Form G-325 submitted in connection with the beneficiary’s prior asylum application, the beneficiary listed his work experience as: (1) self-employed, landscaping, May 1993 to present (date of application signature: October 30, 1994); and (2) Farmer (Ecuador), from June 1976 to December 1992. The application had additional space to list other positions should that have been relevant. The first position where the beneficiary lists that he was employed as a self-employed landscaper conflicts with the dates listed on Form ETA 750 for his listed experience with Riverview as a cook in Oakdale, New York. The dates of the second position where the beneficiary lists that he was employed as a farmer in Ecuador conflict with the dates of the experience verified for the position with the Hotel Hilton. The beneficiary did not list any other prior positions on the Form G-325A, either related to employment with the Hotel Hilton, or as a chef or cook.

Further, counsel submitted no evidence on appeal to demonstrate that the Service Center’s conclusion regarding the inconsistencies in the beneficiary’s claimed experience was in error. Counsel did not submit any documentation or evidence to verify any other experience that the beneficiary had listed on the ETA 750.

The information listed on Form ETA 750B, and Form G-325A conflict significantly, and raises serious concerns regarding the veracity of the beneficiary. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), which states: “Doubt raised on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.” Further, “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.” *Matter of Ho*, 19 I&N Dec. at 591-592.

The petitioner has failed to resolve the inconsistencies in the evidence, and therefore, has not documented that the beneficiary had two prior years of experience as a cook. As a result, the record does not demonstrate that the beneficiary meets the position’s experience requirements certified on the Form ETA 750.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.