



U.S. Citizenship  
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File: WAC-03-225-53365 Office: CALIFORNIA SERVICE CENTER Date: **SEP 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:

SELF-REPRESENTED

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 immigrant visa petition. The matter 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 ("Cook/Indo Mediterranean"). 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 May 3, 2005, denial, the case was denied based on the petitioner's failure to demonstrate that the beneficiary met the requirements of 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 appeal.<sup>1</sup>

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

The regulation 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.

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<sup>1</sup> 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).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 19, 2001. The proffered wage as stated on Form ETA 750 for the position of an antenna repairer is \$11.55 per hour, 40 hours per week, which is equivalent to \$24,024 per year. The labor certification was approved on March 3, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on August 1, 2003. Counsel listed the following information on the I-140 related the petitioning entity: date established: 1995; gross annual income: \$10,000,000; net annual income: \$600,000; and current number of employees: 240.

On May 14, 2004, the Service Center issued a Request for Additional Evidence ("RFE") requesting additional documentation regarding the petitioner's ability to pay the beneficiary the proffered wage from 2001 to the present, along with documentation to corroborate the experience letter provided on behalf of the beneficiary, specifically for the petitioner to send copies of the beneficiary's signed, dated, and certified federal tax returns from 1997 to the present, along with the beneficiary's W-2 statements. The petitioner submitted its federal tax returns along with a statement from the beneficiary that he was unable to supply tax documents or W-2 statements since he was paid in cash.

On May 3, 2005, the Director denied the case finding that the petitioner's response was insufficient to document that the beneficiary had the required skills listed on the certified ETA 750. The petitioner appealed to the AAO.

We shall examine the documentation related to the beneficiary's qualifications within the prior record, and then address the petitioner's additional arguments on appeal. In evaluating the beneficiary's qualifications, 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 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> 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).

On the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered, as a cook/Indo Mediterranean, with duties including: "Responsible for the complete planning and preparation of dishes, dinners, deserts and other foods, according to recipes for restaurant specializing in a Indo-Mediterranean cuisine. Prepares meats, soups, sauces, vegetables, pastas, and other foods prior to cooking. Seasons and cooks food according to prescribed method, personal judgment and experience with cuisine. Portions and garnishes food and serves to waiters on order." The petitioner listed no educational requirements in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, signed on April 18, 2001, the beneficiary listed his prior work experience as: [REDACTED] Pacific Pizza Corporation, 2200 West Valley Road, Alhambra, CA 91803, as a cook from July 1997 to April 2001, 40 hours per week. Further, the job description block for the position with [REDACTED] Pacific Pizza Corporation described his experience as follows: "Did all preparation, cooking, seasoning, portioning, garnishing and serving orders to waiters. Observed, tasted, and seasoned foods based on personal judgment and experience with cuisine. Did ordering and inventory."

For the individual beneficiary to qualify for the certified labor certification position, the petitioner must demonstrate the beneficiary's prior experience to qualify the individual for that position, and that the beneficiary obtained the experience by the time of the priority date. Evidence must be in accordance with 8 C.F.R. § 204.5(l)(3), which 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.

To document the beneficiary's experience, the petitioner submitted a letter from [REDACTED] Pacific Pizza Corporation, which provided that the beneficiary "has worked as a full time Cook for us receiving a salary of \$420.00 per week." The Service Center noted that the letter was deficient, as it did not specify the beneficiary's job duties while he was employed as a Cook for [REDACTED] Pizza.

As noted above, the RFE requested additional documentation to confirm the beneficiary's experience. In response, the petitioner had submitted the beneficiary's statement that he was paid in cash and could not provide any further confirmation of his employment.

The petition was denied and on appeal, the petitioner submitted a second letter. The second letter was submitted on letterhead of "Tacos Los Sahuayos, Av. Tepecyac 4069 Col. Chapalita, Zapapan, Jal. Mexico." The translated letter provided: "by means of this letter I hereby state that [REDACTED] worked in this restaurant during 2 years (1995-1997). As such, I highly recommend him for the uses he desires."

The letter that the petitioner has presented on appeal is lacking critically in listing the beneficiary's job title for the prior position. The letter does not specify whether the beneficiary was a cook, kitchen help, a waiter, worked as a dishwasher, or any other related restaurant position. The letter similarly fails to list the beneficiary's job duties during the time period that he worked for Tacos Los Sahuayos, and whether the beneficiary worked on a full time or a part time basis. Additionally, the beneficiary did not list any experience with Tacos Los Sahuayos on his ETA 750B Form. *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.

The second letter provided would not confirm, either considered separately or in addition to the initial letter, that the beneficiary had the required two years of experience in the job offered as a Cook/Indo Mediterranean. Further, we note that the ETA 750A job offer specifically lists the position as a "Cook/Indo Mediterranean" and the job duties entail the "complete planning and preparation of dishes, dinners, deserts and other foods, according to recipes for restaurant specializing in a Indo-Mediterranean cuisine." Nothing in the beneficiary's Form ETA 750B description of his duties with Jacmar Pizza evidences prior experience with the preparation of food of an Indo Mediterranean variety. Further, the job offer contemplates duties of a more complex skill, such

as the “complete planning and preparation,” than the beneficiary lists in his prior work experience. The beneficiary’s work experience letters do not provide any job details or description of his work to allow us to conclude whether the tasks of his prior experience would meet the criteria of the job offered.

Specifically, to fulfill the requirements of the position, the labor certification as drafted, and certified would require that the beneficiary evidence two years of prior experience in the job offered, as a “Cook/Indo Mediterranean.” The petitioner did not list that a candidate would qualify for the position based on two years of related experience, solely as a cook, chef, or any similar related occupation.

Accordingly, the petition was properly denied for failure to document that the beneficiary’s experience met the requirements of the certified ETA 750B. 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.