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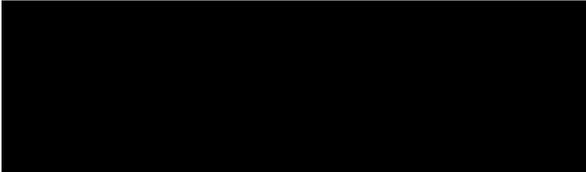
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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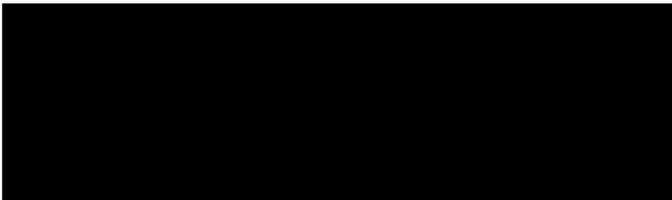


FILE:  Office: CALIFORNIA SERVICE CENTER Date: **SEP 29 2006**
WAC-04-242-53645

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 is a bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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 has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

On appeal, counsel submits a letter and additional evidence.¹

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.

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 30, 2001.

Citizenship and Immigration Services (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).

The certified Form ETA 750 in the instant case states that the position of baker requires two (2) years of experience in the job offered. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary set forth his work experience. He listed his experience as "Self-Employed" from March 2000 to the present, and as a "Baker" for [REDACTED] in Los Angeles, California from January 1997 to March 2000. He provided no further information concerning his working experience as a baker on this form, which was signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

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). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The instant I-140 petition was submitted on August 31, 2004 with a copy of an experience letter from [REDACTED] the sole proprietor of El Quetzal Bakery #5² located at 1205 W. Venice Boulevard, Los Angeles, California 90006 to corroborate the information represented on the Form ETA-750B pertinent to the beneficiary's qualifications as required by the above regulation.

The director issued a request for additional evidence (RFE) on September 23, 2004 requesting the petitioner to provide evidence for the petitioner's ability to pay as well as to "[p]rovide the beneficiary's W-2's from 1997 to 2000 while employed by El Quetzal Bakery #4" in an effort to substantiate the beneficiary's claimed experience. In response to the director's RFE, counsel submitted a letter from the beneficiary instead of the W-2 forms for the beneficiary. The beneficiary stated in his letter that: "[d]ue to my current immigration status, I was paid cash. Therefore, I am unable to prove [sic] you W-2's for the years of 1997 to 2000."

On January 20, 2005, the director denied the petition finding that the evidence submitted had not established that the beneficiary met the minimum requirements listed on the Form ETA 750 at the time the request for certification was filed, and therefore, the beneficiary was not qualified.

On appeal counsel submits other forms of evidence than W-2 forms to substantiate that the beneficiary has exceeded the minimum requirements for experience under 8 C.F.R. § 204.5(l)(3)(ii)(B) and asserts that the newly submitted evidence establishes the beneficiary's qualifications for the proffered position.

The issue in the instant case is whether the petitioner established the beneficiary's requisite experience as required by the proffered position on the Form ETA 750.

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) of 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 record shows that the petitioner submitted a photocopy of an experience letter from [REDACTED]. The petitioner did not explain where the original copy is kept. This letter was dated April 22, 2001, on a computer created letterhead of El Quetzal Bakery #4, signed by the owner of the business. The letter came without any supporting documents. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be

² Although the letter was on the letterhead of El Quetzal Bakery #4, the owner claimed later in his notarized statement dated February 16, 2005 that the #4 was a typographical error.

determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989).

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. The director requested the petitioner to submit the beneficiary's W-2 forms for 1997 to 2000 from the former employer. However, the petitioner submitted a statement from the beneficiary instead of his W-2 forms from the former employee. The beneficiary claimed that he had no W-2 forms for these years because he was paid cash, and therefore, they were not available. The form ETA 750B indicates that the beneficiary was self-employed since March 2000. If the beneficiary was paid cash from 1997 to 2000 as full time employee compensation, then that income should have been reported on his tax returns or other documentation since the amount would have been over the minimum exemption for tax filing. However, the beneficiary did not provide any documentary evidence to support his assertions. 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)). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The record contains an original copy of a notarized statement dated February 16, 2005 from [REDACTED] submitted with the appeal. [REDACTED] February 16, 2005 statement declares in pertinent part that: "I employed [the beneficiary] as a Baker from 1997 to 2000. Due to his immigration status, I paid him cash."

According to [REDACTED]'s first letter dated April 22, 2001 the beneficiary worked as a full time baker for his business from January 6, 1997 to March 15, 2000. The February 16, 2005 statement does not indicate how much the beneficiary was paid; therefore, it is not clear whether the beneficiary worked on full time basis or not. If the beneficiary had worked and had been paid as a part time employee or even independent contractor on an as-needed basis, the part time experience from January 1997 to March 2000 would not be sufficient to meet the minimum experience requirement of two full time years. "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. 582, 591-592 (BIA 1988).

On appeal counsel asserts that newly submitted evidence such as photos of the beneficiary at work, the former employer's tax returns and the operating permit supports [REDACTED] February 16, 2005 statement and substantiates the beneficiary's qualifications for the proffered position. Counsel submits eight photos of the beneficiary working in a bakery. However, the photos do not show when, where and with whom these photos of the beneficiary were taken. Counsel does not explain how these photos evidence that the beneficiary worked as a full time baker at El Quetzal #5 located at 1205 W. Venice Blvd., Los Angeles, California from January 1997 to March 2000, and how they establish that the beneficiary was paid cash during the employment. Submitted Public Health Operating Permit issued by County of Los Angeles to El Quetzal #5 in 1993, 1995, 1999, and 2004 establishes that the business exists and operates during these years. However, they do not demonstrate the beneficiary's experience as a full time baker with this bakery from January 1997 to March 2000.

Counsel also submits [REDACTED] individual income tax returns for the years 1997 through 2000 as evidence to substantiate the beneficiary's experience with El Quetzal #5. El Quetzal #5 is alleged as a sole

proprietorship, which the beneficiary claimed to have worked for and [REDACTED] is alleged the sole proprietor. Unlike a corporation, a sole proprietor reports income and expenses from the businesses on his individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. After completely reviewing the Schedule C's for all these years, the AAO notes that the name of proprietor reported on these tax returns is [REDACTED] instead of [REDACTED] although they filed a joint individual tax return on Form 1040 and the name of business is El Quetzal Bakery instead of El Quetzal #5. No evidence in the record indicates [REDACTED]'s title and position with the business, nor was any explanation given as to why such a letter was unavailable from the sole proprietor. Counsel did not submit any evidence showing the relationship between El Quetzal Bakery and El Quetzal #5. The April 22, 2001 letter and February 16, 2005 statement are not accepted as primary evidence concerning the beneficiary's experience from an employer or trainer as required by the regulation at 8 C.F.R. § 204.5(g)(1).

In addition, the AAO also notes from the Schedule C's for El Quetzal Bakery that the business did not have wage or labor expense in any single year during this period from 1997 to 2000; in the other words, it did not pay anyone any amount of money as salaries or wages in those years either as an employee or independent contractor. Counsel did not explain why the business did not have any wage expenses despite [REDACTED]'s claim that the employer paid the beneficiary for his full time work. Counsel did not explain how the tax returns support [REDACTED]'s statement. Furthermore, the Schedule C's show that the business had net income of \$10,300 in 1997, \$8,360 in 1998, \$10,170 in 1999 and \$10,095 in 2000 without any wages paid. Therefore, the Schedule C's do not support the beneficiary's full time employment with El Quetzal Bakery.

For the reasons discussed above, the AAO finds that the petitioner did not establish with regulatory-prescribed evidence the beneficiary's two years of experience as a baker, and further failed to establish that the beneficiary is qualified for the proffered position. Counsel's assertions and new evidence submitted on appeal fail to overcome the ground of denial in the director's decision.

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.