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U.S. Citizenship
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Services

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FILE:

WAC 04 136 50617

Office: CALIFORNIA SERVICE CENTER

Date: APR 02 2007

IN RE:

Petitioner:

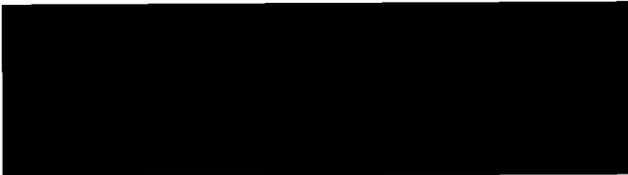
Beneficiary:



PETITION:

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

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, a Form ETA-750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary meets the petitioner's qualifications for the position as stated in the Form ETA-750 as of the petition's priority date, and denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this 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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, hold baccalaureate degrees and are members of the professions.

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 January 5, 2000.

On the Form ETA-750B, signed by the beneficiary on November 4, 1999, the beneficiary did not claim to have worked for the petitioner. The ETA-750 was certified by the Department of Labor on June 5, 2002.

The I-140 petition was submitted on April 8, 2004. On the petition, the petitioner claimed to have been established in 1980, and to currently have 11 employees. The petitioner's 2000, 2001, and 2002 federal income tax returns reflect a net annual income of \$54,026.00, \$56,635, and \$121,795.00, respectively.

In a request for evidence (RFE) dated July 2, 2004, the director requested, in part, proof of the beneficiary's education and employment experience. The director specifically requested evidence that the beneficiary possesses eight years of grade school education, and three years of employment experience as described on the ETA-750.

In response to the RFE, counsel submitted the following evidence pertaining to the beneficiary's education and employment experience:

- Sworn statement, dated 9/9/04, from the beneficiary, declaring, in part: that he was employed at the [REDACTED] bakery from January 1977 to December 1980; that [REDACTED] was deceased and, therefore, his daughter, [REDACTED] served as the "representative" on the beneficiary's experience letter using the seal of her managing brother, [REDACTED] and that the bakery's new representative, [REDACTED], had issued a new experience letter with his own seal;

- Certification of Studies, dated 09/04/2004, from the National Educational System in Guadalajara, Jalisco, Mexico, crediting the beneficiary with primary education for the school period from 1975-1976;
- Letter, dated 09/01/04, from the Secretary of Education in Guadalajara, Jalisco, Mexico, listing the grades the beneficiary obtained in the first, second, and third grades of secondary school (night shift), from 1976-1979;
- Letter, dated 09/11/04, from a representative of the Mexican bakery, Panificadora [REDACTED] confirming that the beneficiary worked as a baker for the said business for more than three years, eight hours per day for six days a week, from January 1977 through December 1980;
- Letter, dated 09/10/04, from a friend and former coworker of the beneficiary, stating that the beneficiary worked as a baker in the [REDACTED] bakery from 1977 to 1980;
- Letter, dated 09/10/04, from a delivery person for the [REDACTED] bakery, stating that the beneficiary worked at the [REDACTED] bakery from 1977 to 1980;
- Letter, dated 09/10/04, from a person who presently works in the area of the [REDACTED] bakery, stating that the beneficiary worked at the [REDACTED] bakery from 1977 to 1980; and
- Photos of the “[REDACTED]” bakery.

The petitioner’s submissions in response to the RFE were received by the director on September 22, 2004.

On October 1, 2004, the director sent a Notice of Intent to Deny (NOID) to the petitioner, stating, in part:

- It is unreasonable to assume that the beneficiary at fourteen years of age was employed as a baker with a “vast knowledge in preparing breads, cakes[,] conchas, rolls, empanadas, cookies and all types of international bread ordered for special occasions”;
- The letters submitted by co-workers of the beneficiary and the photos of the bakery do not qualify as evidence of experience. Experience letters must be submitted by the owner or supervisor of the beneficiary; and
- The beneficiary also submitted evidence that while he was employed as a baker six days a week he was also attending school full time. It is also unreasonable to assume that a fourteen year old would work beyond full time and be able to attend school.

In response to the NOID, counsel submitted a letter, dated October 26, 2004, stating, in part:

- [T]he claim of “vast knowledge” refers to [the beneficiary] when he finished working for Panificadora [REDACTED] not when he started working there;
- [The beneficiary] submitted a sworn statement stating that on October 30, 1999 he was unable to obtain a letter of employment from Panificadora [REDACTED] and his previous employer, [REDACTED] Orozco, because the latter was by then already deceased. . . . [REDACTED] was at that

time the “official representative” of her father’s estate, and as such she was the **manager of the bakery**. . . . [T]he new representative of [the petitioner] [is] now her brother, [REDACTED]; and

[The beneficiary] attended school from 1977 to 1980 at night. . . . It was only by attending night school that [the beneficiary] was able to work a full-time job during the day for [the petitioner] from 7 A.M. to 3 P.M.

The petitioner’s submissions in response to the NOID were received by the director on October 28, 2004.

In a decision dated July 14, 2005, the director determined: that the letters from [REDACTED] and [REDACTED] are insufficient evidence of employment because they are not written by the direct supervisor or employer of the beneficiary; that the petitioner did not submit contracts or pay statements to corroborate the claims in such letters; that neither the son or daughter of the deceased owner of Panificadora Diana were employed at the said business during the time of the beneficiary’s alleged employment, the son was only 11 years old during the beneficiary’s alleged employment period, and therefore the deceased owner’s son and daughter are unqualified to write letters describing the beneficiary’s “vast knowledge”; that the letters from the local businessman and deliveryman are insufficient evidence of the beneficiary’s employment because it is unreasonable to assume that such persons could remember and verify the beneficiary’s employment experience; that an overseas investigation conducted by the U.S. Consulate in Guadalajara found no reliable sources to verify the beneficiary’s claimed employment; and that a check with the Mexican Social Security Institute revealed no employment record for the beneficiary. The director therefore denied the petition.

On appeal, counsel submitted a brief and copies of previously submitted documentation. Counsel stated, in part, that the petitioner never received a copy of the overseas investigation report, which only confirmed that the investigator failed to find a source to verify the beneficiary’s employment at the Diana bakery and his social security record. Counsel stated further:

The petitioner has established by a preponderance of the evidence that the beneficiary worked at Diana bakery for more than three years from January 1977 to December 1980 in Jalisco, Mexico. Moreover, the CSC has abused its discretion by ignoring a letter from [REDACTED] . . . who was the supervisor of the beneficiary at [REDACTED] bakery, even though CSC requested a letter from either the beneficiary’s former employer (the now deceased [REDACTED] or supervisor, back in October 1, 2004 . . . The CSC further abused its discretion when only an affidavit is needed to prove an alien meets the requirements for a job offered. *Lu-Ann Bakery Shop, Inc. V. Nelson*, 705 F. Supp. 7 (D.D.C. 1988). . . .

On January 20, 2006, counsel submitted a “supplemental brief” and included a copy of a decision from the Ninth Circuit Court of Appeals, *Lin v. Gonzales*, 2006 U.S. App. LEXIS 675 (9th Cir. 2006). Counsel stated, in part, as follows:

In *Lin v. Gonzales*, supra, the Ninth Circuit Court of Appeals dealt with the issue of the nature of evidence required to support an [IJ’s] adverse credibility finding in an asylum case. . . .

The Ninth Circuit determined that the IJ discounted the probative value of the three documents based only upon speculation and conjecture and without support from the record. *Lin* at *9. The Court stated that the IJ based his speculation on what a document should look like based solely on an “American-based view of government forms.” *Id.* at *20.

On February 10, 2006, counsel submitted a second "supplemental brief" and included a copy of Memorandum from [REDACTED], Acting Deputy Director, U.S. Citizenship and Immigration Services (CIS), *Matter of Chawathe* (January 11, 2006), regarding the standard of proof in administrative immigration proceedings. Counsel stated, in part, as follows:

In our case, the petitioner and beneficiary submitted 19 items of evidence, each one indisputably relevant and probative. The director did not find any reasons to impeach the credibility of any of these items. . . .

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 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) or 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.

To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 Application for Alien Employment Certification, Form ETA-750A, blocks 14 and 15, sets forth the minimum education, training and experience that an applicant must have for the position of baker. On the ETA 750A submitted with the instant petition, blocks 14 and 15 describe the requirements of the offered position as follows:

| | | |
|-----|------------------------------|-------|
| 14. | Education (number of years) | |
| | Grade School | 8 |
| | High School | Blank |
| | College | Blank |
| | College Degree Required | None |
| | Major Field of Study | None |
| | Training - yrs | 0 |
| | Experience | |
| | Job Offered | Yrs 3 |
| | Related Occupation | Yrs 0 |
| | Related Occupation (specify) | None |
| 15. | Other Special Requirements | None |

The beneficiary states his qualifications on Form ETA-750B. On the ETA-750B submitted with the instant petition, in block 11, for information on the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), the beneficiary states the following:

| <u>Schools, Colleges and Universities, etc.</u> | <u>Field of Study</u> | <u>From</u> | <u>To</u> | <u>Degrees or Certificates Received</u> |
|--|------------------------------------|-------------|-----------|---|
| [REDACTED] Guadalajara, Jalisco, Mexico | General studies | 09/1969 | 06/1975 | Completed |
| Escuela Secundaria por Cooperacion Guadalajara, Jalisco, Mexico | Night school/ General education | 09/1975 | 06/1979 | Completed |

On the ETA-750B submitted with the instant petition, in block 15, for information on the beneficiary's qualifying work experience, the beneficiary states the following:

| <u>Name and Address of Employer</u> | <u>Name of Job</u> | <u>From</u> | <u>To</u> | <u>Kind of Business</u> |
|-------------------------------------|-----------------------------------|-------------|-----------|-------------------------|
| [REDACTED] | Baker, Latin American Specialties | 01/1977 | 12/1980 | Bakery |

The issue is whether the beneficiary met all of the requirements stated by the petitioner in block 14 of the labor certification as of the day it was filed with the Department of Labor.

At the outset, the AAO notes that the record contains inconsistencies regarding the beneficiary's education. On the ETA-750B submitted with the instant petition, in block 11, the beneficiary states that he took "General studies" from 09/1969 to 06/1975. The record, however, does not contain any evidence to corroborate this claim. Rather, a document from the Secretary of Education of the State of Jalisco, dated 09/01/2004, accredited the beneficiary with one year of primary education for the school year from 1975 to 1976. Further, on the ETA-750B submitted with the instant petition, in block 11, the beneficiary also states that he took secondary school classes at night from 09/1975 to 06/1979. This information conflicts with the document, dated 09/01/04, from the Secretary of Education, Regional Union of Educational Services, Center 1 Region, Scholastic Control Section, in Guadalajara, Jalisco, Mexico, who states, in part, that the beneficiary took evening classes for secondary grades one, two, and three from 1976-1977, from 1977-1978, and from 1978-1979. The 09/01/04 document does not indicate that the beneficiary commenced his secondary school classes in September 1975, as reflected on the ETA-750B. The record contains no explanation for these inconsistencies. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: Doubt cast 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) 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 also notes that the record contains inconsistencies regarding the beneficiary's work experience. On the ETA-750B submitted with the instant petition, in block 11, the beneficiary states that he worked as a

baker of Latin American specialties at the [REDACTED] in Guadalajara, Jalisco, Mexico from 01/1977 to 12/1980. The record contains an affidavit from [REDACTED] dated 06/18/05, who declares, in part, that he, the affiant, was 11 years old and the beneficiary 14 years old when the beneficiary began to work for the petitioner. The record also contains letters, dated June 20, 2005, from the beneficiary's father and mother declaring, in part, that their son was employed by the petitioner when he was 14 years old. The record also contains a letter, dated 12/18/05, from a neighbor certifying, in part, that the beneficiary was 14 years old when he began working for the petitioner. The record, however, reflects that if the beneficiary had begun to work for the petitioner in 01/1977, then he would have been just barely 13 years old. As these letters contain the identical error, the AAO must question whether the opinions expressed in each letter are the views of each author. Further, in his 09/10/04 letter, [REDACTED] identifies himself as the beneficiary's co-worker and friend. It is only after the director issued his Notice of Intent to Deny, dated 10/01/04, stating, in part, that the record contained no experience letters by the petitioner's owner or supervisor of the beneficiary, that [REDACTED] and [REDACTED] submitted letters, dated 06/18/05 and 12/18/05, respectively, asserting, in part, that [REDACTED] was the beneficiary's supervisor. It is not clear, however, that [REDACTED] would realistically have been the beneficiary's supervisor, when he previously described their relationship as mere co-workers and friends. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: Doubt cast 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) 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. It is also noted that in a letter dated October 26, 2004, counsel asserts, in part: "[I]t is not uncommon in Mexico for young men to begin working at an early age to support themselves and their often poor extended family." Counsel, however, provides no evidence in support of his assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 1977); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

Based on the foregoing analysis, the evidence in the record fails to establish that the beneficiary meets the petitioner's qualifications for the position as stated in the Form ETA- 750 as of the petition's priority date. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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.