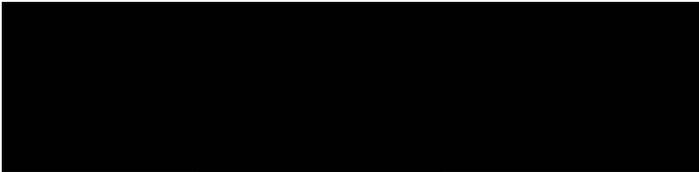




U.S. Citizenship
and Immigration
Services

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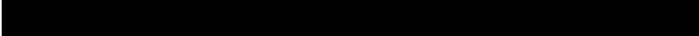
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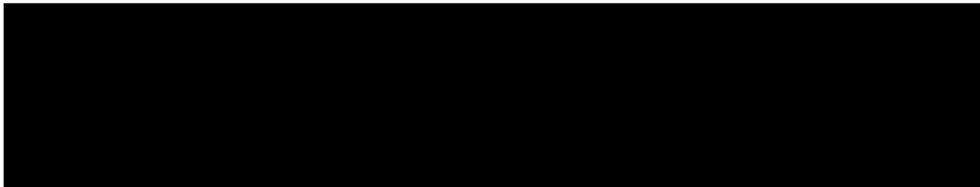
FEB 22 2007

FILE:  Office: CALIFORNIA SERVICE CENTER Date:
WAC-05-125-50539

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 Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is in fast food business. It seeks to employ the beneficiary permanently in the United States as a first-line supervisor/manager of food preparation (store manager). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. The director 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 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.

As set forth in the director's August 24, 2005 denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The director noted inconsistencies in information pertaining the beneficiary's employment experience.

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 demonstrate 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). Here, the Form ETA 750 was accepted on February 28, 2001.

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. However, on appeal, counsel does not submit any new evidence independent objective evidence with the brief.¹ The relevant evidence in the record includes two experience letters from the beneficiary's prior employer. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the director erred in giving less weight to the verification letters, and that there are no discrepancies between the two job verification letters.

¹ Although 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) and 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 make decision based on evidence submitted only since counsel does not submit any new evidence on appeal.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of store manager. In the instant case, item 14 describes the requirements of the proffered position. The applicant must have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A. Item 15 of Form ETA 750A does not reflect any special requirements. Item 13 describes the duties of the proffered position as follows:

Manage the entire store engaged in Fast Food business. Plan and prepare work schedules and assign employees to specific duties. Coordinate with workers activities. He is responsible to ordering food supplies. Prepare daily record of transaction and prepare weekly selling report and inventory report to be presented to Franchise. Keep operating records. Coordinate sale promotion activities according to the franchise policy. Answer customer's complaints or inquiries. Hire and train employees.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has been unemployed since October 2001, worked 40 hours per week for Dollar Store in Rialto, California as a manager from July 1995 to December 2000, worked 40 hours per week for Northridge Liquor in Northridge, California as a store manager from March 1994 to June 1995, and worked 40 hours per week for a coffee shop named Coffee Time in Toronto, Canada as a store manager from December 1991 to February 1994. He does not provide any additional information concerning his employment background on that form.

The record of proceeding also contains a Form G-325, Biographic Information sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form under a section eliciting information about the beneficiary's last occupation abroad, he represented his experience as store manager working for Coffee Time same as on the Form 750B above a warning for knowingly and willfully falsifying or concealing a material fact.

With the petition, the petitioner submitted a copy of an experience letter from [REDACTED] on Coffee Time Donuts Incorporated letterhead pertinent to the beneficiary's qualifying work experience. The record of proceeding contains another undated letter from [REDACTED] submitted in response to the director's request for evidence (FRE). On appeal, counsel does not submit any additional evidence pertinent to the beneficiary's qualifications.

The regulation at 8 C.F.R. § 204.5(1)(3) 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.

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.

The instant I-140 petition was submitted with an experience letter from [REDACTED] pertinent to the beneficiary's qualification as required by the above regulations. [REDACTED]'s letter stated in pertinent part that:

This letter is to confirm that [the beneficiary] was employed by Coffee Time store [REDACTED] located at [REDACTED], Toronto, Canada, in the position of Production/Store Manager for 27 months from December 1991 to February 1994.

During [the beneficiary's] employment he was responsible for management of the entire store and co-ordination of workers activities. He was responsible for recruiting new workers, training them, assigning duties and weekly schedules. He also prepared sales and inventory reports. In his capacity as a manager [the beneficiary] also planned and developed new sales strategies to promote the overall growth and progress of the business. He maintained communication with the Coffee Time franchise head office. He also conducted weekly staff meetings with employees to implement franchise policy according to franchise regulations.

[REDACTED] letter submitted with the petition was on letterhead of Coffee Time Donuts Incorporated with date of March 21, 2001 ([REDACTED] 2001 letter), and signed by [REDACTED] as the owner and proprietor. It was from a former employer and included the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. Therefore, [REDACTED] 2001 letter may be accepted as evidence in the form of letter from former employer as required by the regulations at 8 C.F.R. § 204.5(l)(3) and 8 C.F.R. § 204.5(g)(1). However, the letter did not verify whether the beneficiary worked as full time employee or part-time. If the beneficiary worked on a part-time basis, the 27 months of experience would not have met the requisite two years of experience in the job offered. Therefore, the petitioner failed to establish the beneficiary's qualifications for the proffered position with this letter. The petitioner must demonstrate further that the beneficiary possessed the requisite two years of full time experience in the proffered position prior to the priority date.

In response to the director's RFE, the petitioner submitted another letter from [REDACTED] which was dated June 20, 2005 [REDACTED] 2005 letter). This letter include the name, address, and title of the writer and a specific description of the duties performed by the beneficiary. The letter also specified the starting and ending dates of the employment and verifies that the beneficiary worked as a full time employee during the 27-month period.

2005 letter was on his personal letterhead instead of the company's. The regulation allows other documentation relating to the alien's experience or training be considered if such a letter from a former employer is not available. In his 2005 letter, [REDACTED] explained that Coffee Time store # [REDACTED] the beneficiary claimed to have worked for closed in July 2003 and he provided this letter as the owner of the store between October 1991 and July 2003. The director declined to accept this letter as evidence to establish the beneficiary's qualifications because it described the beneficiary's duties differently from [REDACTED] s 2001 letter.

After a complete review of both letters from [REDACTED] the AAO finds that two letters together meet the requirements set forth by the regulations and have established that the beneficiary possessed the requisite two years of experience required by the Form ETA 750. The two letters include different descriptions of the duties performed by the beneficiary during the period, however, the 2005 letter contains the description which merely expands the description from the 2001 letter. The difference does not appear to be so material that the letters' reliability are doubtful and further that the letters themselves could not be accepted as regulatory-prescribed evidence. In addition, the main purpose of the regulatory requirements that an experience letter must include a specific description of the duties is to verify whether the beneficiary possesses such experience to be capable to perform the duties set forth at the Form ETA 750 Item 13. The AAO concurs with counsel's argument that the descriptions in the two letters establish that the beneficiary had qualifying experience for the proffered position prior to the priority date.

Counsel's assertions on appeal have overcome the director's finding in his decision to deny the petition. The evidence submitted establishes that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date and the beneficiary qualifies for the proffered position in the instant case.

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 met that burden.

ORDER: The appeal is sustained. The decision of the director is withdrawn. The petition is approved.