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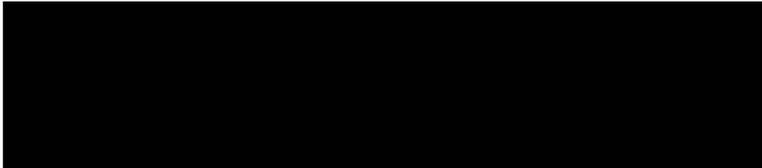
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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File: [Redacted] Office: TEXAS SERVICE CENTER Date: JUN 01 2007
SRC-06-027-51102

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 Director, Texas Service Center (“director”), 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 specialty cook (“Cook, Specialty Foreign Food”). 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 December 6, 2005 denial, the case was denied based on the petitioner’s failure to demonstrate that the beneficiary had the experience required by the certified ETA 750.

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.¹

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 an immigrant visa 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.

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).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on February 13, 2003.² The proffered wage as stated on Form ETA 750 is \$9.00 per hour for an annual salary of \$18,720 per year. The labor certification was approved on August 10, 2005, and the petitioner filed the I-140 Petition on the beneficiary's behalf on November 3, 2005. The petitioner listed the following information on the I-140 Petition: established: February 24, 2000; gross annual income: "attached"; net annual income: "attached"; and current number of employees: 9.

On November 16, 2005, the director issued a Notice of Intent to Deny ("NOID"), which provided that the petitioner had not submitted evidence to establish that the beneficiary had the required two years of experience. The NOID provided that "all evidence submitted shows the beneficiary has only worked as a cook since January 2003 until the present. Please submit evidence which [shows] the beneficiary has the required two years of experience." The petitioner resubmitted the letter that it initially filed the petition with, which the director had previously identified as deficient to show that the beneficiary met the requirements of the certified ETA 750. The director denied the petition, the petitioner appealed and the matter is now before the AAO.

In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("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).

² We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was formerly permitted by the DOL. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services ("CIS") based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule becomes effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

On the Form ETA 750A, the “job offer” position description provides: “To prepare and cook all types of Middle Eastern cuisine.” Further, the job offered listed that the position required prior experience of: 2 years in the job offered, Specialty Cook. The petitioner did not list any other special requirements.

On the Form ETA 750B, the beneficiary listed his relevant experience as: [REDACTED] Saida Region, Lebanon, from October 2003 to the present (date of signature, October 20, 2005), position: Chef..

A beneficiary is required to document prior experience 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 the following letter:

Letter from [REDACTED], Owner, [REDACTED], October 19, 2005;
Position title: “Chef of Lebanese Kitchen;”
Dates of employment: January 2003 to present (date of letter October 19, 2005);
Description of duties: not listed.

The director then issued the NOID for the petitioner to submit evidence to demonstrate that the beneficiary has the required two years of experience. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition’s filing date, which as noted above, February 13, 2003. *See Matter of Wing’s Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In response to the NOID, the petitioner resubmitted the letter the same letter, and provided that the letter demonstrated that the beneficiary had thirty-three months of experience, more than the required two years of experience.

The director denied the petition as the beneficiary’s experience was all obtained, with the exception of one month, after the priority date. The petitioner failed to demonstrate that the beneficiary had obtained the required two years of experience before the priority date.

On appeal, counsel provides that the director erred in denying the I-140 Petition, and that “the enclosed letter from [REDACTED] clearly establishes that the beneficiary had forty-six months of experience through December 2002, which is prior to the February 19, 2003 priority date.” Counsel provided that had the NOID indicated that “evidence was required prior to the February 19, 2003 priority date, such evidence would have been promptly submitted.”

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). A petitioner must establish that the beneficiary had the required experience by the priority date. The NOID indicated that the beneficiary's documented experience was deficient.

The letter submitted on appeal provided:

Letter from [REDACTED], Director, [REDACTED] Mouharbieh, Saida, Lebanon,
December 21, 2005;
Position title: "Chef of Lebanese Kitchen;"
Dates of employment: February 1999 to December 2002;
Description of duties: not listed.

The purpose of the request for evidence or a NOID is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's NOID. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

Further, in reviewing the experience letters provided, the letters fail to address the beneficiary's job duties, or that the beneficiary is able to prepare "all types of Middle Eastern cuisine," as opposed to only Lebanese cuisine, or that Lebanese cuisine would encompass preparation of "all types of Middle Eastern cuisine." Additionally, we note that the beneficiary listed only one position on his Form ETA 750B, the position with [REDACTED] Form ETA 750B, Section 15, prior work experience, provides the following instructions: "List all jobs held during the last three (3) years. Also list any other jobs related to the occupation for which the alien is seeking certification as indicated in item 9." As a related position, additionally which fell within the prior three years of October 20, 2005, the beneficiary should have, but did not list that he worked for [REDACTED]. Instead, in "Box B" where a subsequent employer may have been listed, the box was marked "N/A," or not applicable. *See also 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 [REDACTED] letter submitted on appeal, but not listed on the certified Form ETA 750B.

Based on the foregoing, the petitioner has failed to establish that the beneficiary met the requirements of the certified ETA 750. Accordingly, the petition will be denied. 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.