



U.S. Citizenship
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FILE:

Office: VERMONT SERVICE CENTER

Date:

OCT 25 2007

EAC-05-255-51583

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. 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 had any experience with the different types of foreign foods indicated in the Form ETA 750 submitted. The director denied the petition accordingly.

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.

As set forth in the director's March 23, 2006 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 April 30, 2001.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. On appeal, counsel submits an experience letter from [REDACTED] the owner of [REDACTED] Me. in English and Portuguese. Other relevant evidence in the record includes a letter from [REDACTED] and a declaration from [REDACTED] of [REDACTED] Ltda. Me. in Portuguese with English translation. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the director has grossly misinterpreted the initial evidence submitted on behalf of the beneficiary which clearly established the record of 2 years of experience required as a foreign food specialty cook.

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).

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 foreign food specialty cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	EDUCATION	
	Grade School	7 years
	High School	Blank
	EXPERIENCE	
	Job Offered	2 years
	Related Occupation	Blank

The duties are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth her credentials on Form ETA-750B and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), she indicated that she attended [REDACTED]s in the field of "elementary" from September 1961 through September 1976. She provides no further information concerning her educational background on this form. On Part 15, eliciting information of the beneficiary's work experience, she represented that she has been working as a self-employed housecleaner since 1/0/98²[sic]. She did not provide any additional information concerning her employment background on that form.

In corroboration of the Form ETA-750B, the petitioner did not provide any evidence to demonstrate that the beneficiary attended 7 years of grade school. In addition, it is doubtful that the beneficiary's statement on the Form ETA 750B that she attended elementary school named [REDACTED] from September 1961 to September 1976 for 15 years is true. 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. See *Matter of Ho*, 19 I&N Dec. 582, 591 (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) of trainer(s) and shall include the name, address, and title of the

² This is a typographical error. There is no evidence or explanation in the record of proceeding that the beneficiary started her self-employment in January 1998 or October 1998.

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.

With the initial filing, the petitioner submitted a letter from [REDACTED] the owner of the petitioner in the instant case. [REDACTED]'s letter states in pertinent part that:

In addition to her knowledge, [the beneficiary] is fully familiar with estimating food consumption and requisitions or purchases supplies, having spent 5 years as a Cook self employed, in Brazil.

In conclusion, [the beneficiary]'s 5 years of experience as a Cook, all evidence her qualifications for Third Employment-Based Preference Status as a Cook, Specialty, Foreign Food.

Per the regulation at 8 C.F.R. § 204.5(g)(1), other documentation relating to the alien's experience or training must be considered only if a letter from a former employer as generally required by the above regulation is unavailable. However, the petitioner did not submit any evidence to support its assertion that the beneficiary had 5 years of experience as a self-employed cook. The record does not contain any documentary evidence, such as the registration or license for the business run by the beneficiary. 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 AAO is not convinced with the letter from Mr. Meitin that the petitioner submitted sufficient evidence to demonstrate that the beneficiary worked as a self-employed cook for 5 years.

Although the regulation at 8 C.F.R. § 204.5(g)(1) states that the director may consider other documentation relating to the alien's experience if a letter from a current or former employer is unavailable, it still requires other documentation to meet certain evidentiary standards. [REDACTED] is the owner of the petitioner, he is not the beneficiary's former employer or in any position to verify the beneficiary's past experience. A letter from people who have interacted with the beneficiary while she worked for or operated another company cannot be used in lieu of a letter from the actual company for which the beneficiary worked without solid objective evidence. Mr. [REDACTED] letter did not come with any documentary evidence to support its contents. 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)).

In addition, the letter that has been provided is not an affidavit as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of a motion are not evidence and thus, as is the case with the arguments of

counsel, are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

In response to the director's request for evidence (RFE) dated October 24, 2005, the petitioner submitted a declaration from [REDACTED] i of [REDACTED] Me. in Portuguese with an English translation. The declaration was translated by counsel in the instant case, the English translation did not include the date, the writer's name and title in the company, and the certificate of the translator did not certify the English translation as a complete and accurate translation of the original language document. Therefore, the English translation of the declaration from [REDACTED] did not comply with the terms of 8 C.F.R. § 103.2(b)(3), which provides that:

Translations. Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Further, the declaration did not verify the beneficiary's full-time employment with that restaurant. If the beneficiary had worked on a part-time basis, the alleged 31 months of experience could be only counted as 15.5 months of full-time experience, and thus would not meet the two years of experience requirement. The declaration described the beneficiary's "duties as cook were as administrator of the Kitchen and she prepared dishes with meats, poultry and fish." It appears that the experience the beneficiary obtained with the employment at [REDACTED] Me. in Brazil was not the experience as a foreign food specialty cook, and the duties she performed could not qualify her to perform the duties described in Item 13 of the Form ETA 750A. [REDACTED]'s declaration also provided inconsistent information regarding the beneficiary's employment history with the beneficiary's statement on the Form ETA 750B and the petitioner's letter verifying the beneficiary's 5 years of experience as a self-employed cook³. *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 record does not contain any independent objective evidence to resolve these inconsistencies.

On appeal counsel submits a letter from the same [REDACTED] second letter comes from the owner of the former employer and includes a description of the duties performed by the beneficiary as a cook. However, the letter did not verify the beneficiary's full-time employment. If it were part-time, then the alleged 43 months of experience would be counted as 21.5 months of full-time experience which could not meet the requisite two years of experience.

³ Despite requesting listing all jobs held during the last three (3) years, and also listing any other jobs related to the occupation for which the alien is seeking certification as indicated in item 9, the beneficiary only listed her work experience as self-employed housecleaner from 1/0/98 to the present, i.e. April 30, 2001 when the Form ETA 750B was signed by the beneficiary under a declaration under penalty of perjury the foregoing is true and correct pursuant to 28 U.S.C. § 1746. The petitioner's letter did not mention that the beneficiary ever worked for or ran a restaurant named [REDACTED]

Same as his first letter, [REDACTED] second letter contains the same inconsistencies with the beneficiary's statement on the Form ETA 750B and the petitioner's letter verifying the beneficiary's 5 years of experience as a self-employed cook. In addition, [REDACTED] second letter provides inconsistent information with his first one. In the second letter, [REDACTED] verifies that the beneficiary worked for 43 months from April of 1994 through November of 1997 while his first letter certified the beneficiary's employment for 31 months from June 1994 to January 1997. The first letter said that the beneficiary's duties as cook were as administrator of the Kitchen and preparing dishes with meats, poultry and fish, however, the second letter describes the beneficiary's duties as planning menus and cooking foreign-style dishes, dinner, desserts and other foods, portioning and garnishing food, and serving food to waiters. [REDACTED] did not explain what documents or records he based on for his statement and why the two letters provide the beneficiary's employment so differently in either of the letters. The record does not contain any independent objective evidence to resolve these inconsistencies.

[REDACTED] second letter comes both in Portuguese and English without any certificate of translation and [REDACTED] signed both versions. It appears that both Portuguese and English versions were written by [REDACTED] himself. However, the English version does not contain the date in English but in Portuguese. [REDACTED] s first "declaracao" was translated into English as "declaration" while his English version of the second "declaracao" is titled "certificate." The record does not contain any evidence that [REDACTED] is competent to draft his second letter in English. If he could be fluent in written English, his first letter would not be in Portuguese and translated into English. The beneficiary's duties described in the second letter is basically cut and pasted from the item 13 of the Form ETA 750A which is completely cut and pasted from the job description for 313.361-030 Cook, Specialty, Foreign Food in the DOT. These defects raise doubt on the authenticity of the English version of [REDACTED] second letter. If the original Portuguese version had been translated into English, an English translation with a certificate of a translator must be submitted to comply with 8 C.F.R. § 103.2(b)(3).

Since the documents previously submitted contain inconsistencies and raise doubt on the authenticity and reliability of the declaration from [REDACTED] the petitioner should submit independent objective evidence, such as the employer's corporate documents, the employer's payroll records or personnel records, the beneficiary's income statements showing her compensation from [REDACTED] Ltda. Me. or taxation records showing her income from her employment with that restaurant during the time period, to resolve the inconsistencies, to establish the beneficiary's employment with [REDACTED] Ltda. Me., and to demonstrate that [REDACTED] was [REDACTED] Me.'s authorized representative for the time period. However, the record does not contain such evidence submitted previously and on appeal.

The AAO thus affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience as a foreign food specialty cook from the evidence submitted into this record of proceeding and thus the petitioner has not demonstrated that she is qualified to perform the duties of the proffered position.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*.

345 F.3d 683 (9th Cir. 2003); *see also 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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. DOL. *See* 8 CFR § 204.5(d). As noted previously, the priority date in this case is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11.99 per hour (\$24,939.20 per year). On the petition, the petitioner claimed to have a gross annual income of \$1,450,000 and to currently employ 39 workers. The petitioner did not provide information about the date established⁴ and its net annual income on the form.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not submit the beneficiary's W-2, 1099 forms or any other compensation documents, nor did the beneficiary claim that she had worked for the petitioner during the relevant years. The petitioner failed to demonstrate that it paid the beneficiary the proffered wage from 2001, the year of the priority date, to the present.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *[REDACTED] v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (36 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng [REDACTED] v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the

⁴ However, the petitioner's tax return shows that the petitioner was incorporated on June 1, 1994.

argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The record contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for its fiscal years of 2000 through 2002. According to the tax returns, the petitioner is structured as a C corporation and its fiscal year runs from July 1 to June 30. The priority date in the instant case is April 30, 2001, therefore, the petitioner's tax return for its fiscal year of 2000 covering from July 1, 2000 to June 30, 2001 is the tax return for the year of the priority date. The tax returns for 2000 through 2002 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$24,939.20 per year from the year of the priority date:

- In the fiscal year 2000 (7/1/00-6/30/01), the Form 1120 stated a net income⁵ of \$66,778.
- In the fiscal year 2001 (7/1/01-6/30/02), the Form 1120 stated a net income of \$(1,734).
- In the fiscal year 2002 (7/1/02-6/30/03), the Form 1120 stated a net income of \$4,758.

Therefore, for the fiscal years 2001 and 2002, the petitioner did not have sufficient net income to pay the proffered wage while the petitioner's net income in the fiscal year of 2000 established its ability to pay the proffered wage for the year of the priority date.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

⁵ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

⁶ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during its fiscal year 2001 were \$2,658.
- The petitioner's net current assets during its fiscal year 2002 were \$(10,186).

Therefore, for the fiscal years 2001 and 2002, the petitioner did not have sufficient net current assets to pay the proffered wage.

The record before the director closed on January 19, 2006 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal corporate tax return for its fiscal years of 2003 (7/1/03-6/30/04) and 2004 (7/1/04-6/30/05) should have been available. However, the petitioner did not submit its tax returns for 2003 and 2004. 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). The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner failed to establish its ability to pay the proffered wage for 2003 and 2004 because it failed to submit its tax returns or other regulatory-prescribed evidence for these two fiscal years.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor except for the fiscal year 2000, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, its net income or its net current assets. In addition, it is noted that the petitioner already has one petition approved. The record clearly shows that the petitioner has not established its ability to pay all proffered wages.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.