



U.S. Citizenship
and Immigration
Services

PUBLIC COPY
**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

B6



FILE: EAC-04-186-50138 Office: VERMONT SERVICE CENTER

Date: JUL 22 2008

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. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook (foreign 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 denied the petition on the grounds that the petitioner failed to demonstrate that the beneficiary had the required two years of experience on the date of filing. The AAO affirmed the director's decision, noting that the record does not contain evidence to resolve the inconsistency between the two statements from the beneficiary's former employer and therefore, counsel's assertions on appeal cannot overcome the grounds of the denial.

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 August 29, 2003.

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 landscape gardener foreman. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|--------------------|---------|
| 14. | Experience | |
| | Job Offered | 2 years |
| | Related Occupation | Blank |

Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked as a full-time (working 40 hours per week) cook for

██████████ from January 2001 to July 2003.¹ He did not provide any additional information concerning his employment background on that form.

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 on June 7, 2004 with an attestation of work from ██████████ (the first attestation of work). The petitioner submitted a photocopy of this attestation. This foreign language document is on the company's letterhead, and not dated, but appears to be translated into English on August 24, 2003. The undated attestation of work verifies that the beneficiary worked as a qualified cook for thirteen months from October 1, 2001 to October 30, 2002. The director denied the petition on December 8, 2004 because the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience in the job offered as set forth by the Form ETA 750A.

On appeal, counsel submitted a new attestation of work from ██████████ (the second attestation of work). The second attestation of work affirms that the beneficiary worked as a qualified cook for two years and seven months from January 1, 2001 to July 30, 2003. Like the first attestation of work, the second attestation of work is on the letterhead of the company, and from ██████████ as the owner of ██████████. However, the second attestation of work is inconsistent with the first one regarding the beneficiary's employment period with ██████████ and the record does not contain any independent objective evidence to resolve the inconsistency. *See Matter of Ho*, 19 I&N Dec. at 591-592. Neither counsel, the petitioner, the beneficiary nor ██████████ has explained the inconsistent statements relative to the beneficiary's stated differing terms of employment with ██████████. Therefore, the AAO concluded that the evidence submitted did not demonstrate that the beneficiary had the requisite two years of experience and dismissed the appeal accordingly.

On motion, counsel submits notice of findings from DOL on October 23, 2003, counsel's response to the notice of findings, notice of remand from DOL on November 13, 2003, the response to the notice of remand, and a photocopy of the second attestation of work and its English translation and asserts that with these documents, the petitioner established that the beneficiary has the necessary experience. Upon a complete review of these documents, while the AAO concurs with counsel's assertion that the submitted documentation shows that the amendment of the beneficiary's employment terms from October 2001-October 2002 to January 2001 to July 2003 was made under the DOL supervision and before the final determination of the

¹ It is noted that on the Form ETA 750B signed by the beneficiary on August 14, 2003, the beneficiary represented that he worked for this restaurant from October 2001 to October 2002, however, later on January 7, 2004, the beneficiary corrected the starting and ending dates to reflect from January 2001 to July 2003. On the motion, counsel submits correspondence between DOL and the petitioner regarding the correction. The evidence in the record shows that the beneficiary amended his statement on the employment period under the DOL instruction and before the labor certification was certified (the Form ETA 750 was certified on February 21, 2004). Therefore, the AAO considers the beneficiary's amended statement, i.e. from January 2001 to July 2003, as his final statement regarding his employment period on the Form ETA 750.

labor certification, the AAO finds that the petitioner still failed to demonstrate that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date of August 29, 2003.

First, the regulation requires that the petitioner establish the beneficiary's qualifications in connection with experience with the evidence in the form of letter(s) from current or former employer(s) or trainer(s). The beneficiary's statements on the Form ETA 750B cannot be considered such evidence.

Second, counsel does not submit any new or additional evidence to support the contents of the second attestation of work, such as the beneficiary's documents showing his income from his former employer, the employer's payroll records or personnel records or other legal documents showing the beneficiary's employment during the relevant years. Nor does counsel provide any explanations to resolve the inconsistency between the two attestations relative to the beneficiary's stated differing terms of employment with [REDACTED]

as pointed out in the AAO's June 19, 2006 decision, and thus, the instant motion cannot overcome the grounds of the AAO's dismissal.

Third, although from the correspondence submitted on motion it appears that the beneficiary's amendment on the term of his employment was made before the final determination of the labor certification, a complete review of the record and the filing history as a whole raises a question on authenticity and reliability of the beneficiary's employment with [REDACTED]. Both the beneficiary's initial statement on the Form ETA 750B and the first attestation of work from [REDACTED] stated that the beneficiary worked from October 2001 to October 2002. Later, the beneficiary amended his statement on the form to the period from January 2001 to July 2003 in response to the DOL's notice of remend. However, the petitioner submitted the first attestation with the term of October 2001 to October 2002 with the initial filing of the instant petition. On appeal, counsel submitted the second attestation of work, which verifies the beneficiary's employment term as from January 1, 2001 to July 30, 2003. It appears that the petitioner made changes to the labor certification application and the petition in an effort to make a deficient application and petition to conform to DOL and CIS requirements. The record does not contain any explanation how both the beneficiary and his former employer had made the exactly same mistake in the beneficiary's initial statement on the labor certification and the first attestation of work respectively. Further, on appeal counsel submitted an original copy of the second attestation from [REDACTED] with the original signatures of the writer and translator. On motion, counsel also submits a photocopy of the second attestation from [REDACTED]

which was submitted in response to the DOL notice of finding. The two copies have exactly same contents and format. However, while the original copy was dated August 1, 2003, the photocopy was not dated; while the original copy bears the author's signature in the middle of the company's stamp, the photocopy has the signature above the stamp and the two signatures appear different; and while the translator did not date the English translation for the original copy of the second attestation, he dated the English translation with the photocopy submitted to DOL January 29, 2004. 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. at 582.

In addition, the attestations do not verify the beneficiary's full-time employment and do not include a specific description of the duties performed by the beneficiary. Without such a specific description of the duties performed by the beneficiary at [REDACTED], the AAO cannot determine whether the beneficiary's experience obtained through the employment with [REDACTED] qualifies him to perform the duties described in the item 13 of the From ETA 750A. Because of these deficiencies, the attestations of work from [REDACTED] cannot be given full weight as primary evidence as required by the regulation at 8 C.F.R. § 204.5(g)(1) in these proceedings. Therefore, the petitioner did not establish with regulatory-prescribed evidence the beneficiary's prior at least two years of experience as a foreign cook, and

further failed to establish that the beneficiary is qualified for the proffered position. Counsel's assertions on motion fail to overcome the ground of denial in the director's decision. The AAO's June 19, 2006 decision will be affirmed.

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 not met that burden.

ORDER: The motion is granted. The previous decision of the AAO, dated June 19, 2006, is affirmed. The petition is denied.