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FILE:

[REDACTED]

Office: PHOENIX DISTRICT OFFICE

Date: JAN 16 2007

WAC-05-015-52162

IN RE:

Applicant:

[REDACTED]

PETITION: Application to Register Permanent Residence or Adjust Status Pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255

ON BEHALF OF PETITIONER:

[REDACTED]

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 employment-based application for adjustment of status was denied by the District Director of the Phoenix District Office. The director certified the decision to the Administrative Appeals Office (AAO) for review. The AAO affirmed the decision of the director and dismissed the appeal. The petitioner has now filed a Motion to Reconsider the AAO decision. The Motion to Reconsider will be granted. The prior decision of the AAO will be affirmed.

The applicant seeks to adjust as the beneficiary of an approved employment-based immigrant petition pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. Section 245(a) of the Act, 8 U.S.C. § 1255(a), provides for adjustment of status. The beneficiary specifically seeks to adjust based on section 245(i) of the Act, 8 U.S.C. § 1255(i). As set forth in the director's May 15, 2006 decision, the director determined that the beneficiary's employer and petitioner hired him without any supervisory experience, and, therefore, the job opportunity in the underlying ETA 750 did not require a skilled worker. Further, the director determined that the beneficiary did not meet the qualifications of the labor certification, and since he did not meet the certified requirements, the beneficiary would not be able to adjust based on the I-140 filed. The director denied the beneficiary's I-485 adjustment application, and then issued a notice that certified the decision to the AAO for review. The AAO issued a determination on September 7, 2006 upholding the director's decision that the beneficiary did not meet the qualifications of the labor certification, and dismissed the appeal.

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 appeal¹.

The history of the case is quite lengthy and complicated, but pertinent to the case, and in order to fully understand its progression, is summarized in a chronology as follows:

- On April 30, 2001, the petitioner filed Form ETA 750 on behalf on the beneficiary for the position of an Assistant Manager, for 40 hours per week, at a pay rate of \$11.50 per hour;
- On February 10, 2004, the Form ETA 750 is approved;
- On October 4, 2004, the petitioner filed Form I-140 on the beneficiary's behalf;
- On October 20, 2004, the applicant filed an I-485 Application to Register Permanent Residence or Adjust Status and Supplement A to Form I-485 with the California Service Center based on the I-140 Immigrant Petition filed by [REDACTED] Ltd. d/b/a McDonald's on behalf of the applicant as a beneficiary;²
- The beneficiary was scheduled for an adjustment interview with the local Citizenship & Immigration Services ("CIS") office in his residential jurisdiction in Phoenix, Arizona. The interview took place on April 19, 2006;
- During the interview, the officer reviewed the beneficiary's work experience listed on the ETA 750. The beneficiary indicated that he worked for McDonald's from December 1996 to December 1998 as a cook and cashier for the first year, and in the second year, that he worked as a "crew trainer" where

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).

² On July 31, 2002, an interim rule allowed for the concurrent filing of Form I-140 and Form I-485.

he trained new employees how to run a cash register, and to prepare food items. The beneficiary then indicated that he started employment with the petitioner in January 1999 as a front line, assistant manager and has worked in that role since that time.

- CIS concluded that based on the beneficiary's experience prior to his employment with the petitioner [REDACTED] Ltd. d/b/a McDonald's, the beneficiary did not have the required two years of experience as an Assistant Manager, and two years in a related supervisory position. Since the beneficiary did not meet the requirements of the certified ETA 750, the I-140 approval should be revoked, and without an approved I-140 petition, the Adjustment of Status application would have to be denied.

On May 15, 2006, the case was certified to the AAO for review;

- Following submission of a brief on behalf of the beneficiary, the AAO dismissed the appeal on September 7, 2006 finding that the beneficiary did not meet the requirements of the certified ETA 750;

On September 29, 2006, counsel filed a Motion to Reconsider.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. *See* 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or CIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *See* 8 C.F.R. § 103.5(a)(3).

Counsel has asserted in the Motion to Reconsider that the petitioner submitted documentation to show the beneficiary met the qualifications as set forth in the certified labor certification, and that the AAO's decision would therefore be an incorrect application of the law.

We will reconsider the Motion. Counsel provides only two points: (1) that the beneficiary's prior work experience letter verifying his work from January 1991 through February 1996 demonstrates his experience for the position, and further, that the letter provided is sufficient to conclude that the beneficiary performed duties related to the position of an assistant manager; and (2) counsel explains inconsistencies between the beneficiary's G-325, which conflicted with the experience verified.

To briefly review, 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.

In evaluating the beneficiary's qualifications, 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

petitioner's priority date.³ 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).

On the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered, as an Assistant Manager, with job duties partially including: "reports directly to the store manager and confers with restaurant owner to implement and maintain critical operating procedures for food holding times, service speed and raw and finished product quality. Ensures restaurant cleanliness and sanitation. Trains and supervises all employees in food preparation, customer service, safety, security and sanitation procedures. Handles customer complaints and ensures customer satisfaction . . . Knowledgeable of and enforces all personnel policies and labor laws according to state and federal laws . . . completes cash sheets, accounts for cash drawer money, and makes bank deposits." The job offer section additionally notes that two years of experience in a related occupation is required as a "Supervisor of Related Business." The petitioner listed that the position required no education in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary listed his experience as: (1) employed with the petitioner, ██████████ Ltd. d.b.a. McDonald's, 6005 South Central Ave., Phoenix, AZ, as a Swing Manager a/k/a: Manager Trainee, from December 1997 to the present (April 24, 2001) (crossed out and written over in red pen to read November 1999 to the present) for his employment with ██████████ (2) A.G.K. Restaurants,⁵ d/b/a McDonald's, 3323 North 24th Street, Phoenix, AZ, as a Crew Trainer, from the dates February 1999 to June 1999 (crossed out in red pen to read December 1997 to December 1998), for 20-25 hours per week (crossed out in red pen to read 40 hours); and (3) A.G.K. Restaurants d/b/a McDonald's, Food Counter Service and Cashier, from February 1998 to February 1999 (crossed out and written over to read December 1996 to December 1997), for 20 to 25 hours per week (crossed out to read forty in red pen).

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(l)(3):

(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

³ This determination is made when the petitioner files the I-140 petitioner with CIS. CIS is responsible for ensuring that the petitioner has documented the beneficiary's qualifications. DOL does not determine whether the beneficiary meets the qualifications of the labor certification.

⁴ Presumably the officer who reviewed the application with the beneficiary at the time of the adjustment interview made the red pen marks on the ETA 750. While the DOL did write the Occupational Title and Occupational Code on the first page of the ETA 750 in red pen as well, none of the other red marks on subsequent pages of the ETA 750B are initialed or marked in DOL standard fashion.

⁵ We note that for labor certifications, DOL limits what experience can be gained with the same employer. *See e.g. Matter of Delitizer Corp. of Newton*, 1988-INA-482 (May 9, 1990)(en banc); *Matter of Kellogg, et al.*, 94-INA-465 (BALCA Feb. 2, 1998)(en banc). Further, we note that ██████████ Ltd. and A.G.K. Restaurants, while both doing business as McDonald's have different Federal Employment Identification Numbers and would be considered separate entities, rather than the same employer.

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 petitioner previously submitted three letters regarding the beneficiary's prior work experience from two different McDonald's franchises where the beneficiary worked. We addressed those letters and the deficiencies therein in our September 7, 2006 decision. Counsel does not address, question, or provide any additional information to correct the deficiencies in those letters. Instead, regarding counsel's first point, he refers to a letter submitted only on appeal, after the denial of the beneficiary's I-485 Adjustment of Status application. Previously, the AAO decision addressed this letter as follows:

Counsel submitted additional letters to document the additional experience that the beneficiary obtained in Mexico prior to his U.S. entry, which was not listed on the labor certification. The additional letters provide:

Letter from [REDACTED] S.C., Cuernavaca Mor., dated May 26, 2006, signed by a "legal representative of [REDACTED]"

Position title: Administrative Assistant

Dates of employment: January 1991 to November 1991

Description of job duties: None listed

Position title: Assistant to the Manager

Dates of employment: December 1991 to January 1993

Description of job duties: None listed

Position title: Chief of Personnel

Dates of employment: February 1993 to December 1993

Description of job duties: None listed

Position title: General Manager

Dates of employment: January 1994 to February 1996

Description of job duties: none listed

Letter from [REDACTED] Cuernavaca Mor., dated May 31, 2006, signed by a "legal representative of [REDACTED]"

Which provides: "in relation to the steadfastness of work that was extended with date of May 26 of the present year of his activities in this company, I want to clarify that the above mentioned actividades [sic] realized them in the field of restaurant."

The letters provided were deficient in that they do not provide a description of the job duties. Further, one title listed in the letter's translation, is different than how counsel phrased the description in his appeal brief,

which asserts that the beneficiary was an “Assistant Manager,” as opposed to the translated letter version, which listed that he was an “Assistant to the Manager.” Given the preceding position listed, as an “Administrative Assistant,” it is altogether plausible that the beneficiary then progressed to “assist the manager,” as an assistant, rather than work as an Assistant Manager, a position that would connote a higher level of responsibility. Had the letter provided a description of the beneficiary’s job duties as required under 8 C.F.R. § 204.5(i)(3), we could determine the actual nature of the position, rather than focus on semantics and translations.

Only the general manager experience would seem relevant. This, however, leaves open the question of his job duties, which are not included. Further, “restaurant field” was added to a second letter, and does not specify further the nature of his former employer’s activities. In the absence of specified job duties, and the failure to elaborate on the former employer’s business, we cannot conclude that the letters establish that the beneficiary qualifies for the certified position.

In his Motion to Reconsider, counsel has not provided any affidavits or other documentary evidence to address the deficiencies in the letters noted above. Without further evidence, counsel’s statements alone that the letter documents the beneficiary’s work experience are insufficient. 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)).

Secondly, counsel seeks to explain inconsistencies referenced on the beneficiary’s G-325, which conflicted with the experience verified in the GB Consultores letter on which the beneficiary relies. The beneficiary’s Form G-325, signed and dated on May 17, 2004, listed that prior to coming to the U.S., he was self-employed in Enamel and Painting from January 1985 to October 1996. The dates of the beneficiary’s self employment in the field of Enamel and Painting overlap with the dates attested to in the letters above that he was working in the “restaurant field.” Counsel explains that in this eleven year time period, “the beneficiary was attempting to operate as an owner. This endeavor was in addition to his regular employment listed in the brief. He only participated in an attempt to initiate a business, it did not interfere nor disrupt his performed [work] at GB Constructors, S.C.”

We note again that counsel has not provided any affidavits or other documentary evidence to confirm the beneficiary’s attempt to operate as an owner, or that the enamel and painting business did not “interfere” with his work at GB Consultores. Without further evidence, counsel’s statements alone are insufficient. See *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)). **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).

The beneficiary’s prior work experience remains in doubt. See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), which states: “Doubt raised 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.” Further, “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.” *Matter of Ho*, 19 I&N Dec. at 591-592. Additionally we reference, *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. The beneficiary's position abroad with GB Consultores was never listed on the ETA 750, and only raised subsequent to the I-485's denial.

Counsel has failed to overcome the deficiencies in the AAO's prior decision. 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 to Reconsider is granted. The AAO's prior decision, dated September 7, 2006, is affirmed. The Adjustment of Status application remains denied.