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

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: EAC 03 047 54814 Office: VERMONT SERVICE CENTER Date: JUL 06 2006

IN RE: Petitioner: [redacted]
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:

[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 preference visa petition was denied by the Acting Director, Vermont Service Center, and is now before the Administrative Appeals Office 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 cook. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The acting director determined that the petitioner had not established that the beneficiary has the requisite training as stated on the labor certification petition and denied the petition accordingly.

On appeal, counsel submits a brief.

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 or seasonal nature, for which qualified workers are unavailable in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

> (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.

Eligibility in this matter hinges on the petitioner demonstrating 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). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on February 14, 2000. The labor certification states that the position requires a two-year culinary course.

With the petition counsel submitted two Japanese documents and English translations. The translations show that those documents are a certificate of graduation dated September 18, 1975 and another certificate, also dated September 18, 1975, signed by the governor of Osaka, Japan, stating that the beneficiary is a certified professional cook pursuant to Japanese law. Neither of those documents indicates that the petitioner has the requisite two years of training.

Because the evidence submitted was insufficient to demonstrate that the beneficiary attended the requisite two-year culinary course the Vermont Service Center, on October 17, 2003, requested additional evidence. Specifically, the Service Center requested "evidence to establish that the beneficiary possessed the required two year culinary course as of [the priority date]." The request for evidence stipulated that the evidence provided should include the dates during which the training was received. The USPS returned that request for evidence as undeliverable. On May 24, 2004 the Vermont Service Center reissued the request for evidence to counsel.

In response, counsel submitted a transcript from the Japanese Culinary Institute. That transcript shows that the beneficiary enrolled at the institute on April 18, 1974 and graduated on September 18, 1975, a period of one year and five months.[1] Counsel provided no other evidence pertinent to the beneficiary's training.

On September 22, 2004 the acting director denied the petition, finding that the evidence does not demonstrate that the beneficiary is qualified for the proffered position pursuant to the requirements of the approved Form ETA 750 labor certification.

On appeal counsel notes that the beneficiary exceeds the statutory requirement of two years of specialized training or experience for a position as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act. Counsel asserts that the petitioner did not require two years of culinary traning when it sought to fill the proffered position, providing copies of classified advertisements in support of that assertion. Counsel states that the beneficiary's employment experience greatly exceeds the requirements of the proffered position. Counsel cites two district court decisions for the proposition that a beneficiary is not necessarily required to possess the qualifications listed on the Form ETA 750 labor certification.

In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court even in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id* at 719.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the qualifications required 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 Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.23d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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[1] The beneficiary's training encompassed 17 months. Whether he was receiving instruction during each of those months is unclear. This office notes that two years of education or training need not necessarily encompass a full 24 months. A year of undergraduate college education in the United States, for instance, would typically encompass nine months from September to May. Two years of college education in the United States, then, would encompass 18 months of instruction. The beneficiary's instruction may also have been equivalent to two years of instruction although it encompassed only 17 months. The petitioner submitted no evidence, however, to support that conclusion.

The evidence submitted demonstrates that the beneficiary has considerable experience in the proffered position but does not demonstrate that he has the requisite two years of training. The evidence does not demonstrate that the beneficiary is eligible; therefore, for any position that requires two or more years of training. The evidence does not demonstrate that the beneficiary is eligible for the proffered position pursuant to the terms of the approved labor certification.

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 appeal is dismissed.