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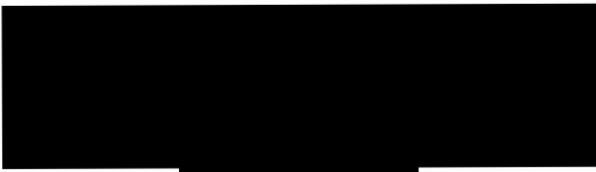


**U.S. Citizenship  
and Immigration  
Services**

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**SEP 14 2007**



FILE:



Office: VERMONT SERVICE CENTER

Date:

EAC 06 036 50917

IN RE:

Petitioner:



Beneficiary:

Petition:

Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).<sup>1</sup> The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with one year of qualifying employment experience. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 May 11, 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.<sup>2</sup>

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 DOL 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 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

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<sup>1</sup> The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

<sup>2</sup> This office notes that the Form I-140 petition was filed by King Street Blues, Inc. and the Form ETA 750 indicates that the beneficiary will be employed by Kingstowne Blues, Inc. Pursuant to the Virginia State Corporation Commission's website, King Street Blues, Inc. and Kingstowne Blues, Inc. are separate corporations. *See* <http://www.scc.virginia.gov/division/clk/diracc.htm> (accessed July 31, 2007). The DOL does not certify a Form ETA 750 labor certification on behalf of a potential employee/beneficiary, but rather to an employer/applicant. Under certain circumstances, the petitioner may substitute a beneficiary. The beneficiary is not permitted, however, to substitute a petitioner. An exception to this rule is triggered if the petitioner is purchased, merges with another company, or is otherwise under new ownership. The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop*, 19 I&N Dec. 481 (Comm. 1986). The petitioner must also establish its continuing ability to pay the proffered wage. If the petitioner pursues this matter further, it must address this issue.

pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>3</sup> On appeal, counsel submits a brief, letters dated May 24, 2006, May 20, 2005, November 28, 2003 and January 22, 2001 from [REDACTED] a letter dated June 6, 2006 from [REDACTED], paystubs issued to the beneficiary by Whole Foods Market, a letter dated June 6, 2006 from [REDACTED], a letter dated March 24, 2006 from Ann Walters-Cool, four of the beneficiary's 1999 IRS Forms W-2, Wage and Tax Statements, issued by Cavalier Maintenance Services, Inc., Potomac Minute Maids, Inc., Whole Foods Market Group, Inc. and La Parisienne Bakery Inc., and a document entitled "Employment Verification Letter for the U.S. Department of Homeland Security" dated February 12, 2006 from Whole Foods Market printed from theworknumber.com website. Other relevant evidence in the record includes a letter dated March 8, 2006 from [REDACTED]. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that Citizenship and Immigration Services (CIS) "lied when it claims that the letter verifying the beneficiary's past work experience was clearly fraudulent," that "it is a second act of bad faith by [CIS] to maintain the past employer's subsequent letters to re-verify that the original date of 5/14/99 as a start date of past employment does not serve to establish that the beneficiary was qualified for the proffered position as of the date of filing," that CIS committed a third act of bad faith when it found that the petitioner did not reconcile the fact that it enclosed a blatantly fraudulent document, that the director's decision was based on the race and nationality of the beneficiary and that other beneficiaries of different race and national origin are treated differently with respect to typos made on documents submitted to CIS, that the evidence submitted establishes that the beneficiary began employment with Whole Foods Market on May 14, 1999, and that CIS has an incentive to lie because it charges a fee for filing appeals to the AAO.

To determine whether a beneficiary is eligible for an employment based immigrant visa, 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 cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

- |     |                         |       |
|-----|-------------------------|-------|
| 14. | Education               |       |
|     | Grade School            | blank |
|     | High School             | blank |
|     | College                 | blank |
|     | College Degree Required | blank |
|     | Major Field of Study    | blank |

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<sup>3</sup> 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).

The applicant must also have one year of experience in the job offered or one year of experience as an assistant cook. The duties of the proffered job 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 on September 20, 2005 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, she represented that she worked as a baker for La Parisienne Bakery from March 1998 to December 1998, and that she worked as a cook at Mid-Atlantic Kitchen, 1521 Kevin Branch, Landover, Maryland from May 1999 to the date she signed the Form ETA 750B. She does not provide any additional information concerning her employment background on that form.

With the petition, the petitioner submitted a letter dated May 20, 2005 from [REDACTED], Plant Manager at Whole Foods Market, Mid-Atlantic Kitchen, in Landover, Maryland which stated that the beneficiary "has been employed with Whole Foods Kitchen since 5/14/99." As noted by the director in his decision, the start date was typed in a different font over white-out. The director noted that it appeared that the date that was covered up was May 14, 2000, which would mean that the beneficiary did not have the required one year of experience as of the priority date. The letter dated May 20, 2005 indicates that the beneficiary "currently holds the position of cook," but does not describe her position or duties prior to the priority date in 2001.

In response to the director's request for evidence dated February 28, 2006 (RFE), the petitioner submitted a letter dated March 8, 2006 from [REDACTED], Plant Manager at Whole Foods Market, Mid-Atlantic Kitchen, in Landover, Maryland, indicating that the beneficiary "has been employed by Whole Foods Market since May 14, 1999." The letter further indicates that the beneficiary's "current position at Whole Foods Market is that of team member of the cook chill team," but does not describe her position or duties prior to the priority date in 2001. An identical letter from [REDACTED] dated March 24, 2006 also accompanies the petitioner's response to the director's RFE.

In response to the director's RFE, the petitioner also submitted a letter dated November 28, 2003 from [REDACTED], Plant Manager at Whole Foods Market, Mid-Atlantic Kitchen, in Landover, Maryland, indicating that the beneficiary "is employed with Whole Foods Market" and that she "has been with us since May 14, 1999." The letter does not describe the beneficiary's position or duties at Whole Foods Market.

The petitioner's response to the director's RFE also included a document entitled "Employment Verification Letter for the U.S. Department of Homeland Security" dated February 12, 2006 from Whole Foods Market printed from theworknumber.com website. The unsigned letter states that the beneficiary began employment with Whole Foods on May 14, 1999 and that her job title is "Kitchens Team Member," but does not describe her position or duties prior to the priority date in 2001.

The petitioner's response to the director's RFE also included the undated "Affidavit of [REDACTED] In the document, the beneficiary indicated that her "bosses" made a correction on the employment verification letter stating that she began work on May 14, 1999.

On appeal, counsel submits a letter dated May 24, 2006 from [REDACTED] stating that the beneficiary has been employed with Whole Foods Market since May 14, 1999, and that he made an error in the dates regarding the beneficiary's hire date in one of his previous letters. Counsel also submits a letter dated June 6, 2006 from [REDACTED], indicating that she started work at Whole Foods Market in 1996 and that she saw the beneficiary working at Whole Foods Market in 1999. Further, counsel submits a

letter dated June 6, 2006 from [REDACTED] indicating that she has worked for Whole Foods Market since 1993 and that she saw the beneficiary working at Whole Foods Market in 1999, but that she doesn't remember the month or date in 1999 when she saw her working there. On appeal, counsel also submits a letter dated January 22, 2001 from [REDACTED] Commissary Director, Whole Foods Market, Commissary-Kitchen, in Rockville, Maryland indicating that the beneficiary has been employed with Whole Foods Market since May 14, 1999. The letter states that she works in the bakery department, but does not describe her duties in the bakery department.

On appeal, counsel also submits paystubs issued to the beneficiary by Whole Foods Market for various pay periods between May 1999 and December 2002. The earliest paystub was issued to the beneficiary on May 28, 1999 for the period ending May 23, 1999. The paystub indicates that the beneficiary was employed with the food packaging team at the Whole Foods Market Commissary located at 4942 Boiling Brook Parkway in Rockville, Maryland. The latest paystub was issued to the beneficiary for the pay period ending December 22, 2002. The paystub indicates that the beneficiary was employed with the food packaging team as a Kitchens Team Member at the Whole Foods Market Maryland store.

Finally, on appeal, counsel submits four of the beneficiary's 1999 IRS Forms W-2, Wage and Tax Statements, issued by Cavalier Maintenance Services, Inc., Potomac Minute Maids, Inc., Whole Foods Market Group, Inc. and La Parisienne Bakery Inc. The beneficiary's W-2 issued by Whole Foods Market Group, Inc. indicates that she earned \$8,784.16 in 1999.

The regulation at 8 C.F.R. § 204.5(l)(3) 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.

The beneficiary's paystub dated May 28, 1999 issued by Whole Foods Market indicates that the beneficiary worked 40 hours during the pay period ending May 23, 1999. Other bi-weekly paystubs issued to the beneficiary by Whole Foods Market indicate that she was employed on a full-time basis by Whole Foods Market through the priority date on April 30, 2001. Therefore, the petitioner has established that the beneficiary was employed by Whole Foods Market for over one year before the priority date. However, the petitioner has not established that the beneficiary worked as a cook or an assistant cook for the required one-year period.

The evidence submitted by the petitioner regarding the beneficiary's duties at Whole Foods Kitchen is as follows: (1) a letter dated May 20, 2005 from [REDACTED] Plant Manager at Whole Foods Market, Mid-Atlantic Kitchen, in Landover, Maryland which stated that the beneficiary "currently holds the position of cook," but does not describe her position or duties prior to the priority date in 2001; (2) letters dated March 8, 2006 and March 24,

2006 from [REDACTED], Plant Manager at Whole Foods Market, Mid-Atlantic Kitchen, in Landover, Maryland, indicating that the beneficiary's "current position at Whole Foods Market is that of team member of the cook chill team," but does not describe her position or duties prior to the priority date in 2001; (3) a letter dated November 28, 2003 from [REDACTED], Plant Manager at Whole Foods Market, Mid-Atlantic Kitchen, in Landover, Maryland, that confirms the beneficiary's employment with Whole Foods Market, but does not describe the beneficiary's position or duties at Whole Foods Market; (4) a document entitled "Employment Verification Letter for the U.S. Department of Homeland Security" dated February 12, 2006 from Whole Foods Market printed from theworknumber.com website, which indicates that the beneficiary's job title is "Kitchens Team Member," but does not describe her position or duties prior to the priority date in 2001; (5) a letter dated January 22, 2001 from [REDACTED], Commissary Director, Whole Foods Market, Commissary-Kitchen, in Rockville, Maryland indicating that the beneficiary works in the bakery department, but does not describe her duties in the bakery department; (6) an affidavit from the beneficiary, a letter dated May 24, 2006 from [REDACTED] and letters from the beneficiary's co-workers at Whole Foods Market that do not address the beneficiary's position or duties; and (7) paystubs issued to the beneficiary by Whole Foods Market for various pay periods between May 1999 and December 2002 which indicate that the beneficiary was employed with the food packaging team, but do not indicate the beneficiary's duties.<sup>4</sup>

On appeal, counsel asserts that CIS "lied when it claims that the letter verifying the beneficiary's past work experience was clearly fraudulent," that "it is a second act of bad faith by [CIS] to maintain the past employer's subsequent letters to re-verify that the original date of 5/14/99 as a start date of past employment does not serve to establish that the beneficiary was qualified for the proffered position as of the date of filing," that CIS committed a third act of bad faith when it found that the petitioner did not reconcile the fact that it enclosed a blatantly fraudulent document, that the director's decision was based on the race and nationality of the beneficiary and that other beneficiaries of different race and national origin are treated differently with respect to typos made on documents submitted to CIS, that the evidence submitted establishes that the beneficiary began employment with Whole Foods Market on May 14, 1999, and that CIS has an incentive to lie because it charges a fee for filing appeals to the AAO. We agree with counsel's assertion that the evidence submitted establishes that the beneficiary began employment with Whole Foods Market on May 14, 1999. However, the evidence does not establish that the beneficiary has one year of experience as a cook or an assistant cook as required by the Form ETA 750 in the instant case. We disagree with counsel's other assertions on appeal.

Counsel asserts that CIS committed acts of bad faith and that CIS has an incentive to lie because it charges a fee for filing appeals to the AAO, but does not present any evidence or legal support for his conclusions. Counsel further asserts that the director's decision was based on the race and nationality of the beneficiary and that other beneficiaries of different race and national origin are treated differently with respect to typos made on documents submitted to CIS. However, counsel does not present any evidence or legal support for his conclusions. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired one year of experience as a cook or an assistant cook from the evidence submitted into

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<sup>4</sup> On the paystub issued for the pay period starting June 4, 2001 and ending June 17, 2001, and on each paystub issued thereafter, the job title of "Kitchens Team Member" was listed on the beneficiary's paystubs.

this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.