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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

DATE: JAN 10 2012 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Japanese 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). The director determined that the petitioner had not established that the beneficiary was qualified to perform the duties of the position as of the priority date.

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 April 9, 2008 denial, the issue in this case is whether the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience as set forth on the Form ETA 750.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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 labor certification application, 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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). According to the plain terms of the labor certification, the applicant must have two years of experience as a cook or two years of related experience as a cook's assistant.

The beneficiary set forth his evidence on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he has been employed full-time as a cook for [redacted] from June 1997 through December 2000. The beneficiary described his past position and the job to be performed

on the Form ETA 750B as: "Prepared and cooked [a] variety of Japanese dishes including sushi, seafood, meat, [and] vegetables." The beneficiary also claimed to have been "Unemployed/Student" from April 2001 to the date he signed the Form ETA 750B, i.e., April 23, 2004. The beneficiary does not provide any additional information concerning his employment background on that form.

The record of proceeding contains another I-140 dated December 23, 1998 and another Form ETA 750 submitted on behalf of the beneficiary. On the Form ETA 750B the beneficiary indicated that he was self-employed from February 1998 through the date he signed the Form ETA 750B, i.e., December 10, 1998; and that he was employed as a manager at [redacted]. in Seoul, Korea from December 1997 through July 1998.

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.

As evidence of the beneficiary's qualifications, the petitioner submitted a letter dated January 29, 2008 from [redacted] in which the representative stated that the beneficiary was employed by the company, first as an office trainee and then as an office manager. The declarant further stated that the beneficiary was employed by the company from July 12, 1988 through December 5, 1997, and that although the beneficiary resigned from his job with the company in May 1997, he was obligated to periodically work for [redacted] in order to effectuate the smooth transfer of his assignments through December 1997.

The petitioner submitted a letter from the representative of [redacted] in Seoul, Korea who stated that the beneficiary was employed by the company as a cook from June 1997 through December 2000.

The director determined that there was an inconsistency in the beneficiary's employment history and therefore requested in a Request for Evidence (RFE) that the petitioner address the inconsistencies in the beneficiary's employment history and to submit all relevant evidence. In

response to the RFE, the petitioner submitted an affidavit from the beneficiary in which he stated that he did not remember signing the previous Form ETA 750B. He also stated that he worked for [redacted] as a manager from July 1988 through December 1997, and that as a result of the Asian Financial Crisis, he needed to leave that ruined industry and find other employment in order to support himself and his wife and two children. He stated that he was released from active duties at the security company in May 1997 and began working as a cook for [redacted] in late June 1997. The petitioner submitted as evidence various documents in an attempt to demonstrate that the Asian financial crisis started prior to July 1997.

On appeal, counsel asserts that the director misapplied the law and failed to comprehend the full scale of the Asian financial crisis, and failed to review all evidence submitted in response to the RFE. The petitioner submits evidence already contained in the record of proceeding including a statement from the senior vice president of [redacted], and also submits the beneficiary's affidavit, and other documents pertaining to the Asian financial crisis. In his affidavit, the beneficiary stated that the Asian financial crisis began in Korea in mid-1997, not July 1997, and that the documents submitted substantiate that claim.

While the record of proceeding may contain documentation attesting to an Asian financial crisis in 1997, the petitioner has failed to provide evidence or a sufficient explanation for the many inconsistencies found in the record pertaining to the beneficiary's employment history. Regardless of the timing of the 1997 Asian financial crisis, the petitioner must demonstrate that the beneficiary was qualified to perform the duties of the position as a cook with two years of experience as of the priority date, April 29, 2004. The beneficiary indicated on the initial Form ETA 750B signed on December 10, 1998 that he was employed by [redacted] as a manager from December 1997 through July 1998. However, the employment letter from [redacted] indicated that the company employed the beneficiary from July 12, 1988 through December 5, 1997 (with a release date of May 1997). Furthermore, the beneficiary does not even list [redacted] on his 2004 Form ETA 750B. Nor does he list the [redacted] on his 1998 Form ETA 750B. It is also noted that the beneficiary stated, under penalty of perjury, on the initial Form ETA 750B that he was self-employed from February 1998 through December 10, 1998, the date the form was signed. In contrast, the beneficiary indicates on the current Form ETA 750B that he was employed by [redacted] from June 1997 through December 2000.

Regardless, even if the AAO were to agree that the Asian financial crisis began in mid-1997, it does not change the fact that the beneficiary indicated on his Form ETA 750B that he was self-employed at a time when he was purportedly employed as a cook, or that his recollection of his employment with the security company is subsequent to the time line when the security company stated that he worked for them. Finally, the beneficiary contradicts himself where on the initial Form ETA 750B he stated that he was employed by [redacted] from December 1997 through July 1998 but in his affidavit he stated, under penalty of perjury, that he was employed by the security company from July 1988 through December 1997. 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. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 29, 2004. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). There has been no plausible explanation given for these inconsistencies and contradictions.

The information provided in the employment statements contradict each other and conflict with the beneficiary's statements on the Form ETA 750B, as noted above. Because of these unexplained inconsistencies, the AAO does not accept the employment statements as evidence of the beneficiary's two years of employment as a cook. Moreover, the description of the beneficiary's work experience as a cook is too vague to establish that he has the required work experience. 8 C.F.R § 204.5(l)(3)(ii)(A). The appeal will be dismissed for this reason as well.

Accordingly, it has not been established that the beneficiary has the requisite two years of experience or that he is qualified to perform the duties of the proffered position. 8 C.F.R § 204.5(g)(1) and (l)(3)(ii)(A).

Beyond the decision of the director, the petition may not be approved, as the petitioner has failed to submit sufficient evidence to demonstrate its ability to pay the proffered wage. The proffered wage in the instant matter is $11.87 per hour based upon a 40 hour work week ($24,689.60 a year). The relevant time period is from 2004 through 2010. The record of proceeding shows that the petitioner is an S corporation. It has submitted its IRS Form 1120S tax returns for 2004 and 2005 which demonstrate its ability to pay the proffered wage in those years. However, the record lacks evidence to demonstrate the petitioner's ability to pay the proffered wage in 2006 2007 or any subsequent years.

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.