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[REDACTED]

FILE:

[REDACTED]

Office: PHOENIX DISTRICT OFFICE

Date: SEP 07 2006

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 decision of the director will be affirmed and the application will be denied.

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.

On notice of certification, the applicant, through counsel, has submitted a brief and evidence.

Section 245(a) of the Act provides in pertinent part:

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) or [sic] may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence.

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 on October 20, 2004, based on a pending I-140 Immigrant Petition filed by [REDACTED] on behalf of the applicant as a beneficiary.¹ After review of the application, the beneficiary was scheduled for an adjustment interview with the local CIS office in his residential jurisdiction in Phoenix, Arizona. The interview took place on April 19, 2006. During the interview, the officer conducting the interview reviewed the beneficiary's work experience listed on the ETA 750. The beneficiary indicated that he worked for [REDACTED] 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 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.

The Service concluded that based on the beneficiary's experience prior to his employment with the petitioner [REDACTED] that he had not obtained the required two years of experience as an Assistant Manager, and two years in a related supervisory position.² The director concluded that since [REDACTED] hired the beneficiary without having the required experience, that, therefore, the position required no prior experience and was not a valid "skilled worker" petition. Since the beneficiary did not meet the requirements of the certified

¹ On July 31, 2002, an interim rule allowed for the concurrent filing of Form I-140 and Form I-485.

² The decision notes that it looks like the petitioner requested that the DOL reduce the experience requirement from two years as an Assistant Manager, and two years as a supervisor in a related field to two years as a Manager or two years in a related field. Further, the decision continues that this change was not accepted or approved by DOL.

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. The decision notes that other mitigating factors were considered in denying the adjustment application and that the decision accounted for and weighed the potential hardship to the beneficiary's two children. The officer concluded that the unfavorable factors to warrant an exercise of favorable discretion did not rise to the level as set forth in *Matter of Leung*, 16 I&N Dec 12 (BIA 1976), and further that *Matter of Leung* provides "that in the absence of unusual or outstanding equities, an application for adjustment of status under section 245 of the Act which is supported by a labor certification predicated upon employment experience gained while applicant was in the United States unlawfully will be denied as a matter of discretion."

We concur with the director's decision that the beneficiary does not meet the qualifications of the approved labor certification. We draw this conclusion through an examination of evidence in the record of proceeding. However, the AAO will withdraw the portion of the director's decision that concludes that since the beneficiary was hired without experience, the position does not require a skilled worker.

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.

We shall review the evidence in the record related to the I-485 denial, specifically, the beneficiary's qualifications, and then consider the petitioner's additional arguments on appeal.

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 petition'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).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on April 30, 2001. The petitioner is a food service restaurant and seeks to employ the beneficiary permanently in the United States as an Assistant Manager. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The

³ This determination is made when the petitioner files the I-140 petition 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.

petitioner listed a proffered wage of \$11.50 based on forty hours a week, equivalent to \$23,920. The labor certification was approved on June 10, 2003, and the petitioner filed an I-140 on behalf of the beneficiary on October 5, 2004. On the I-140, the petitioner listed that it was established in 1984, had 125 employees, generated approximately \$3 million in income, and would pay the beneficiary \$460 a week. The California Service Center stamped the I-140 petition approved on April 15, 2005.

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. Uses board [sic] discretion to order supplies, take deliveries of raw materials and reject shipments not meeting quality standards . . . controls labor, waste, and cash yields. 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 petitioner listed that the position required no education in Section 14, and listed no other special requirements for the position in Section 15.

The job offer section additionally notes that two years of experience in a related occupation is required as a “Supervisor of Related Business.” Here, we note that the word “or” was added to the form, to read two years as an Assistant Manager, *or* two years as a supervisor of a related business. The change is handwritten, with no initials by the petitioner, or stamp that DOL approved the correction. Additionally, the word “supervisor” is crossed out, similarly without any initials or DOL stamp approving the change, so that it would read two years experience [in a] related business. Without acceptance of the “or,” the construction would be interpreted as two years as an Assistant Manger “and” two years in a related occupation, as a “supervisor related business” requiring a total of four years of experience. Since there is no clear indication that DOL approved these hand written changes, the language will be read to require “two years” as an Assistant Manager and “two years” as a supervisor in a related business.

On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary listed his experience as: (1) employed with the petitioner, [REDACTED], 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 [REDACTED] (2) [REDACTED] 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) [REDACTED] Food Counter Service

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 Gaucho 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.



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(1)(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 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 to document the beneficiary's qualifications, the petitioner submitted the following letters with the I-140 petition:

Letter from the petitioner, [REDACTED] dated April 10, 2001, signed by the owner, confirming that he works for store [REDACTED] (no location listed).⁶

Position title: Swing Manager

Dates of employment: March 16, 2000 to present

Salary: \$7.65

Description of duties: none

Letter from [REDACTED] not dated, signed by a Senior Manager, confirming that he worked at store #1403, located at 3323 North 24th Street.

Position title: not listed

Dates of employment: not listed

Description of duties: "he took charge of training new employees and he was also in charge of the maintenance program. He was also in charge of getting "coin orders" from the bank on bi-weekly basis."

Letter from [REDACTED] dated April 23, 2001, signed by the Office Manager, confirming that he worked at 3323 North 24th Street in Phoenix, Arizona.

Position title: "hired in the position of food preparation and was earning \$7.25 per hour when he quit."

Dates of employment: November 29, 1996 to June 6, 1999

Description of duties: none

Additional: Certificate of Achievement dated April 1, 2000, for completion of "McDonald's Swing Manager Development Program" for Swing Manager Trainees. The certificate does not identify whether the training was

⁶ The location listed at the bottom of the letter 125 North 24th Street, Phoenix, Arizona, may reflect a separate office address rather than the individual store location.

one day, one week, or otherwise document the amount of time required to complete the training.

In reviewing the letters above submitted to document the beneficiary's work experience, all three letters are deficient, and viewed separately, or together are deficient to demonstrate that the beneficiary's work experience meets the requirements of the certified ETA 750. The first letter provides inconsistent dates of employment for the dates of his work with the petitioner, but would constitute at most thirteen months of supervisory experience. The letter indicates that he began with the petitioner on March 16, 2000, and the ETA 750B, provides that the beneficiary began with the petitioner on either December 1997, or November 1999 (based on the red pen changes). The second letter fails to confirm any dates of employment, and is not on company letterhead. The third letter, while it documents experience, appears to include only experience in food preparation, which would not be acceptable to demonstrate two years of employment as an assistant manager. The first and third letters are additionally deficient as they both fail to list the beneficiary's job duties.⁷ The letters provided and experience listed, do not establish the beneficiary's qualifications to meet the requirements of the certified labor certification.

The beneficiary was provided an opportunity to respond to the decision and certification. In response, counsel for the beneficiary⁸ contends that the officer erred in not asking the beneficiary at the time of the interview whether the beneficiary was employed abroad in Mexico, and whether he had any experience that would qualify him for the position certified before he entered the U.S. Further, counsel contends that the "administrative determination was arbitrary, capricious, and an abuse of discretion," and cites to 5 U.S.C. Section 706. We shall consider the beneficiary's work abroad, as set forth below, to determine whether that experience alone, or taken together with the experience above, qualifies the beneficiary for the position.

Counsel contends in the brief on behalf of the beneficiary that before coming to the U.S., the beneficiary worked for [REDACTED] "in the field of restaurant business from 1991 to 1996. He was the assistant manager for the company from December 1991 to January 1993, and from February 1993 to December 1993 he was chief of personnel, from January 1994 to February 1996, he was a General Manager." 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], 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

⁷ While the officer seemed additionally concerned that the experience was gained while the beneficiary was unlawfully present, we note that the beneficiary has applied for adjustment under the provisions of section 245(i) of the Act, which might allow adjustment despite the unauthorized work if certain factors are met. To read the experience otherwise would negate the purpose of section 245(i) of the Act. We do note, however, that the record reflects different social security numbers for the beneficiary: one number used for employment with the petitioner and on the adjustment application forms; a different number used on the 1997 tax returns; and a third number used for employment with [REDACTED]. Nothing reflects that any of the numbers used were tax identification numbers. The use of multiple social security numbers might present one unfavorable equity in a future adjustment of status application.

⁸ A prior lawyer had filed the labor certification and I-140 on the petitioner's behalf.

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] 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 are deficient in that they do not list 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 lists 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(1)(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. Additionally, if we accept the two years as a general manager as sufficient for two years as a supervisor in a related field, that leaves an additional two years undocumented as an Assistant Manager. 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.

As an additional point of significance, the beneficiary’s Form G-325, signed and dated on May 17, 2004, filed with his Adjustment of Status application conflicts with the letters provided. On the beneficiary’s Form G-325A, the beneficiary lists under the last section “show below last occupation abroad if not shown above” that prior to coming to the U.S., he was “self employed” in Cuernavaca, Morelos, Mexico. Further, he listed that he worked in “Enamel and Painting” from the time period of 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,” the very experience that counsel seeks to rely on to show that the beneficiary qualifies for the certified position.

The significant discrepancy in the letter provided, which documents experience not listed on the labor certification, and provided only after the officer denied the adjustment, conflicts significantly with the experience listed on the G-325A Form. Based on the conflict in the letter and prior listed experience, the veracity of the

letters provided on appeal and the beneficiary's prior work experience is 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.

Based on a review of the entire record, we concur with the ultimate determination that the beneficiary does not meet the position's experience requirements certified on the Form ETA 750. Therefore, the beneficiary is not eligible for the benefit sought.

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. The petition remains denied.