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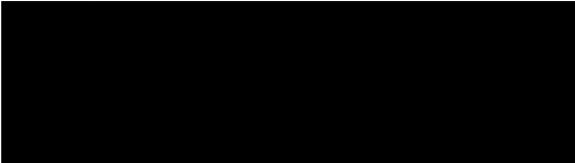
FILE: WAC-03-083-53246 Office: CALIFORNIA SERVICE CENTER Date: **DEC 16 2005**

IN RE: Petitioner:
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:



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, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the preference visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a manager of a lodging facility. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that the beneficiary was qualified for the proffered position and denied the petition accordingly.

On appeal, counsel submits a brief statement.

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.

The issue to be discussed in this case is whether or not the petitioner established the beneficiary's qualifications for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's priority date, its date of filing the Form ETA 750 with DOL, which is December 18, 1997. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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 Louis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

Even if a petition has been withdrawn by the petitioner, the petitioner has the right to substitute a new beneficiary on an ETA 750 labor certification application by filing a new I-140 petition, supported by a new ETA 750B for the new beneficiary. The ETA 750's underlying any withdrawn petitions remain valid, with the same priority dates. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996); see Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure*, vol. 4, § 43.04 (Mathew Bender & Company, Inc. 2004) (available at "LexisNexis" Mathew Bender Online). Mr. Crocetti specifically stated the following:

The substituted alien must have met all of the minimum education, training, or experience requirements, as stated in Part A of the original Form ETA 750 filed by the employer, at the time the original labor certification application was submitted to the state employment office. The petitioner must submit documentation that the substituted alien meets the education, training, or experience requirements set forth in the original labor certification application.

Substitution of Labor Certification Beneficiaries, supra at 2.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (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 manager of a lodging facility. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	N/A
	High School	N/A
	College	N/A
	College Degree Required	N/A
	Major Field of Study	N/A

The applicant must also have two years of experience in the proffered position, the duties of which are set forth in Item 13 of the Form ETA 750 A, which will not be restated in this decision since it is incorporated into the record of proceeding.

The substituted beneficiary set forth his credentials on Form ETA-750B and signed his name 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, he represented that he worked for the petitioner since November 2000 until the date he signed the Form ETA-750B on December 30, 2002, as a head housekeeper "supervis[ing] housekeeping staff." Prior to that, he indicated that he was a lead housekeeper at SnoPeak Lodge in Kings Beach, California from March 1996 to September 2000 also supervising the housekeeping crew.

With the initial petition, the petitioner submitted a letter from Snow Peak Lodge from Lyle Watts, Snow Peak Lodge's general manager, verifying the substituted beneficiary's employment at that business from March 1996 until September 2001 supervising the cleaning crew with knowledge of maintenance and an ability to schedule cleaning and repairs.

Because the evidence was insufficient, the director requested additional evidence concerning the evidence of the beneficiary's qualifications, *inter alia*, on June 12, 2003. The director stated that "[e]vidence of prior experience should be submitted in letterform from the previous employer, Crown Motel showing the name, address, title, and phone number of the person(s) verifying this information. This verification should state the beneficiary's title, duties, and dates of employment/experience and number of hours worked per week."

In response to the director's request for evidence, the petitioner submitted another letter from Mr. Watts on Snow Peak Lodge letterhead with address and a phone number verifying the substituted beneficiary's employment there from March 1996 through September 2001. He stated that the beneficiary "supervised the cleaning crew and his knowledge of maintenance and ability to schedule cleaning and repairs was outstanding."

The director denied the petition on August 26, 2004, stating that the beneficiary's experience at the Snow Peak Lodge involved supervision of cleaning staff and constituted twenty-one months prior to the priority date in December 18, 1997 which is short of the two years of experience required by the proffered position. Thus, the director determined that the beneficiary did not have the requisite qualifying employment experience prior to the priority date and was not qualified for the proffered position.

On appeal, counsel states that neither the governing statute nor regulations requires a substituted alien to have qualifying experience as of the original priority date of the ETA 750 A. He cites a footnote from a 1992 Immigration Briefings article with Jay Solomon.

As the AAO noted at the outset, counsel is mistaken. Policy has been dictated over this issue in 1996, subsequent to the footnoted discussion relied upon by counsel, when DOL ceded responsibility for adjudicating substituted beneficiaries on certified labor certification applications to CIS, which determined that any substituted aliens must demonstrate that they are qualified as of the original priority date of the labor certification application. *See Matter of Wing's Tea House*, 16 I&N Dec. at 158. Since all applicants for the proffered position through the DOL-guided recruitment process had to make a similar showing, such a policy's rationale is fair.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

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.

Thus, for petitioners seeking to qualify a beneficiary for the third preference "skilled worker" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification" as clearly directed by the plain meaning of the regulatory provision.

Additionally, the regulation at 8 C.F.R. § 204.5(1)(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 AAO concurs with the director. Although the second letter from Snow Peak Lodge, submitted in response to the director's request for evidence, appears to conform to the regulatory requirements at 8 C.F.R. § 204.5(i)(3) as it was written by the beneficiary's employer, on company letterhead, provided the name, address, and title of the employer, and described the training the beneficiary obtained at that business, it does not demonstrate that the beneficiary had two years of qualifying employment experience *prior to December 18, 1997*, the priority date of the certified Form ETA-750. Thus, the AAO affirms the director's determination that the petitioner has failed to establish that the beneficiary had two years of qualifying employment experience prior to the priority date.

Beyond the decision of the director, the content of the letter from the Snow Peak Lodge does not reflect that the beneficiary had the requisite specific experience required by the proffered position. The beneficiary supervised only the cleaning division of the Snow Peak Lodge. However, according to Item 13 of the Form ETA 750 A, the duties of the proffered position, in addition to supervising cleaning staff, also require applicants to be able to assist a manager of a small motel cleaning public areas, performing electrical, plumbing, and structural repairs, mowing and watering lawns, cultivating flower beds and shrubbery, and inspecting rooms and common areas. None of those responsibilities were detailed in the employment verification letter submitted from the Snow Peak Lodge. Thus, the letters from the Snow Peak Lodge would not illustrate that the beneficiary is qualified for the proffered position even if it could be established that the beneficiary worked there for the requisite two years prior to December 18, 1997.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also 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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.