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U.S. Citizenship
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Services

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FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date:

NOV 07 2005

SRC-99-272-51241

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

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, Director
Administrative Appeals Office

CC:

[REDACTED]

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal¹. The appeal will be dismissed.

The petitioner is a hotel. It seeks to employ the beneficiary permanently in the United States as a chief cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner failed to establish that the beneficiary is qualified to perform the duties of the proffered position.

On appeal, counsel² submits a brief and additional evidence.

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 filing date, which is January 9, 1998. See *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, 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 chief cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

¹ The petitioner's appeal was filed in March 2000 but the case file was returned to the director in December 2000 prior to adjudication. A different petitioner also filed an I-140 petition on behalf of the beneficiary in July 2001, but that petition was denied because it was not accompanied by a labor certification application approved by the Department of Labor. There was no basis for appeal from that denial. While the instant appeal was still pending, the same petitioner filed a second petition in March 2003, almost identical to the instant petition except that the petitioner's name now contains a "d/b/a Days Inn." That petition was placed on hold pending the results of this appeal. The file was returned to the AAO in February 2005.

² Counsel was [REDACTED] for this petition's filing and appeal. Another properly executed Form G-28, Notice of Entry of Appearance as Attorney or Representative, is in the record of proceeding signed by [REDACTED] and the petitioner's representative subsequent to the filing of appeal and in connection with the second petition filing that is currently on hold pending this appeal's disposition. The record of proceeding does not have a statement revealing the petitioner's intent concerning his choice of counsel for the instant appeal. Thus, the AAO is sending a copy of this decision to both [REDACTED] and [REDACTED].

14.	Education	
	Grade School	completed
	High School	completed
	College	
	College Degree Required	
	Major Field of Study	General

The applicant must also have three years of experience in the job offered in order to perform the job duties listed in Item 13 of the Form ETA 750 A: "Total management of restaurant kitchen. In charge of all kitchen personnel, purchasing of foods and machinery, customer satisfaction, overseeing preparation of all food, planning of menus." Additionally, Item 15 of the Form ETA 750 A requires the "[a]bility to prepare authentic Indian food."

The 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 Summit Café, a restaurant located in Orlando, Florida, as the Owner/Manager from April 1994 through July 1997. He represented that he worked 50 hours per week assuming the following responsibilities: "Running all aspects of restaurant. In charge of all personnel, customer satisfaction, purchasing of inventory, planning menus, and preparation of meals, including Indian food."

With the initial petition, the petitioner submitted no evidence pertaining to the beneficiary's qualifications.

Because the evidence was insufficient, the director requested additional evidence concerning the evidence of the beneficiary's qualifications on October 19, 1999.

In response to the director's request for evidence, counsel stated that the beneficiary "ran several eating establishments prior to the filing of this petition. He owned the Summit Café for three years that was a sole proprietorship." The petitioner submitted undated copies of customer evaluations of the Summit Café; a financing statement submitted by the beneficiary to the State of Florida in connection with his financing of the Summit Café; a copy of a Collateral Assignment of Lease document; Summit Café's menu; copies of three letters from various people, apparently customers of the Summit Café, thanking the beneficiary for catering jobs in 1996 and 1997; and a copy of a Seller's Closing Statement," dated April 25, 1994, evidencing the beneficiary's purchase of a business "operated as C&E Café," located at an address listed by the beneficiary on the Form ETA 750B as Summit Café's address. None of the letters from Summit Café customer establish that the beneficiary cooked the food that was catered at their event or that the food was Indian cuisine. The Summit Café menu does not reflect any Indian cuisine on it.

The director denied the petition on January 7, 2000, stating that "[t]here is no evidence that the café served Indian food or that the beneficiary was the head cook."

On appeal, the petitioner submits additional evidence, namely, a letter from the beneficiary and additional letters from Summit Café customers. The beneficiary's letter states the following, in pertinent part:

I was the owner and full time manager of a ca[f]e in Orlando, Florida for approximately three years. Two or three times per week during my ownership I prepared Indian food for our daily lunch specials. These special [sic] were not listed on the regular café menu.

I also had a catering operation for small to medium size businesses in Orlando. I have enclosed

reference letters from some of the parties that I catered with Indian food. I have been preparing and cooking Indian food for many years.

The regulation at 8 C.F.R. § 204.5(l)(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(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 AAO concurs with the director’s decision based upon the evidence contained in the record of proceeding at the time of her adjudication. The AAO, however, is not limited to the evidence submitted in connection with the instant petition. The AAO may review all evidentiary submissions contained in the record of proceeding. In connection with the third visa petition filed on the beneficiary’s behalf, the same petitioner submitted a letter on [REDACTED] Restaurant letterhead for a restaurant in Surrey, England, that claims that the beneficiary was their head cook from February 1987 to January 1992. The letter is signed by [REDACTED] without any further identification of who [REDACTED] is. That letter is dated July 6, 2000. The petitioner also submits copies of pages from the beneficiary’s passport showing entries every year into the United States from 1990 through 1993, although the length of his stay is unclear. Additionally, other markings in the beneficiary’s passport reflect that he entered the United Kingdom in 1989 and 1991 with permission to stay for five years.

The beneficiary’s Form G-325, Biographic Information sheet, accompanies an adjustment of status to lawful permanent resident status application. The beneficiary signed the Form G-325 in 2003 above a penalty warning about knowingly and willfully falsifying or concealing a material fact. On the Form G-325, the beneficiary represented that he has been a general manager of the Ramada Inn in Chattanooga, Tennessee since January 1998.

On the item requesting information about the beneficiary's last occupation abroad, the form was left blank, and under the item requesting the beneficiary's last address outside the United States for more than one year, the beneficiary wrote "Unknown."

Also contained in the record of proceeding is another form completed and signed by the beneficiary and submitted to CIS in 1992. That form, Form I-687, Application for Status as a Temporary Resident, elicited biographical information from the beneficiary, such as his history of residence and departures from the United States, residence in another country, and employment history. On that form, the beneficiary represented that he last entered the United States in 1988 without a visa and his only absence from the United States since 1982 had been for a temporary visit to friends, family, and relatives in London, England from March 1988 through April 1988. He also represented that he had been self employed since 1981 through "present," which would be 1992 when the form was submitted, "cleaning houses, moving houses, carpet cleaning, etc." On an accompanying sworn and notarized Affidavit, the beneficiary represented that he arrived in the United States in 1981 and has lived continuously in the United States since. The disposition of that case is unclear but it did not appear to be adjudicated. Regardless, the beneficiary provided representations about his residence and employment, which contain sworn testimony and declarations under the penalty of perjury.

There is a clear discrepancy in the above information. The beneficiary could not have been the head cook of a Tandoori restaurant in Surrey, England from February 1987 to January 1992 if he was also continuously residing in the United States until 1992 "cleaning houses, moving houses, carpet cleaning, etc." Additionally, the beneficiary never represented his employment history at a Tandoori restaurant in Surrey, England on any other documentary submission until a third third-preference employment-based immigrant visa filing after multiple denials.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states: "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." *Matter of Ho*, 19 I&N Dec. at 591-592 also states: "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."

Because of the inconsistent factual representations contained in the record of proceeding, the AAO does not find the letter from [REDACTED] Restaurant to be credible and probative evidence³. The evidence submitted showing that the beneficiary purchased a café in 1994 does not establish that he was a head cook or that he can cook Indian food, as required by the proffered position as delineated on the Form ETA 750 A. Indeed, he states that he cooked 2 to 3 times a week. No other evidence contained in the record of proceeding corroborates the beneficiary's representation that he has the ability to cook Indian food or that he worked as a head cook for three years.

Thus, the AAO concurs with the director's decision that the petitioner has failed to establish 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.

³ The letter also fails to meet the regulatory requirements set forth at 8 C.F.R. § 204.5(1)(3) since the letter is not clearly from a trainer or employer, providing the trainer or employer's title, as well as a description of duties performed by the beneficiary.



Page 6

ORDER: The appeal is dismissed.