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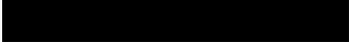


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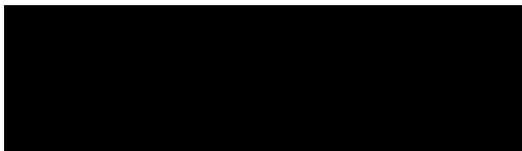
Office: CALIFORNIA SERVICE CENTER

Date: **NOV 16 2005**

IN RE: Petitioner: 
Beneficiary: 

PETITION: 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 preference visa petition¹ was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Korean restaurant. It seeks to employ the beneficiary permanently in the United States as a Korean specialty 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 had not established that the beneficiary had the requisite experience as stated on the labor certification application at the time the request for certification was filed and denied the petition accordingly.

On appeal, counsel submits a brief statement and additional evidence. A new counsel retained by the petitioner submits his properly executed Form G-28, Notice of Entry of Appearance as Attorney or Representative, and additional evidence.

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).

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 or seasonal nature, for which qualified workers are not available in the United States.

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. 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). The priority date in the instant petition is April 12, 2001.

The certified Form ETA 750 in the instant case states that the position of Korean specialty cook requires two (2) years of experience in the job offered. On the Form ETA 750B, signed by the beneficiary on April 9, 2001, the beneficiary set forth his work experience. He listed his experience as a "Cook, Korean Specialty" at Yu Chun Chic Naeng Myun, Los Angeles, California from April 1998 to present (i.e. the date of the preparation of the Form ETA 750B which was dated April 9, 2001).

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 U.S. Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

¹ The petitioner filed a new petition with the California Service Center for the same beneficiary on February 7, 2005 (Receipt Number: WAC-05-087-53198).

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The instant I-140 petition was submitted on May 21, 2003 without any documentation concerning the beneficiary's qualification as required by the above regulation. In response to the director's request for additional evidence (RFE) dated December 27, 2003 relevant to the beneficiary's qualification as required by the regulation at 8 C.F.R. § 204.5(g)(1), the petitioner submitted an affidavit from Young Ho Hahn. On July 3, 2004, the director determined that without evidence that can substantiate the beneficiary's prior "Cook" experience, the affidavit itself failed to establish the beneficiary's qualification, noting that the author of the affidavit and the owner of the petitioning company, Yu Chun Korean BBQ, have the same family name and are of possible relation [REDACTED] and [REDACTED] and denied the petitioner accordingly.

Former counsel argues on appeal that:

[REDACTED] and [REDACTED] were divorced on March 9, 1999. The petitioning company's job offer to the beneficiary was made in April 2001, a good two (2) years after [REDACTED] divorce from [REDACTED]. Therefore, at the time of the job offer, [REDACTED] and [REDACTED] were not related, and were not in an amicable relation to cooperate in any business deals.

Counsel's conclusion is misplaced on incomplete information. The record of proceeding shows that the petitioner was established in 1997, and since then [REDACTED] owns 10% and [REDACTED] owns 90%. On September 29, 2004, the County of Los Angeles issued Public Health Operating Permit to [REDACTED] Korean BBQ. Affidavits from [REDACTED] and [REDACTED] recently submitted by substituted counsel also verify that [REDACTED] owns 90% of Yu Chun Korean BBQ and [REDACTED] owns 10% of the restaurant as of January 10, 2005. Affidavits from [REDACTED] and [REDACTED] both verify that [REDACTED] was a partner who had 10% shares of [REDACTED] in April 2001. Thus, [REDACTED] was an owner of the petitioning employer and also a partner of the beneficiary's restaurant prior to the priority date. A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000).

Although 8 C.F.R. § 204.5(g)(1) permits the consideration of other documentation of the beneficiary's qualifying experience in the circumstances that the required evidence is not available, it still requires other documentation to meet certain evidentiary standards. The affidavits of Young Ho Hahn submitted through former counsel on March 10, 2004 and through new counsel on March 23, 2005 are not notarized. The declarations that have been provided on motion are not affidavits as they were not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. See *Black's Law Dictionary* 58 (7th Ed., West 1999). Both of the affidavits are not dated. The first affidavit does not identify the author properly as a 10% owner of the petitioning restaurant and 10% partner of the beneficiary's restaurant, nor does it indicate

the beneficiary's working address. Moreover, the two affidavits appear to be inconsistent.² It is also noted that the signatures in each affidavit appears different. Because of these defects, the affidavits will be given little weight in these proceedings.

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. 582, 591-592 (BIA 1988) 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.

The record contains copies of the beneficiary's Form 1040, US Individual Income Tax Return from 1998 through 2001 with all attachments and schedules, Articles of Incorporation and Stock Certificate of Yu Chun Naeng Myun, Inc., and the beneficiary's W-2 forms from Yu Chun Chic Naeng Myun, Inc. for 2002 and 2003, submitted to show the beneficiary had more than two (2) years experience as a Korean Specialty Cook prior to the priority date. Counsel asserts that the W-2 forms and Schedule E prove the beneficiary's employment with Yu Chun Chic Naeng Myun. Here the priority date for the instant case is April 12, 2001. Thus, evidence after the priority date in 2001 is not necessarily dispositive of the beneficiary's qualified experience prior to the priority date.

Form 1040, US Individual Income Tax Return, for the beneficiary in the record indicates that the beneficiary filed his tax returns as self-employed for 1998 and 1999, and as cook for 2000 and 2001. The beneficiary himself had identified his occupation as a full-time cook only for one year and three months prior to the priority date. That would be not sufficient to be qualified for the position of Korean Specialty Cook, which requires at least two (2) years experience in the job offered.

Former counsel asserts that Form W-2 from Yu Chun Chic Naeng Myun for 1998 proves the beneficiary's employment as Korean cook. However, the form W-2 from Yu Chun Chic Naeng Myun in the amount of \$5,600 submitted as evidence is not for the beneficiary but for his wife, [REDACTED] with her social security number. That is the only W-2 form attached to the beneficiary's tax return for 1998. In 2001, Yu Chun Chic Naeng Myun issued Form W-2 for his wife again in the amount of \$6,495. The W-2 forms for the beneficiary's wife cannot be used to prove the beneficiary's experience as cook with that business entity. The record of proceeding does not contain any evidence to establish that Yu Chun Chic Naeng Myun issued any form W-2 to the beneficiary during the years 1998 through 2001. 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

² In his first affidavit [REDACTED] states that: "[f]rom April 1, 1998 to August 31, 2001, [the beneficiary] was employed with Yu Chun Chic Naeng Myun as Korean Specialty Cook on a full-time basis which required services of 40 hours per week," however, he verifies in his second affidavit that "[the beneficiary] has been working as a cook at Yu Chun Chic Naeng Myun, located at [REDACTED] Los Angeles [sic], CA from April 1998 to present."

I&N Dec. 190 (Reg. Comm. 1972)). Instead former counsel conceded that no W-2 form was separately issued. Therefore, the petitioner failed to prove the beneficiary's prior experience with W-2 forms.

Former counsel also asserts that the beneficiary's Schedule E to his 1040 individual income tax forms can prove the beneficiary's qualifying work experience as a Korean cook. The beneficiary reported \$1,696 for 1998, \$12,745 for 1999, \$37,130 for 2000 and \$52,960 for 2001 as income from rental real estate, royalties, partnerships, S corporations, trusts, etc. in his 1040 individual income tax returns. Schedule Es for 1998, 1999, 2000 and 2001 show that the incomes came from Yu Chun Chic Naeng Myun as a partnership with Employer Identification Number [REDACTED] and all investment is at risk. However, evidence does not provide substantiation that the beneficiary worked for Yu Chun Chic Naeng Myun as a full-time **Korean specialty cook**, not part-time, not as manager or other executive or businessman for at least two (2) years during the period from April 1998 to April 12, 2001.

Former counsel also submitted a reference letter from Korean American Business Association (KABA) stating "a large number of Korean restaurant owners are also head cooks of their own restaurants". There are two more reference letters submitted, one from [REDACTED] the owner of Shin Jung Korean BBQ Restaurant and the other from [REDACTED] the owner of Shi Gol Sam Bap Korean Restaurant stating that they are owners as well as head cooks for their own restaurants. These reference letters make general statements about Korean restaurants and come without any supporting evidence. None of them verify that the beneficiary had worked for his own restaurant as both the owner and the head cook during the period from April 1998 to April 2001, nor did they verify that the beneficiary was a skilled cook with many years of experience when he opened his restaurant like most restaurant owners who are also head cooks for their own restaurants. The KABA's reference letter verifies that: "as skilled cooks with many years of experience, these owners open their own restaurants which specialize in dishes they themselves have mastery in." The AAO would presume that most restaurant owners would have working experience as a cook. Nevertheless, 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)).

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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.