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U.S. Citizenship
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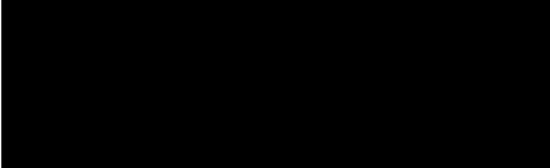
Office: NEBRASKA SERVICE CENTER

Date: OCT 19 2005

IN RE: Petitioner: [Redacted]
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:



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

The petitioner is a South Indian specialty restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook, foreign food. The petitioner has two employment-based petitions pending. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

On appeal, the counsel submits 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.

8 CFR § 204.5(l)(3)(ii) states, in pertinent part.

(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 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 and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on September 25, 2002. The proffered wage as stated on the Form ETA 750 is \$12.50 per hour (\$26,000.00 per year). The Form ETA 750 states that the position requires three years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, income tax returns of petitioner, and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The I-140 petition is dated September 22, 2003, and it was filed on October 14, 2003. A Request for Evidence, was issued by the Service Center, that consistent with the requirements of 8 C.F.R. 204.5 § (l)(3)(ii), requested that evidence of the beneficiary's experience be in the form of letters from current or former employers giving the name, address, and title of the employer, and a description of the experience of the alien that included specific dates of that current or prior employment and "specific" duties. The Service Center commented, "... The work

experience letter provided indicates that the beneficiary was employed as an Assistant Cook and as a Cook, but does not contain a description of the duties actually performed by the beneficiary. As such [the Service Center advised] this evidence is insufficient.”

The petitioner’s response was to reconfirm its own understanding of the beneficiary’s work history without providing additional evidence.

The director denied the petition on August 16, 2004.

The issue to be discussed in this case is whether or not the petitioner had established that the beneficiary has the requisite experience¹ as stated on the labor certification petition. To be eligible for approval, a beneficiary must have the experience specified on the labor certification. *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-750B, item 15, sets forth work experience that the beneficiary listed for the position of specialty cook, foreign food:

15. WORK EXPERIENCE

a. NAME AND ADDRESS OF EMPLOYER

[REDACTED]

NAME OF JOB

Cook

DATE STARTED

Month – Sept Year - 1994

DATE LEFT

Month – July Year- 2000

KIND OF BUSINESS

Restaurant

DESCRIBE IN DETAIL DUTIES...

Prepared & cooked South Indian cousine [sic] such as masalauada, idli, palak, paneer, malai, kofta, channa, masala, aloo, matar. Estimate foods. Requisition of supplies. Plan & prepare menu according to menu or customer order and shortening to prepare foods.

NO. OF HOURS PER WEEK

48

¹ The beneficiary states no education attainments in the certified Alien Employment Application, ETA 750, Part B, section 11.

In this case, the job verification letter that the petitioner submitted with the petition to prove the beneficiary's work experience as a specialty cook, foreign food conflicted with the Form ETA 750, Part B above recited that stated that the beneficiary's duties as cook began in the last quarter of 1995 (meaning that he was an assistant cook prior to that time).

That letter written by the manager of [REDACTED] dated June 20, 2000 stated in pertinent part:

This is to certify that ... [the beneficiary] ... has worked as an Assistant Cook in our South Indian Section of our Restaurant from 1st September, 1994 to 31st August, 1995 and then as a Cook from 1 Sept. 95 to 31 July, 2000²

Subsequently, the beneficiary entered the United States on September 20, 2000, and after receiving work authorization was employed by the petitioner.

As mentioned above, and is evident in the letter, it does not contain a description of the duties actually performed by the beneficiary that would reconcile the beneficiary's cooking experience asserted in the letter with that specified in the certified Alien Employment Application. Therefore, the AAO concurs with the director that evidence submitted with the response to the Request for Evidence is insufficient. The Service Center's request was consistent with the requirements of 8 C.F.R. 204.5 § (1)(3)(ii) especially since the beneficiary has not stated any vocational education as a cook or any employment as a cook prior to 1995.

The purpose of the Request for Evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The problem that arises in this case is the lack of detail in the experience letter. There is no information concerning what he did in the Assistant Cook then Cook positions. The record is silent where he gained his skills initially. *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."

Even if the record of proceeding did not contain inconsistencies, the AAO concurs with the director's determination that no probative evidence establishes that the beneficiary has three years of experience as a specialty cook, foreign food. The Service Center pointed out that the above-mentioned letter is dated before the termination date of the beneficiary and on its face was not credible. The AAO concurs. The petitioner offered no explanation for this discrepancy on appeal. There is no other evidence contained in the record of proceeding that establishes that the beneficiary was employed for three years in an employment capacity with duties similar to the duties of the proffered position.

² The Service Center pointed out that this letter is dated before the termination date of the beneficiary. The petitioner offered no explanation for this discrepancy.

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 come forward with sufficient evidence of work experience to substantiate that set forth in the certified Alien Employment Application, and therefore, it not established that the beneficiary has the requisite experience as specialty cook, foreign food. The petitioner has not met that burden.

ORDER: The petition is dismissed.