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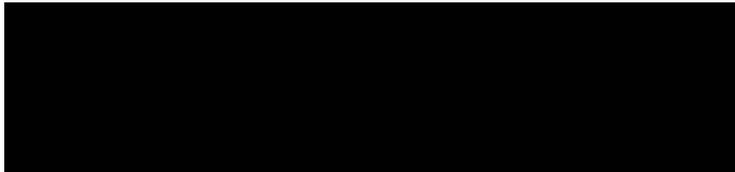
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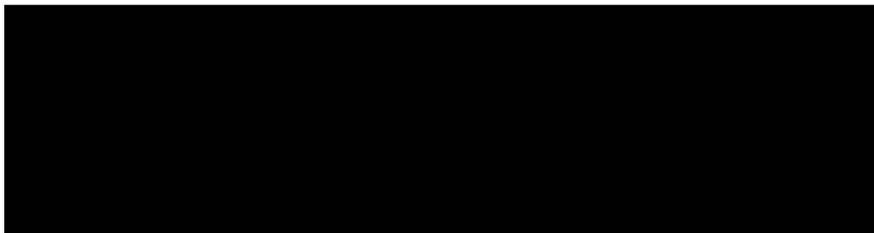
BE



FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: DEC 12 2008
EAC-03-129-55051

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)



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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 is qualified to perform the duties of the proffered position with two years of qualifying employment experience. The director denied the petition accordingly.

The record shows that the appeal is properly filed timely and makes a specific allegation of error in law or fact. 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.

As set forth in the director's September 27, 2004 denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The director noted inconsistencies in information pertaining to the beneficiary's employment experience and found it doubtful that the beneficiary could work in Mexico as a cook while he also claimed to stay in the United States.

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 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 April 29, 1997.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal². On appeal, counsel submits new Form G-325 Biographic Information for the beneficiary. Other relevant evidence in the

¹ The instant petition is the second petition filed by the petitioner on behalf of the beneficiary based on the same approved labor certification. The petitioner filed a previous petition (EAC-02-002-51164) on October 2, 2001, which was denied by the director of Vermont Service Center on February 22, 2002. The subsequent appeal was dismissed by the Administrative Appeals Office on April 13, 2004. The petitioner submitted the third petition (EAC-06-064-52240) on December 21, 2005 while the instant appeal is pending with the AAO. The third petition filed by the petitioner on behalf of the beneficiary is pending with the Vermont Service Center.

² 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).

record includes a letter from the beneficiary's prior employer in Mexico. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the beneficiary stayed in Mexico for the period the experience letter claimed the beneficiary worked as a cook for La Parilla restaurant in Mexico, and thus he possessed the requisite two years of experience as set forth on the Form ETA 750.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and 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 cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

The applicant must have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name on February 25, 1997 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 has been self-employed since January 1994. Prior to that, he represented that Iridum Bar/Club Restaurant at 44 West 63rd Street, New York, New York 10023 employed him as a cook from December 1990 through February 1993. He did not provide any additional information concerning his employment background on that form.

The record of proceeding also contains a Form G-325, Biographic Information sheet signed by the beneficiary on February 4, 2003 and submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form under a section eliciting information about the beneficiary's last five years residence, he represented that he has been living at [REDACTED] Brooklyn, NY since March 1995 and lived at [REDACTED], Brooklyn, NY from January 1992 to March 1995, and about the beneficiary's last occupation abroad, he represented that he worked as a cook for [T]ridim Bar/Club Restaurant at 44 West 63rd St., New York, NY 10023 from December 1990 to February 1993 above a warning for knowingly and willfully falsifying or concealing a material fact.

With the petition, the petitioner submitted a letter from [REDACTED] Administrator of La Parrilla Restaurant in Puebla, Mexico dated December 6, 2001 stating that the beneficiary worked as a cook in their restaurant from April 1993 to May 1995.

On appeal, counsel submits a new Form G-325 signed by the beneficiary on October 28, 2004. On this new form under a section eliciting information about the beneficiary's last five years residence, he represented that he has been living at [REDACTED] Brooklyn, NY since January 1996, lived in [REDACTED] Puebla, Mexico from March 1993 to January 1996 and at [REDACTED] Brooklyn, NY from August 1990 to [REDACTED]

March 1993; and about the beneficiary's last occupation abroad, he represented that he worked as a cook for La Parilla in Mexico from April 1993 to May 1995.

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 experience letter from La Parilla appears to be the one from a former employer and meets the above quoted regulatory requirements. However, it provided inconsistencies with the Form ETA 750B and G-325 initially filed. These inconsistencies cast doubt whether the experience letter is fraudulent. *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."

On appeal counsel attempts to resolve those inconsistencies. Counsel asserts that the beneficiary's "first entry in US was [in] 08/1990 and he returned to Mexico [in] 03/1993. While there he worked at La Parrilla from 04/1993 until 05/1995 as a cook. From 05/1995 to 01/1996 he stayed and remained in Mexico, [in] 01/1996 he decided to returned and entered [the] United States and been in US to present (01-1996 is his last entry)." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel submits a new Form G-325 to resolve inconsistencies. However, "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. 591-592 (BIA 1988). A new Form G-325 signed by the beneficiary himself is not independent objective evidence, and thus, not sufficient to resolve inconsistencies in the instant case. Furthermore, the record does not contain any independent objective evidence to resolve inconsistencies between the experience letter and the Form ETA 750B.

The AAO thus affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience in the proffered position from the evidence submitted into this record of proceeding and thus the petitioner has not demonstrated that he is qualified to perform the duties of the proffered position.

It may be noted that a denial of an I-140 petition is without prejudice to the petitioner submitting a new I-140 based on the same approved ETA 750 labor certification. *Cf.* 8 C.F.R. §§ 103.2 (a)(7)(ii) (new fees will be

required with any new petition), 103.2(b)(15) (withdrawal of a petition or denial of a petition due to abandonment does not preclude the filing of a new petition with a new fee). However, any new petition submitted by the petitioner would have to be supported by evidence clarifying the grounds of denial in the previous petition. In the instant case, the petitioner did not submit any new evidence on the issues the director and the AAO reviewed and adjudicated in the previous petition (EAC-02-002-51164). Moreover any new petition would have to be supported by evidence sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, including the years since the record closed in the instant petition. However, the record shows that the petitioner did not establish its ability to pay for the years other than 1997 and 1998.

Therefore, beyond the director's decision and counsel's assertions on appeal, the AAO will discuss issues whether or not the petitioner has demonstrated that it had the continuing ability to pay the proffered wage from the priority date. 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 AAO notes that the employer named [REDACTED] located at 100 7th Avenue, Brooklyn, New York 11231 filed with and had a labor certification application certified by the Department of Labor. CIS records show that three petitions were filed on behalf of the beneficiary by [REDACTED] at [REDACTED] Brooklyn, NY 11215), [REDACTED] (at [REDACTED] Brooklyn, NY 11215) and [REDACTED] Restaurant (at [REDACTED] Brooklyn, NY 11215) respectively based on the same certified labor certification. In the instant petition, the petitioner submitted Form 1120 U.S. Corporation Income Tax Returns filed by [REDACTED] for 1997 and 1998 to establish the petitioner's ability to pay. The record of proceeding does not contain any evidence to prove that [REDACTED] is the trade name or part of [REDACTED] or [REDACTED] nor does the record contain any evidence to establish relationship between [REDACTED] Restaurant e dba [REDACTED] Diner and [REDACTED] or [REDACTED]. The record contains no evidence that the petitioner qualifies as a successor-in-interest to [REDACTED] or [REDACTED]. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also 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 April 29, 1997 and the instant petition was filed on February 26, 2003. As of that date the petitioner's federal tax return for 2001 should have been available. Therefore, the petitioner must submit its tax returns for 1997 through 2001. However, the petitioner submitted 1997 and 1998 tax returns only, but not for 1999 through 2001. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner failed to establish its ability to pay the proffered wage in 1999 through 2001 because it did not submit the tax returns or other regulatory-prescribed evidence for these years.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage in the years from 1999 to 2001 through an examination of wages paid to the beneficiary, its net income or net current assets.

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.