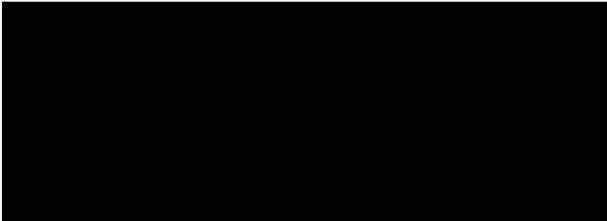


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FILE:



Office: VERMONT SERVICE CENTER

Date: OCT 19 2006

EAC-03-185-53951

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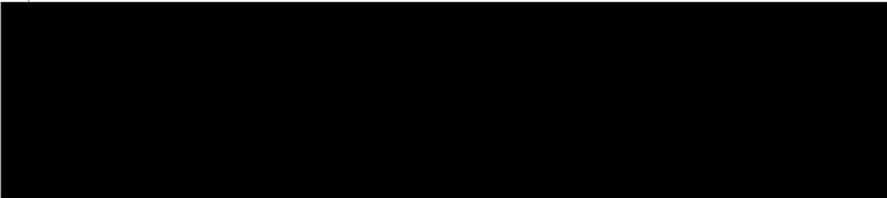
Petitioner:



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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition¹ was denied by the Acting Center Director (Director), Vermont Service Center. Upon completion of reviewing the record of proceeding after granting a motion to reopen, the director affirmed the previous decision. Now the matter is before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a grocery store with food/salad bar. It seeks to employ the beneficiary permanently in the United States as a food service manager. 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, counsel submits a letter and additional evidence.²

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.

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 30, 2001.

Citizenship and Immigration Services (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).

¹ The petitioner filed an I-140 petition (EAC-98-182-51997) on the behalf of the instant beneficiary with the Vermont Service Center on June 9, 1998 based on an approved labor certification in the position of cook. The previous petition was denied by the director of Vermont Service Center on December 1, 1998 because the petitioner did not establish that it had the ability to pay the proffered wage at the time of filing. A subsequent appeal was submitted on January 5, 1999. On March 9, 1999 the director rejected the appeal because of untimely filed and also rejected to treat the appeal as a motion because the requirements at 8 C.F.R. §§103.5(a)(2) or (3) had not been met.

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). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The certified Form ETA 750 in the instant case states that the position of food service manager requires two (2) years of experience in the job offered or in related occupation of management. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, he set forth his work experience. He listed his experience as "Manager" at the petitioner from February 2000 to the present, and as a "Manager" for Won Fashion, Inc. (Won Fashion), a clothing factory located at 301 Hunting Park Avenue, Suite B, Philadelphia, Pennsylvania from August 1997 to December 1999. He provided no further information concerning his working experience as a manager on this form, which was signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

The instant I-140 petition was submitted on May 22, 2003 with letters from Chechol O, the owner of Julie Oh Fashion, Inc., Yong T. Hwang, the owner of International True Textile, Inc., and Woo Kyun Chang, CPA of Woo Kyung Chang & Co. to corroborate the information represented on the Form ETA-750B pertinent to the beneficiary's qualifications as required by the regulation.

The director issued a request for additional evidence (RFE) on April 13, 2004 noting that three letters from people who have interacted with the beneficiary while he worked for another company are not sufficient and cannot be used in lieu of a letter from the actual company for which the beneficiary worked, and therefore, requesting the petitioner to submit evidence to establish that the beneficiary possessed the required two years of work experience as of April 30, 2001. In response to the director's RFE, counsel submitted Won Fashion's articles of incorporation, application for Philadelphia business tax account number, and corporate income tax returns for 1997, 1998 and 1999. Counsel also submitted letters from Geun J. Lee, CPA, Young Park, the owner of Pro Made Wholesale and Ok Ja Jung, a former employee of Won Fashion.

On August 11, 2004, the director denied the petition finding that while the petitioner claimed the beneficiary was self-employed as the manager of Won Fashion from August 1997 to December 1999, a previous Form ETA 750B indicated that the beneficiary worked for the petitioner from August 1995 to June 1998. The director was not convinced that the beneficiary held the work experience he claimed because of the discrepancy.

On appeal counsel asserts that there was no discrepancy in the claimed work experience for the period of August 1997 to June 1998, and submits a copy of the previous Form ETA 750B to support her assertions.

The issue in the instant case is whether the petitioner established the beneficiary's requisite two years of experience as required by the proffered position on the Form ETA 750.

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

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or 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 record shows that the beneficiary established Won Fashion in August 1997 and operated this company as the president and manager until December 1999 when it was closed. The petitioner established that a letter

from a former employer as generally required by the above regulation is unavailable in the instant case since the company was closed and the beneficiary claimed to have been self-employed. Per the regulation, other documentation relating to the alien's experience or training will be considered. As other documentation to be considered in determining whether the beneficiary possessed the requisite two years of experience as a manager prior to the priority date, the petitioner submitted letters from [REDACTED] the owner of Julie Oh Fashion, Inc., [REDACTED], the owner of International True Textile, Inc., and [REDACTED] of Woo Kyung Chang & Co. to verify that the beneficiary worked for his own company as the president and manager for more than two years. The petitioner also submitted letters from [REDACTED] Young Park, the owner of Pro Made Wholesale, and [REDACTED] a former employee of Won Fashion to further verify that the beneficiary owned and operated Won Fashion. The letters from business owners show that the beneficiary interacted with other business owners in a managerial capacity. The letters from the accountants show that the beneficiary owned and operated a business and utilized accounting services in that capacity. In addition, a copy of Articles of Incorporation of Won Fashion, Inc. in the record shows that the beneficiary established a domestic business corporation under the name of Won Fashion, Inc. on May 30, 1997. A copy of Application for Philadelphia Business Tax Account Number submitted in response to the RFE indicates that the beneficiary as the president of the company applied for such a number for Won Fashion to do business in manufacturing men and women's clothing on August 22, 1997. The tax returns of Won Fashion, Inc. prove that the company filed Form 1120 tax returns for its income in 1997, 1998 and 1999 and the beneficiary signed the tax returns as the president of the company. The tax returns show that Won Fashion paid officer's compensation of \$18,500 in 1997, \$28,600 in 1998 and \$0 in 1999. Similarly, the tax returns indicate that the company paid salaries and wages of \$64,184 in 1997, \$193,320 in 1998 and \$127,146 in 1999 respectively. These documents establish that the beneficiary created and operated the company named Won Fashion, which had income and filed its corporate income tax returns for the years 1997 through 1999.

On appeal counsel argues that there was no discrepancy in claimed work experience and submits copies of the previous Form ETA 750B. The AAO concurs with counsel's argument after reviewing the newly submitted evidence. On the previous Form ETA 750B the beneficiary claimed that he worked for the petitioner from August 1995 to the present, i.e. the time the beneficiary signed the Form on June 24, 1996 while the beneficiary claimed to have worked for Won Fashion from August 1997 in the instant petition.

Therefore, after completely reviewing the evidence submitted, the AAO concurs with counsel's assertion that the submitted evidence is sufficient to establish the beneficiary's two years of self-employed experience as a manager at Won Fashion. The petitioner has demonstrated that the beneficiary had the requisite two years of experience in the job offered prior to the priority date, that is in this case April 30, 2001.

Counsel's assertions on appeal have overcome the director's finding in his decision to deny the petition. The evidence submitted establishes that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date, and that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.