

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

B6

PUBLIC COPY



FILE:

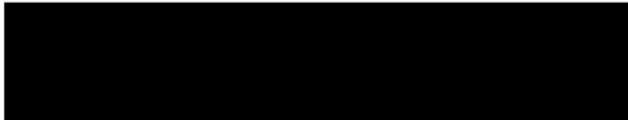
[Redacted]
EAC 04 080 50213

Office: VERMONT SERVICE CENTER

Date: SEP 05 2006

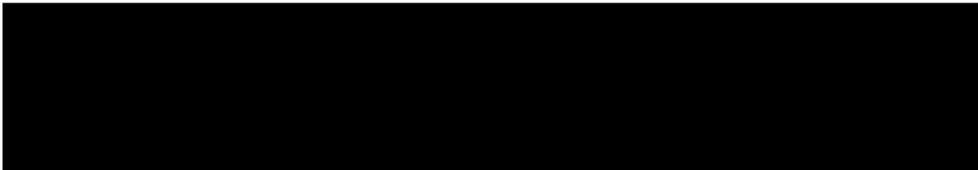
IN RE:

Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 petition was denied by the Director, Vermont Service Center. The petitioner appealed. The appeal will be dismissed.

The petitioner operates a gas station. It seeks to employ the beneficiary permanently in the United States as an assistant manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. 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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

The regulation at 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 regulation at 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.

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. 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 25, 2001. The proffered wage as stated on the Form ETA 750 is \$9.65 per hour (\$18,064.80 per year).¹ The Form ETA 750 states that the position requires one year of experience as an assistant manager or two years of experience as a gas station attendant.

¹ It has been five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

On appeal, counsel submitted additional evidence.

With the petition, the petitioner submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor ("USDOL"); a support letter from the petitioner; U.S. Internal Revenue Service Form tax returns; and two affidavits both dated January 6, 2004.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate that the beneficiary has the requisite experience as stated on the labor certification petition beginning on the priority date, consistent with the regulation at 8 CFR § 204.5(I)(3)(ii), the director requested on February 24, 2004, additional pertinent evidence of the beneficiary's prior job experience.

In response to the above requests, Counsel submitted an explanatory letter; a letter dated March 23, 2004, of the beneficiary's prior job experience from [REDACTED] and, an affidavit made May 17, 2004 by [REDACTED]

The director denied the petition on July 21, 2004, finding that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition.

On appeal, the counsel has failed to identify specifically an erroneous conclusion of law or a statement of fact as a basis for the appeal, but recounts the documentary evidence provided. Counsel indicates that the full record of the beneficiary's employment as a gas station attendant was not provided by [REDACTED] when in fact a second letter from [REDACTED] mentioned below stated that the beneficiary was a salesperson of that gas station location from December 5, 1983 though October 1, 1985, and that the beneficiary could have worked there prior to December 1983 employed by a third party outsourcing personnel provider. Counsel has not provided any information concerning this third party outsourcing personnel provider

The petitioner has submitted on appeal a letter dated August 16, 2004, of the beneficiary's prior job experience from [REDACTED], and a photocopy of a [REDACTED] for the beneficiary from 1983 through 2004 submitted to show that the beneficiary did work in 1983.

The issue to be discussed below is whether or not the petitioner had established that the beneficiary has the requisite experience as stated on the labor certification petition. 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 March 3, 2000. *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, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of assistant manager.

In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education
 - Grade School
 - High School -
 - College =
 - College Degree Required Blank
 - Major Field of Study Blank
 - Training =
 - Experience
 - Job Offered - Years/Mos. 1/ Blank ["Or" written in number space]
 - Related Occupation gas station attendant
 - Years/Mos. 2/-

In the instant case, the Application for Alien Employment Certification, Form ETA-750B, item 15, sets forth work experience for the position of assistant manager:

15. WORK EXPERIENCE

(a)

NAME AND ADDRESS OF EMPLOYER

[Redacted]

NAME OF JOB

Security Officer

DATE STARTED

Month - 12 [December] Year 1998

DATE LEFT

Month - 02/11 [February 11] Year 2002

KIND OF BUSINESS

Security services

DESCRIBE IN DETAIL DUTIES...

Maintains access control (Evening shift: app. 4pm-11pm)

NO. OF HOURS PER WEEK

35

(b)

NAME AND ADDRESS OF EMPLOYER

[Redacted]

NAME OF JOB

Education assistant

DATE STARTED

Month - 11 [November] Year 1983

DATE LEFT

² A note written into this information box is as follows: "has merged with [Redacted] last December and is known as [Redacted] It is located at [Redacted] 22003 ..."

Present [i.e. April 18, 2001]
KIND OF BUSINESS
Embassy
DESCRIBE IN DETAIL DUTIES...
Processes educational enquiries from public/employers ... (7am-3pm)
NO. OF HOURS PER WEEK
40

(c)

NAME AND ADDRESS OF EMPLOYER
[REDACTED]
NAME OF JOB
Gas station attendant
DATE STARTED
Month – 5 [May] Year 1984
DATE LEFT
Month – 5 [May] Year 1987
KIND OF BUSINESS
Gas station
DESCRIBE IN DETAIL DUTIES...
Operated gas pumps. Received payment. Maintained inventory
NO. OF HOURS PER WEEK
40

The beneficiary submitted a CIS Form G-325A dated December 30, 2003 to support his adjustment application. According to the section stating the beneficiary's employment in the last five years, the beneficiary was employed by the Embassy of Pakistan as an "Edu. Ass." (education assistant) from November 1993 to present (i.e. December 30, 2003), and in addition to that experience, he was also employed by [REDACTED] in Annadale Virginia from December 1998 to February 2002 where the beneficiary worked in the evening.

Two affidavits were submitted by two former employees of [REDACTED] both dated January 6, 2004. Both affidavits by [REDACTED] and [REDACTED] indicated that they had worked with the beneficiary. [REDACTED] stated that Mr. [REDACTED] was employed from March 1983 to April 1985. and, [REDACTED] stated that he was employed from August 1983 to December 1985. Mr. [REDACTED] indicated in his statement that the beneficiary "continued working at that gas station after I left." Neither of the affiants stated their contact address, job title at [REDACTED] the job or duties of the beneficiary or supervisor, manager or job trainer information, or the beneficiary's term of employment.

In response to the request for evidence, counsel submitted an explanatory letter; a letter dated March 23, 2004, of the beneficiary's prior job experience from [REDACTED], and, an affidavit made May 17, 2004 by [REDACTED]

[REDACTED] of [REDACTED], Richmond Virginia stated in the letter submitted March 23, 2004, that the beneficiary was a salesperson at the [REDACTED] location at [REDACTED] 23041." No description of the job or duties of the beneficiary or supervisor, manager or job trainer information was provided, or term of employment was given.

An affidavit made May 17, 2004 was provided by [REDACTED] who also stated that he was a co-

employee at that gas station mentioned and that the beneficiary worked with Mr. [REDACTED] from September 1983 until "October fo [sic] 1985." Mr. [REDACTED] details the beneficiary's title and job duties as a gas station attendant. Mr. [REDACTED] also provided his contact information.

Upon appeal, counsel submitted another letter from [REDACTED] Richmond Virginia signed by [REDACTED] that stated that the beneficiary was a salesperson of that gas station location from December 5, 1983 though October 1, 1985, and then she speculates that the beneficiary could have worked there prior to December 1983 employed by a third party outsourcing personnel provider.

No pay stub or other evidence of wages paid contained in the record of proceeding establishes that the beneficiary was employed for two years in an employment capacity with duties similar to the duties of the proffered position. Counsel provides evidence that the beneficiary received income during the pertinent years (a PEBES ONLINE RESPONSE for the beneficiary from 1983³ through 2004 without explanation) but no personal income tax returns, W-2 or 1099-MISC statements were provided.

Further, the AAO does not find mentioned the beneficiary's work experience to be credible without any evidence offered of prior experience or training. There is no independent objective evidence from 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. All the affidavits do not agree or provide specific start/stop dates for the beneficiary's employment at Crown.

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."

The evidence submitted does not demonstrate credibly that the beneficiary had the requisite two years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for 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.

ORDER: The appeal is dismissed.

³ The amount stated for year 1983 does not suggest the beneficiary worked for more than a month.