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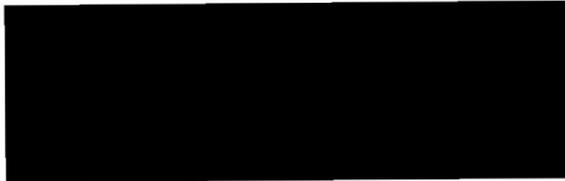
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship and Immigration Services

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FILE: WAC-03-052-50727 Office: CALIFORNIA SERVICE CENTER Date: SEP 29 2008

IN RE: 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 Director, California 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 restaurant cook. The instant petition is for a substituted beneficiary.² 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 additional evidence.³

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 September 4, 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 previously filed three identical immigrant petitions for the beneficiary previously based on a certified labor certification as follows: WAC-01-257-53091 was filed and rejected on August 14, 2001; WAC-01-0282-52359 was filed on September 12, 2001 and denied on March 13, 2002; and WAC-02-192-53239 was filed on May 23, 2002 and denied on October 24, 2003.

² An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, et al., Substitution of Labor Certification Beneficiaries, at 3, http://owns.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

³ 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 restaurant cook requires two (2) years of experience in the job offered. On the Form ETA 750B, signed by the beneficiary on October 15, 2002, she set forth her work experience. She listed her experience as a "Cook" at the petitioning restaurant from February 1998 to the present, and a "Cook" at a restaurant named [REDACTED] in Tecuala, Nayarit, Mexico from January 1991 to November 1994. She provides no further information concerning her working experience as a cook on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

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) 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.

In corroboration of the Form ETA-750B, the petitioner submitted with the petition an experience letter dated September 4, 1997 from [REDACTED] an owner of [REDACTED] verifying that the beneficiary worked as a full time cook from 1991 until 1994 at that restaurant pertinent to the beneficiary's qualifications as required by the above regulation.

In the request for evidence (RFE) dated May 6, 2003, the director requested the petitioner to resolve inconsistencies concerning the beneficiary's full time experience as a cook while attending junior high school at 12 years old. In response to the RFE, the petitioner submitted an affidavit from the beneficiary and another letter from [REDACTED] confirming the beneficiary's full time employment experience from January 1991 to June 1994 as well as attending school.

On December 27, 2004, the director issued a second notice of intent to deny (NOID)⁴ based on an investigation that revealed that the telephone number provided on the experience letter does not belong to [REDACTED] and no person by the name of [REDACTED] is registered in that city with the telephone company. In response to the director's NOID, the petitioner submitted a third letter from [REDACTED] explaining why the telephone number now belongs to another company and photos of the address with a pizza shop that bought the restaurant in 1999.

On February 10, 2005, the director denied the petition finding that the record did not establish that the beneficiary met minimum requirements of experience listed on the Form ETA 750.

On appeal counsel argues that the petitioner provided substantial evidence that the former employer did in fact exist, that the beneficiary was in fact employed there, and that the investigation report was in error.

The issue in the instant case is whether the petitioner established the beneficiary's requisite experience with the restaurant named [REDACTED] under the requirement set forth at 8 C.F.R. § 204.5(g)(1). The

⁴ The first NOID dealt with unrelated issues to this appeal.

regulation requires such evidence must be in the form of a letter from a current or former employer or trainer and must 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. The record of proceeding contains a letter dated September 4, 1997 from [REDACTED] with a certified English translation submitted with the initial filing. This experience letter is on the company's letterhead, signed by [REDACTED] an owner of the restaurant and includes a job description. However, the statement that the beneficiary started working as a full time cook at the age of 12 without any previous experience in cooking brought a doubt as to the validity of the experience letter. "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 (BIA 1988).

In response to the May 6, 2003 RFE, the petitioner submitted an affidavit of the beneficiary and another letter from [REDACTED]. The affidavit clarified that the beneficiary worked as a full time cook at the restaurant in the nearby city of Tecuala during the time she was attending school. The second letter from [REDACTED] is undated but stated that the beneficiary was a full time employee for the restaurant from January 1991 to November 1994 and that the beneficiary also attended school at the same time. However, neither the affidavit nor the employer's letter submitted any independent objective evidence to support their assertions despite the director's request. 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. at 591-592.

Therefore, in the NOID dated December 27, 2004 the director specifically requested the petitioner to provide evidence of the existence of the beneficiary's claimed former employer in the form of a business license and evidence the business was registered with an official government agency, and evidence of employment verification for the beneficiary through the Instituto Mexicano de Servicios Sociales (IMSS). The record contains a third letter dated January 21, 2005 from [REDACTED] and photos. In his January 21, 2005 letter the owner of the restaurant explains why the investigation revealed that the telephone number belongs to someone else. The letter states in pertinent part that:

My restaurant, [REDACTED] was actually formerly located at the address which I listed on the reference letter for [the beneficiary], and was located at [REDACTED] [REDACTED] Nayarit, Mexico and I sold it in 1999 to an individual who wanted to open a Pizza Shop, called [REDACTED] at the same location as was my restaurant before. In addition, the telephone number of my restaurant up to the time that I sold it, was in fact Tel. [REDACTED]. After I sold the restaurant to the Pizza Shop, they changed their telephone number and that is why when the U.S. Consulate investigator called the number they got the business [REDACTED], because they had been given my old number as their new one. I no longer run the restaurant [REDACTED]. [REDACTED], however, I can absolutely confirm that I owned the restaurant, and that [the beneficiary] was employed with my restaurant in the position of Cook on a full time 40 hour per week basis from January of 1991 until November of 1994, and worked the shift from 2:00pm to 10:00 pm seven days per week.

Again the writer did not submit any competent objective evidence to support his assertions. He did not provide any business license, registration or payroll records for his restaurant, or documents concerning the sale and termination of the restaurant business. The owner attached four photos of [REDACTED] the alleged

business that currently occupies the physical address since 1999, and three photos of [REDACTED] [REDACTED] the alleged company that has the telephone number used by [REDACTED] previously. However, the photos of the pizza shop do not show the address and the photos of [REDACTED] do not include the telephone number. Further, neither the petitioner nor the former employer explained how these photos establish that [REDACTED] existed and the beneficiary worked as a full time cook from January 1991 to June 1994. The record does not contain any business license for [REDACTED] and evidence of employment verification for the beneficiary through the IMSS, the Mexican social security system, that covers the period of claimed employment as requested in the director's December 27, 2004 NOID. 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)).

The only independent objective evidence concerning the existence of [REDACTED] in the record is an Application for Registration for Business License filed with the State Government of Nayarit Department of Finance. This document shows [REDACTED] as the legal representative of [REDACTED] [REDACTED] registered the business on September 1, 1997 at [REDACTED] Centro, Tecuala, Nayarit with the State Government of Nayarit, Mexico. Therefore, this document appears to establish the intent to create [REDACTED] in the city of Tecuala, Mexico, however, it does not establish that the beneficiary worked for the restaurant as a full time cook from January 1991 to June 1994 just because the business applied for registration in 1997. The record does not contain any evidence showing that the business existed during 1991 to 1994.

Therefore, the petitioner did not establish with regulatory-prescribed evidence the beneficiary's two years of experience as a full time cook at [REDACTED] and therefore, failed to demonstrate the beneficiary's qualifications for the proffered position.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted 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.