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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

B6.

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FILE: WAC 05 049 51098 Office: CALIFORNIA SERVICE CENTER

Date: APR 02 2007

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:

SELF-REPRESENTED

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, 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<sup>1</sup> permanently in the United States as a cook, Chinese style. 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 and 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 denial dated September 29, 2005, 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 the lack of information pertaining to the beneficiary's employment experience and found that the petitioner has not demonstrated that the beneficiary has met the minimum requirements of the labor certification at the priority date of the labor certification.

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 12, 2001.

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 appeal.<sup>2</sup>

Here, the Form ETA 750 was accepted on April 12, 2001.<sup>3</sup> The proffered wage as stated on the Form ETA 750 is \$11.75 per hour (\$24,440.00 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

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<sup>1</sup> The beneficiary is also known as [REDACTED]

<sup>2</sup> 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).

<sup>3</sup> It has been approximately six 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."

With the petition, the petitioner submitted copies of the following documents: a letter from the beneficiary dated August 20, 2004; the beneficiary's W-2 Wage and Tax Statements for 1988, 1991, 1992, 1993, 1994, and 1995 with portions of the beneficiary's personal tax returns for those years not all legible; copies of two State of California DE-6 Forms for the calendar quarters ending June 30, 2004, and, September 30, 2004, stating that the beneficiary received wages in the amounts of \$3,640.00 for each quarter; and, the petitioner's U.S. Internal Revenue Service Form 1120S tax returns for 2001, 2002, and 2003.

A Request for Evidence was issued by May 5, 2005 by the director. Consistent with the requirements of 8 C.F.R. § 204.5 (l)(3)(ii), the Director requested, *inter alia*, evidence of the beneficiary's prior employment experience on letterhead giving the dates of employment/experience, giving the name and title of the person providing the information with telephone numbers, and a description of the experience of the alien (the beneficiary's titles, duties, dates of employment/experience and numbers of hours worked per week).

As supporting evidence to corroborate the above, the director requested California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last three quarters that were accepted by the State of California. The director requested that the forms should include the names, social security numbers and number of weeks worked for all employees.

The director requested the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor.

In response to the request for evidence, the petitioner submitted, *inter alia*, copies of the following documents: an explanatory letter from the petitioner dated July 19, 2005; the beneficiary's W-2 Wage and Tax Statements for 1988, 1990, 1991, 1992 1993, 1994, and 1995 from the employee [REDACTED] Associates Inc., [REDACTED], federal employer identification number, FEIN # [REDACTED] (the number is obscured for privacy purposes); the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports statements for the quarters ended September and December 2004, and the first quarter of 2005; and, U.S. Internal Revenue Service Form 1120S tax returns for 2001, 2002, and 2003.

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, and, therefore denied the petition on September 29, 2005.

On appeal, the petitioner asserts that the beneficiary has seven years of experience as a cook at Church's Chicken Restaurant, and because it has gone out of business, the beneficiary cannot "provide a piece of paper that has a letterhead from Church's Restaurant stating that he indeed worked there as a Cook, Chinese style ...." The record does not contain any other evidence relevant to the beneficiary's qualifications.

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

14.	Education	
	Grade School	<u>8</u>
	High School	<u>0</u>
	College	<u>0</u>
	College Degree Required	<u>Not Required</u>
	Major Field of Study	<u>Not Required</u>
	Training	<u>Not Required</u>
	Experience .....	
	Job offered (Years/Months)	<u>2/0</u>
	Related Occupation .....	<u>None</u>

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 states special requirements, "Resume or Letter of Qualification Required."

The beneficiary set forth his credentials on Form ETA-750B and signed his name 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 employed by the petitioner since May 1995 to present, and before that as a cook with Church's Chicken, [REDACTED] from June 1988 to May 1995. He does not provide any additional information concerning his employment background on that form.

With the petition, the petitioner submitted an explanatory letter.

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 AAO concurs with the director's determination that no probative evidence establishes that the beneficiary has two years of experience as an cook, Chinese style. No trainers or employers affidavit, document or letter, 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. We note that ETA 750, Part A, Item 15 states the special requirements, "Resume or Letter of Qualification Required." No such documentation is found in the record of proceeding. The fact that that the beneficiary has W-2 statements from Burt Wagoner Associates Inc. does not also provide independent, objective evidence of the beneficiary's employment duties for that employer.

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 as a cook, Chinese style from the evidence submitted into this record of proceeding and thus the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

**ORDER:**       The appeal is dismissed.