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20 Mass Ave., N.W., Rm. 3000
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U.S. Citizenship
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FILE:

WAC 04 259 52634

Office: CALIFORNIA SERVICE CENTER

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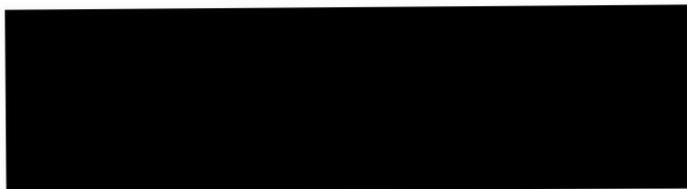
IN RE:

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 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 Middle Eastern restaurant. It seeks to employ the beneficiary permanently in the United States as a Middle Eastern cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director concluded that the petitioner had failed to demonstrate that the beneficiary possessed the requisite qualifying work experience as of the visa priority date and denied the petition accordingly.

On appeal, the petitioner, through counsel,¹ submits additional evidence and maintains that the petitioner has established that the beneficiary's work experience meets the requirements of the approved 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 regulation at 8 C.F.R. § 204.5(l)(3) also 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 regulation at 8 C.F.R. § 204.5(g)(1) further provides that if evidence relating to an alien's qualifying experience or training in the form of letter(s) from current or former employer(s) or trainer(s) is not available, then other documentation relating to the alien's experience or training will be considered.

¹ Current counsel for the beneficiary has requested copies of any and all communication and correspondence. A copy of this decision will be provided as a courtesy, but counsel is reminded that a Notice of Entry of Appearance (G-28) is required to be signed by the petitioner and submitted to the record. The regulation at 8 C.F.R. § 103(a)(1)(iii)(B) provides in pertinent part that for the purpose of appeals, an "*affected party* (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition. An affected party may be represented by an attorney or representative in accordance with part 292 of this chapter." (Original emphasis) The regulation at 8 C.F.R. § 292.4(a) further provides in pertinent part that "an appearance by an attorney shall be filed on the appropriate form by the attorney or representative appearing in each case."

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. 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). The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 30, 2001.² The ETA 750B, signed by the beneficiary on April 26, 2001, indicates that he has worked for the petitioner since November 2000. He also lists one other employer. From June 1994 to July 1999, the beneficiary claims that he was a full-time "owner/cook, middle eastern food," at "Shenken" in Beer Sheva, Israel.

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must have. In this matter, item 14 states that no formal education is required, but an applicant must have three years of work experience in the job offered as a Middle Eastern cook. The job duties described in item 13 include:

Will plan menu and cook Middle Eastern style dishes, dinners, desserts, and other food such as falafel, shawarma, kabob, hammin, baklava, hummus, Israeli salad among others. Estimate food consumption and requisition. Season and cook food according to prescribed method. Portion and garnish food. Estimate food consumption and requisition food supplies. Serve to waiters on order.

The Immigrant Petition for Alien Worker (I-140) was filed on September 24, 2004. On part 5 of the petition, it is claimed that the restaurant was formed in 2000 and currently has one employee. In support of the beneficiary's prior qualifying work experience, the petitioner initially submitted a copy of a letter that is written in Hebrew. The English translation of the letter is undated and indicates that the author of the letter is CEO, [REDACTED] Letter no. 1) The copy of the translator's certification is dated July 20, 2000. According to [REDACTED] the beneficiary was the "Head Chef and Manager of 'Shenkin in the City' between 1994 and 1999." During this time, he "planned and developed" the menu and "planned and supervised the building of the kitchen, hired chefs and trained our cooks prior to the opening of the restaurant." The beneficiary also "worked full time and supervised our kitchen," and was responsible for "ordering of food and food products from various suppliers, changing of the menu and supervision of all gastronomical aspects of our restaurant."

On April 12, 2005, the director requested additional evidence relating to the beneficiary's prior qualifying employment. He advised the petitioner that all foreign documents must be accompanied by a certified English translation. The director further noted that the ETA 750B had indicated that the beneficiary was the owner of the restaurant while [REDACTED]'s letter had omitted this fact, suggesting that the beneficiary was a manager. In response, the petitioner provided another letter from [REDACTED] Letter no. 2). The copy of the translator's certification is dated July 20, 2000 and appears to be a copy of the certification provided with the first letter

² If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

submitted with the petition. The English version of the letter affirms that the beneficiary worked for the restaurant and was a full-time cook and was responsible for kitchen and restaurant operations, as well as developing the menu, supervising the kitchen, and ordering the food. It is noted that additional photos with Hebrew signs and a copy of a Hebrew language newspaper article are not accompanied by a certified English translation.

The director issued a notice of intent to deny on August 1, 2005. Noting that [REDACTED] failed to mention that the beneficiary owned the restaurant while the labor certification affirmed his ownership interest, the director stated that these discrepancies called into question whether the petitioner had properly demonstrated that the beneficiary had acquired the requisite number of years of experience as a middle eastern cook. The petitioner was afforded 30 days to provide additional evidence or argument in rebuttal to the director's notice.

In response, the petitioner provided another copy of [REDACTED] first letter supplied with the petition, along with the English translation and a copy of the translator's certification. Additionally, the petitioner provided other documents including unsigned letters purported to be written by two former Shenkin employees, Israeli tax department and power department receipts, a selling agreement and previously submitted documents, but none were submitted with a certified English translation of the accompanying document. The petitioner also submitted a copy of the beneficiary's declaration in which he states that he was both a full-time cook and part-owner of the Shenkin in the City restaurant from June 1994 to July 1999, but relinquished ownership when he migrated to the U.S.³

The director denied the petition on September 14, 2005, citing the discrepancies described in the notice of intent to deny and the insufficiency of the evidence submitted in response to that notice. The director concluded that the petitioner had failed to sufficiently establish that the beneficiary had acquired the requisite three years of full-time experience as a Middle Eastern cook.

On appeal, counsel asserts that the evidence was not contradictory in that the beneficiary was both an owner and a cook at the Shenkin in the City restaurant. Counsel provides additional documentation (Exhibit L) represented as various bills, payroll records, credit card statements, and invoices of Shenkin in the City. They are written in Hebrew. The accompanying English translation contains no translation certification relating to any of the documents. Similar resubmissions of documents provided to the underlying record such as two former Shenkin employee(s) letters (Exhibit K), now appearing for the first time as "signed" by the respective authors, lack a certified English translation. It is further noted that these letters are not "affidavits" as designated by counsel on appeal, because they are not declarations confirmed by oath or taken before a person having authority to administer such an oath or affirmation. See *Black's Law Dictionary* 58 (6th ed. 1990).

Counsel additionally offers on appeal, copies of two letters from [REDACTED]. One of the letters is a duplicate of [REDACTED] Letter no. 1 that was submitted to the underlying record, along with copies of the English translation and same July 20, 2000, certification of the English translation. The other unsigned letter is from "[REDACTED]" as general manager. The letter is accompanied by an undated English translation. There is no indication that the translation is certified by the translator. The letter states that the beneficiary is a "stockholder and the experienced man" in the Shenkin restaurant who managed the kitchen, created the food menu, supervised the chefs, and made new dishes for the menu.

³ The I-140 shows the date of entry as August 4, 1999.

The regulation at 8 C.F.R. § 103.2(b)(3) states:

Translations. Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

While the AAO agrees with counsel that, in some circumstances, employment verification can be provided through other documentation consistent with the language of 8 C.F.R. § 204.5(g)(1), in this matter we cannot consider documents written in Hebrew that were submitted without a certified English translation as required by the terms of 8 C.F.R. § 103.2(b)(3). Moreover, the petitioner submitted the same translation dated July 20, 2000, for [REDACTED] Letter no. 1 and [REDACTED] Letter no. 2, which were provided at different dates, in response to different queries by the director. Because it appears that the copy of this certification of English translation, which does not specifically identify any document, has been used as "catch-all" certification, the AAO cannot consider it to be a credible certification of an English translation of the letter that it purports to represent. Therefore, the reliability of the underlying letter has not been established. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The beneficiary's affidavit of his self-employment at the Shenkin restaurant is not sufficient to demonstrate that he accrued at least three years of full-time experience as a Middle Eastern cook. As the petitioner has failed to establish that the beneficiary obtained the requisite qualifying employment experience as a middle eastern cook as of the priority date, the petition may not be approved.

Beyond the decision of the director, it is noted that the petitioner is a corporation. A corporation is an artificial person or legal entity created by and operating under the authority of the laws of the state. *See Black's Law Dictionary* 340 (6th ed. 1990). According to the records of the California Secretary of State, the petitioner was suspended. *See* <http://kepler.ss.ca.gov/corpdata/>. During suspension, a corporation may file an application for tax-exempt status or amend the articles to perfect that application or to set forth a new corporate name. Otherwise the corporation is disqualified from exercising any right, power or privilege. Rev. & Tax C. § 233011. It is noted that § 23305a of the California Revenue and Tax Code also contains provisions related to corporate revivor and reinstatement. In order to sponsor an alien for an employment-based visa, the corporate petitioner must be an active legal entity under pertinent state law during the relevant period. In any future proceedings, the petitioner must also address this issue in order to establish its eligibility. It is recommended that evidence and information establishing past and present shareholders, officers and directors, fictitious business name statements, as well as the identities and payroll records of the petitioner's claimed employee(s) be submitted to the record of proceeding.

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 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.

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ORDER: The appeal is dismissed.