

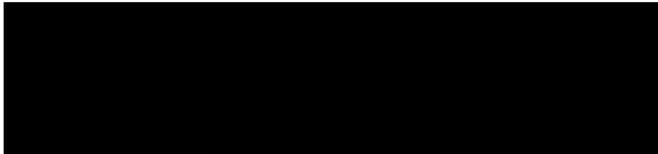
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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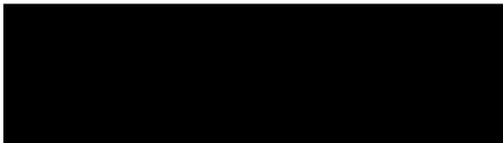
Office: TEXAS SERVICE CENTER

Date: OCT 10 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:



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, Texas 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 beneficiary¹ permanently in the United States as a cook, American food. As required by statute, the petition is accompanied by a duplicate original 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 February 8, 2007 denial, 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 that information pertaining to the beneficiary's employment experience was not provided in the Application for Alien Employment as certified, and that the approval of the labor certification was not predicated on this new information.

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 August 23, 2000.² The proffered wage as stated on the Form ETA 750 is \$11.47 per hour (\$23,857.60 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

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 appeal³.

¹ The beneficiary is also known as Owen [REDACTED]

² It has been approximately seven 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."

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).

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

| | |
|-------------------------|-------------------------|
| 14. Education | |
| Grade School | <u>Yes</u> ⁴ |
| High School | <u>Yes</u> |
| College | Blank |
| College Degree Required | Blank |
| Major Field of Study | Blank |

The applicant must also 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 is relating to "Other special requirements" requires for the position of cook, American food, "good references" and "willing to work O.T."⁵

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 in the offered job from June 2000 to present (i.e. July 7, 2000).

Prior to this experience the beneficiary stated that he worked for one year and six months for the Saveur Restaurant, Washington, D.C., from December 1998 to June 2000 on a full time basis. No other employment experience was stated on the labor certification. The record does not contain corroborating evidence of the beneficiary's employment at the Saveur Restaurant.

The job description found in Form ETA 750, Part A, Section 13 of the offered job of cook, American food, is exactly the same as those descriptions given for the beneficiary's jobs with the petitioner and Saveur Restaurant.

⁴ The labor certification required a minimum education of an applicant of a grade school and high school education. However, the beneficiary stated on Form ETA 750, Part B that he attended [redacted] Honduras in a general field of study. According to the labor certification the beneficiary did not remember his dates of attendance. No indication was stated on the form that the beneficiary completed either grade or high school. There is no evidence submitted in the record of proceeding concerning the beneficiary's formal education. If this matter is pursued, proof is demanded of the beneficiary's formal education. This deficiency presents an additional ground of ineligibility.

⁵ Overtime.

With the petition filed March 27, 2006, counsel submitted the following documents: cover letters dated March 24, 2006 and June 19, 2006; an incomplete copy of the labor certification; a request for the director to secure a duplicate labor certification; a documentation of experience from the [REDACTED] Gaithersburg, Maryland, by (signature illegible) made March 23, 2006; the petitioner's unaudited financial statements as of September 2005; a duplicate original labor certification; with a priority date of August 23, 2000; a letter from the petitioner dated October 17, 2006; AEP tax filing service statements variously dated April 29, 2006 and July 29, 2006, providing payroll as well other data; the beneficiary's Wage and Tax Statements from the petitioner for 2001, 2002, 2003, 2004 and 2005 stating wages paid of \$20,333.37, \$21,885.57, \$23,557.38, \$25,303.51, and \$25,217.76 (not gross wages, includes Medicare deduction); an Application for Alien Employment prepared in 2006; a documentation of experience from the [REDACTED] Gaithersburg, Maryland, by [REDACTED] made March 23, 2006; and the petitioner's annual reports for 2000, 2001, 2002, 2003, 2004 and 2005.

On appeal filed February 26, 2007, counsel asserts that the documentation submitted established that the beneficiary had two years of qualifying experience. Counsel also contends that the cases cited by the director in her decision are inapplicable in this matter.⁶

Counsel submitted on appeal the following documents: the case precedents of *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) and *Matter of Leung*, I&N 16 Dec. 2530 (BIA 1976) that he contends are inapplicable in the case; a documentation of experience from the [REDACTED] Gaithersburg, Maryland, by [REDACTED] made February 19, 2007; and a documentation of experience from the [REDACTED] Restaurant, Gaithersburg, Maryland, by [REDACTED] made February 21, 2007.

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.

On questions of aliens' qualifications to perform job duties stated in labor certifications, a federal court in *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983) relying on an amicus brief from the U.S. Department of Labor ("U.S. DOL") stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and

⁶ The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, reached a similar decision in *Black Const. Corp. v. INS*, 746 F.2d 503, 504 (1984).

U.S. DOL must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). CIS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir.1983). See also *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C.Cir.1977), "there is no doubt that the authority to make preference classification decisions rests with INS [now CIS]. The language of section 204 cannot be read otherwise . . . all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority."

Counsel has submitted documents asserting that the beneficiary has additional job experience with the [REDACTED], Gaithersburg, Maryland to provide the additional time in the offered job. All the documentation of experience from the [REDACTED] states the same job description as the description of the job offered on the labor certification. This replication of the same job description throughout the record of proceeding in present and prior employment, and in the [REDACTED] documents to substantiate job experience in the offered position, is not credible. Additionally, the beneficiary omitted the work experience at the [REDACTED] on the Form ETA 750, Part B, Item 15 section, even though the instructions elicit data pertaining to all jobs held by the alien in the three years before completion of the Form and all experience that would demonstrate the beneficiary's qualifications for the offered position.

The beneficiary signed the certified Form ETA 750, Part B in July 2000 when he omitted the work experience at the [REDACTED]. On an uncertified Form ETA 750, Part B, the beneficiary claimed to have worked at the [REDACTED] from October 1996 to November 1998. The experience at the [REDACTED] fell within the three years of signing the Form. Thus the beneficiary's representation of more work experience since the signing, and the petitioner's reliance on that [REDACTED] experience to demonstrate the beneficiary's qualifications for the offered position of cook, American food, all should have been part of the represented work experience made before the DOL's certification of the Application for Alien Employment Certification Form. This omission and the lack of objective corroborating evidence lessen the credibility that the beneficiary obtained qualifying employment experience at the Laredo Grill Restaurant. This deficiency presents an additional ground of ineligibility.

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). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th

⁷ Although there are multiple statements from the [REDACTED] asserting the beneficiary's employment experience, there is no independent object evidence such as W-2 or 1099-Misc statements from the business showing wage payments to the beneficiary in the record of proceeding.

Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systonics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The regulation at 8 C.F.R. § 204.5(1)(3) requires in pertinent part that such job verification/experience documentation state a description of the training received or the experience of the alien. Since there is no evidence in the record of proceeding that the beneficiary ever worked or was trained in the position of cook, American food prior to October 1996, it follows that the beneficiary received his training in the United States from an American employer.⁸ There is no recitation in any employment verification/certification document that the beneficiary ever received training in the offered position as a cook, American food. There is no explanation whatsoever in the record how the beneficiary is qualified to perform the proffered job duties. This deficiency presents an additional ground of ineligibility.

Counsel takes issue with the case precedents of *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) and *Matter of Leung*, I&N 16 Dec. 2530 (BIA 1976) cited by the director. Both cases are relevant to the issues at hand. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Whereas, as here, the petitioner is attempting to introduce an uncertified Form ETA 750, Part B, into the record that contradicts the labor certification and the beneficiary's sworn statement of work experience in the labor certification (that does not include work experience at the [REDACTED] from October 1996 to November 1998), the labor certification controls. Once the Application for Alien Employment is certified it cannot be amended or modified. While counsel is not suggesting that it the certified Application for Alien Employment can be amended, he has submitted another different uncertified Application for Alien Employment now including employment with the [REDACTED]. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Relative to the case precedent of *Matter of Leung*, I&N 16 Dec. 2530 (BIA 1976), the director in her decision stated for the proposition that when a new (or undisclosed) employment is not listed when the Application for Alien Employment was certified or when the petition was filed the beneficiary's credibility in making this statement is at issue. While the case of *Matter of Leung* concerns issues not found in the present case, the director's reliance on this case for the proposition cited is sound.

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).

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

⁸ The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.