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BE

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: OCT 23 2007
WAC 04 238 52562

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 Director, California Service Center, denied the employment-based visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further consideration and action.

The petitioner is a board and care facility. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition and denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact and is accompanied by new evidence. The procedural history of this case is documented in 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 decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 or seasonal nature, for which qualified workers are unavailable in the United States.

The regulation at 8 C.F.R. § 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.

(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.

Eligibility in this matter hinges on the petitioner demonstrating 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.¹ *Matter of Wing's Tea House*, 16 I&N Dec.

¹ To determine whether a beneficiary is eligible for a third preference immigrant visa, Citizenship and Immigration Services (CIS) must ascertain whether the alien is in fact qualified for the certified job. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to

158 (Act. Reg. Comm. 1977). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on April 17, 2001. The labor certification states that the position requires two years of experience in the job offered.

On the Form ETA 750, Part B the beneficiary, who signed that form on April 13, 2001, did not claim to have worked for the petitioner. The beneficiary claimed to have worked for Multi-Parts Service Center Canteen, in San Fernando, Pampango, Philippines, as a cook from February 1996 to June 1998.

The instructions to the Form ETA 750B require that the beneficiary "List all jobs held during the past three (3) years [and] any other jobs related to the occupation for which the [beneficiary] is seeking certification" The beneficiary listed no other experience on that form.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.²

The record contains a photocopy of a letter dated April 5, 2001. That letter is on the letterhead of Multi-Parts Service Center Canteen on MacArthur Hi-way (sic), Dolores, City of San Fernando, Pampanga, Philippines. It purports to have been signed by its manager and contains what is represented as the beneficiary's previous employer's phone number. That letter states that the beneficiary worked for that company as a cook from February 16, 1996 to June 27, 1998. That letter states that the former employer's phone number is (045) 963-5358.

The record contains a letter dated May 13, 2005 from a representative of the Department of Homeland Security (DHS) to the beneficiary's alleged previous employer. In addition to confirmation of the beneficiary's employment that letter requested certified copies of salient documents.

The record contains another letter from Multi-Parts Service Center Canteen, apparently written in response to the May 13, 2005 letter from DHS. That letter is dated June 9, 2005 and is on a different letterhead. That letterhead gives a different address, Lazatin Boulevard, Villa Victoria Dolores, City of San Fernando, Pampanga, Philippines, but the same phone number as the April 5, 2001 letter. That letter affirms the beneficiary's claim of qualifying employment from February 16, 1996 to June 27, 1998, but says that the

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 Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F2d 1 (1st Cir. 1981).

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

petitioner has no records because the business's office was flooded on August 26, 2004. Given that the former employer claims to have no records of the beneficiary's employment, the basis for the statement of the exact dates it employed the beneficiary is unknown to this office.

The letter also contains a report of an investigation of the beneficiary's claim of qualifying employment. The report states, in its entirety,

Auxiliary investigation predicated upon request from DHS/USCIC, LAGUNAG NIGUEL, by [REDACTED] requesting verification of any possible existing record of previous employment of [the beneficiary] with MULTI-PARTS SERVICE CENTER CANTEEN, and to determine whether attached letter of employment submitted by [REDACTED]

Neighborhood investigation conducted at alleged former employer's address at [REDACTED] [REDACTED] It was found that no such establishment exist [sic] at said location. Alleged employer is not known to residents, traffic police/enforcers and other business establishments along McArthur Hi-way. Indicated telephone number was contacted but no connection was established. Hence, Reporting Investigator deems that alleged employer and former employment is [sic] bogus.

In response to a notice of intent to deny issued on November 22, 2005, informing the petitioner of the contents of the investigative report, counsel submitted two more employment verification letters, both also purported to be from the beneficiary's former employer and were addressed to counsel. Those letters are on a different Multi-Parts letterhead, but give the same phone number as the April 5, 2001 employment verification letter. Those letters reiterate the beneficiary's claim of qualifying employment. They also state that Multi-Parts changed locations on September 2, 2002, moving to a site approximately 400 meters away, but retained the same phone number.

Counsel also submitted (1) a 2005 Sanitary permit issued to Multi-Parts Integrated Ventures Company of Dolores, San Fernando by the City of San Fernando City Health Office, (2) a 2005 business permit issued by the mayor of the City of San Fernando, (3) a certificate of business registration dated December 17, 1999, (4) a registration of Multi Parts Integrated Ventures Company with the Philippine Securities and Exchange Commission, (5) photocopies of portions of phone books showing white pages listings for Multiparts Integrated Ventures Company listing the same phone number shown on the April 5, 2001 letter, and (6) photocopies of a portion of a phone book showing a yellow pages display advertisement for Multi-Parts Motor Service at MacArthur Highway, Dolores, San Fernando, Pampanga that includes several phone numbers, including the phone number listed on April 5, 2001.

The director denied the petition on June 1, 2006. On appeal, counsel asserted that the evidence submitted sufficiently rebuts the information from the investigative report.

The investigation uncovered evidence suggesting that the beneficiary's alleged former employer is a fiction. Pursuant to *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988), the petitioner was obliged to submit independent objective evidence to overcome that evidence rather than merely a feasible explanation of the adverse

evidence. If the evidence rebutting the findings of the investigative report were merely one or more additional employment verification letters from the beneficiary's former employer, that would be insufficient.

The evidence submitted, however, includes business certificates and permits, and even listings and advertisements in telephone books. That evidence rebuts the evidence from the investigative report sufficiently such that, unless the service center is inclined to commission additional investigation, he should find that the beneficiary's alleged former employer does, in fact, exist.

Further, although the investigation of the beneficiary's claim of qualifying employment was conducted on October 20, 2005, the investigative report makes clear that the investigator sought out the beneficiary's former employer at the MacArthur Highway address given on the April 5, 2001 employment verification letter, rather than at the Lazatin Boulevard address given on the June 9, 2005 employment verification letter³ and subsequent correspondence.

On remand the director is permitted to further pursue the issue of the existence of the beneficiary's alleged former employer or any other issue pertinent to the approvability of the instant petition. The director may also request pertinent evidence. The director shall then issue a new decision, which, if adverse to the petitioner's interests, shall be certified to this office for review.

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 petition is remanded for further consideration and action in accordance with the foregoing.

³ That letter appears to have been sent on June 9, 2005, and was not, therefore, in the record on March 30, 2005, when the investigation was requested.