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U.S. Citizenship
and Immigration
Services

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FILE: WAC 05 249 50325 Office: CALIFORNIA SERVICE CENTER Date: **APR 07 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 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 an American/Continental restaurant. It seeks to employ the beneficiary permanently in the United States as a cook (American and Continental specialty dishes). 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 was qualified for the proffered position and denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made 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.

On appeal, counsel submits a brief and evidence.

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 issue to be discussed in this case is whether or not the petitioner established the beneficiary's qualifications for the proffered position. The petitioner must also 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 September 6, 2002.

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.

Here, the Form ETA 750 was accepted on September 6, 2002.¹ The proffered wage as stated on the Form ETA 750 is \$10.00 per hour (\$20,800.00) per year. The Form ETA 750 states that the position requires two years of experience in the proffered position.

¹ It has been over five years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA

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 pertinent evidence in the record, including new evidence properly submitted upon appeal.²

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & 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 and Continental specialty dishes). In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	Blank
	High School	Blank
	College	Blank
	College Degree Required	<u>NONE REQUIRED</u>
	Training	<u>NONE REQUIRED</u>
	Major Field of Study	Blank
	Experience yrs./mos.	<u>2</u>

Item 15 indicates that there are no special requirements that are stated on the labor certification as "NONE 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 indicated that he was employed by the petitioner as a cook from September 1995 to present time (i.e. September 4, 2002) for 40 hours per week. His job duties were as follows: "Assist Chef in preparation and cooking of American and Continental specialty dishes.

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."

² The submission of additional evidence on appeal is allowed by the instructions to the CIS 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 beneficiary also stated on the labor certification that he was employed as a cook for 40 hours per week at the Dandelion Restaurant, 6066 Venice Boulevard, Venice, California from August 1989 to September 1995.

The beneficiary has not provided any further employment information or statement of his prior education or training in the job duties.

The director on June 2, 2006, requested that the petitioner provide documentation from both the petitioner and Dandelion Restaurant detailing the beneficiary's job title, duties and dates of employment, the hours worked each week, and the name, title and phone number of the persons verifying the information.

In response counsel submitted a letter from the defunct Dandelion Restaurant. The letter, which is not notarized, is dated August 12, 2006, from [REDACTED] who according to the letter resides in Sweden (no address given). The letter references an approximately nine year old address of the defunct Dandelion Restaurant. No return address was provided by [REDACTED] or by counsel. There is no evidence of mailing or any information on the letter or [REDACTED]'s contact information or telephone number in Sweden. It is addressed to the California Service Center but received from counsel.

A review of the record demonstrates a similar prior job reference letter from [REDACTED] which is also not notarized. It is addressed to the California Service Center but received from counsel. It is dated August 22, 2005, from [REDACTED] who does not mention or provide his current residence. There is no evidence of mailing, or any information on the letter of [REDACTED]'s contact information or telephone number in Sweden.

Further, no letter was submitted from the petitioner demonstrating the beneficiary's employment in response to the director's request for evidence dated June 2, 2006. 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 director denied the petition on September 5, 2006. On appeal counsel stated that the letter provided by the beneficiary's prior employer [i.e. Dandelion Restaurant] is evidence of the beneficiary's two years of qualifying experience [as cook American and Continental specialty dishes].

As additional relevant evidence counsel submitted a legal brief dated September 21, 2006, three web pages from the Google and Digitaljournalist.org websites, and a photocopy of a letter dated August 12, 2006, from [REDACTED]

Counsel cites the case precedent of *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984, and *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir 1983) and *Black Const. Corp. v. I.N.S.*, 746 F.2d 503 99th Cir. (Guam 1984)³ all cited for the contention that "unless an examiner has some discernable reason for questioning the validity of a document or the information contained therein, that document should be considered as credible."

On this point, counsel asserts on appeal that the lack of contact information in the two letters submitted for [REDACTED] can be explained "because he resides in Sweden, allowing for the time difference

³ *Black Const. Corp.* is not a case precedent binding upon CIS. We note that the AAO is not bound to follow the published decision of a United States district court, even in matters which arise in the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

and the cost in contacting him, he [i.e. ██████████] did not give a contact number.” The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The experience letters omit facts such as ██████████ correct and current address, contact information and telephone number/e-mail address in Sweden. Since the letters submitted by counsel from ██████████ lack of notarization or apostils, or any contact information (address, telephone number) they are not verifiable by CIS.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The AAO questions the validity and authenticity of the two letters dated August 22, 2005, and August 12, 2006 from ██████████, and finds that they are not probative evidence of the beneficiary’s employment experience and qualifications.

Further the letters lack an explanation of the beneficiary’s duties and the hours worked each week. No correlative evidence was submitted by the petitioner or by his prior employer such as pay statements, cancelled checks, pay records of the employers, bank deposits receipts, or other employment records to show that the beneficiary was employed.

The letters from M ██████████ are not independent objective evidence complying with the regulation at 8 C.F.R. § 204.5(l)(3) of the beneficiary’s work experience.

Counsel also contended on appeal that “ ... the failure to submit a letter by [the] petitioner concerning the prior experience obtained by [the] Beneficiary through [the] Petitioner is irrelevant in terms of “qualifying [experience].” Despite the director’s request for evidence relating to this experience, the petitioner declined to provide it. Regardless, the petitioner failed to establish the beneficiary’s prior two years of employment experience with the Dandelion Restaurant. Therefore, the petitioner failed to establish that the beneficiary had the required two years of prior experience in the offered job.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The petitioner has not established that the beneficiary was qualified for the proffered position of cook (American and Continental specialty dishes) with two years of qualifying work experience.

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.