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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

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**U.S. Citizenship
and Immigration
Services**



B6

DATE: DEC 14 2011 Office: TEXAS SERVICE CENTER

FILE: 

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 retail food store. It seeks to employ the beneficiary permanently in the United States as a night store manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary was qualified to perform the duties of the position as of the priority date.

The record shows that the appeal is properly filed, 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 September 2, 2008 denial, the issue in this case is whether the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience as set forth on the Form ETA 750.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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 labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The priority date in this matter is April 16, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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). According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered as a night store manager.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he has been employed as a store manager for [REDACTED] from December

1997 through January 1999; that he was self-employed from February 1999 through April 10, 2001; and that he has been employed by the petitioner as a store manager from May 1, 2001 through July 7, 2003, the date he signed the document. The beneficiary described his past positions and the job to be performed as listed on the Form ETA 750B as: "Provide customer service functions and respond to customer inquires. Cash reconciliation. Hire and train employees. Schedule and assign tasks to various employees. Prepare daily deposits. Track inventory and order merchandise." The beneficiary does not provide any additional information concerning his employment background on that form.

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.

As evidence of the beneficiary's qualifications, the petitioner submitted a letter of employment dated May 17, 2007 from an unknown person who stated that the beneficiary was employed by [REDACTED] from December 1997 to January 1999, which is less than the two year experience requirement. In response to the director's Request for Evidence (RFE) dated May 6, 2008, the petitioner submitted a second employment letter dated June 5, 2008 and signed by [REDACTED] who stated that [REDACTED] employed the beneficiary from December 1997 to October 1999, which is also less than the two year experience requirement. On appeal, the petitioner submitted a third letter dated September 26, 2008 and signed by [REDACTED] who stated that [REDACTED] employed the beneficiary from December 1997 to April 10, 2001. The declarant further stated that the beneficiary started as an employee of the company, but that in February 1999 the beneficiary was terminated as a result of a corporate reorganization. The declarant stated that although the beneficiary was terminated he continued to work for the company as a store manager on a contractual basis. The beneficiary stated under penalty of perjury on the Form ETA 750B that he was employed by [REDACTED] from December 1997 to January 1999.

To meet the qualifications, the employment letter must include the following: the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). The petitioner must demonstrate that, on the priority date,

the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158.

The information provided in the three employment statements contradict each other and conflict with the beneficiary's statements on the Form ETA 750B, as noted above. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon 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 lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). The only explanation provided for these inconsistencies is counsel's claim that the "confusion...is [the] result of [the] employer's reluctance to provide proof of employment." However, as this employer claimed that the beneficiary worked for him in three separate letters, his explanation for the inconsistent dates is not persuasive.

Because of these unexplained inconsistencies, the AAO does not accept the employment letters as evidence of the beneficiary's two years of employment as a night store manager.

Accordingly, it has not been established that the beneficiary has the requisite two years of experience or that he is qualified to perform the duties of the proffered position. 8 C.F.R. § 204.5(g)(1) and (I)(3)(ii)(A).

Beyond the decision of the director, the petitioner has failed to show that it has the continuing ability to pay the proffered wage in 2005, in that it did not submit any evidence to demonstrate that it employed the beneficiary in that year, and neither its net income amount of \$1,835.00 nor its net current asset amount of \$37,164.00 is equal to or exceeds the proffered wage of \$38,730.00.

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.