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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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



BE

DATE: JUL 29 2011 OFFICE: NEBRASKA 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 Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to permanently employ the beneficiary in the United States as a specialty cook. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is March 7, 2005, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

The director's denial concludes that the petitioner failed to establish that the beneficiary possessed the minimum experience requirements of the offered position as set forth in the labor certification.

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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). 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. United States Citizenship and Immigration Services (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, Madany v.*

¹ Section 203(b)(3)(A)(i) of 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.

² The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

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 only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer exactly as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying the plain language of the [labor certification]." *Id.* at 834.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at *7.

The required education, training, experience and skills for the offered position are set forth at Lines 14 and 15 of the labor certification. In the instant case, the labor certification states that the offered position requires four years of high school and four years of experience in offered position of a specialty cook of Korean-style food.

The labor certification, signed by the beneficiary under penalty of perjury on March 3, 2005, states that the beneficiary's highest level of education is the completion of a program in "MERITIME [sic] SVC" at the Mercantile Marine College in Korea in February 1975. The labor certification states the following employment history for the beneficiary:

- "COOK/ KOREAN FOOD" for the petitioner since May 2004;
- "OWNER/COOK" at [REDACTED], from October 2002 through April 2003;
- "CHEF, KOREAN FOODS" [REDACTED] from April 1993 through September 2002; and,
- "COOK/CHEF" for [REDACTED] on "VARIOUS KOREA MARITIME VESSELS" from August 1975 through January 1993.

The record contains the following evidence of the beneficiary's education and employment experience:

- A copy of the beneficiary's resume with English translation;
- A copy of a "Certificate of Crew Member," with English translation, identifying the beneficiary as a chef and cook aboard numerous ships from April 22, 1977, through August 8, 1996;
- A copy of a "Certificate of Employment," with English translation, verifying the beneficiary's employment at [REDACTED] in Busan, Korea, from April 10,

- 1993, through September 10, 2002;
- A copy of a “business license registration,” with English translation, for “[REDACTED]” restaurant, indicating the beneficiary’s wife opened the business in [REDACTED], on October 18, 2002; and,
 - A copy of a “Cook’s License” issued to the beneficiary on July 18, 1974, by the Governor of Northern Gyungsang Province (Korea).³

The regulation at 8 C.F.R. § 204.5(l)(3) provides, in pertinent part:

(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) also states that evidence relating to qualifying experience shall be in the form of letters from current or former employers and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien.

The director determined that the information contained in the “Certificate of Crew Member” contradicted the employment history claimed by the beneficiary on the labor certification. Specifically, the beneficiary testified on the labor certification that he worked at [REDACTED] Restaurant in Busan, Korea, from April 1993 through September 2002, while the certificate he provided indicated that he was working aboard numerous ships from April 22, 1977 until August 8, 1996. The director found that this discrepancy raised significant questions regarding the credibility of the documentation provided by the petitioner and the beneficiary; the director concluded that the petitioner had failed to establish that the beneficiary satisfied the minimum experience requirements as stated on the labor certification and denied the petition.

On appeal, counsel provides an affidavit from the beneficiary dated March 6, 2008. The affidavit states that the beneficiary only stated his full-time employment with [REDACTED] on

³ It is noted that the photograph affixed to this license appears identical to the photograph attached to the beneficiary’s Korean Passport, which was issued nearly 30 years after the Cook’s License.

the labor certification. The beneficiary testifies that, after he resigned from [REDACTED] Company in January 1993, the company called him back on five different occasions "to work as part-time worker (as chef) on ocean-going vessel." The beneficiary states that "there was an agreement between the owner of [REDACTED] and me that whenever [REDACTED] Shipping Company needs my service, [REDACTED] would let me go to work for ocean-going vessel."

However, while the beneficiary claims that he started working at [REDACTED] on April 10, 1993, the beneficiary's crew member certificate indicates that he went to sea aboard the [REDACTED] *Point* on April 20, 1993, until December 11, 1993. The certificate further indicates that the beneficiary returned to sea on January 22, 1994, for over seven months aboard the [REDACTED]. The beneficiary's explanation that he had an "agreement" with [REDACTED] that allowed him to do "part-time" work for the shipping company does not satisfactorily explain the claimed facts, which have the beneficiary working for the restaurant for ten days, leaving for nearly eight months, returning to the restaurant for six weeks, and leaving again for another seven months. Further, the beneficiary's resume also does not reflect this claimed part time employment arrangement with [REDACTED] while also allegedly working for [REDACTED] Restaurant. The beneficiary's resume states he joined [REDACTED] in August 1975 and left in January 1993. His resume also states that he joined Jungang restaurant in April 1992 and left September 2002.

The Form G-325A, Biographical Data, in the record of proceeding also contradicts Part B of the labor certification. Specifically, the beneficiary claims to have been the General Manager of the petitioner since April 2004, not a cook. This claim is also corroborated by a copy of the beneficiary's I-94 card in the record. The G-325A also says that the beneficiary was the owner of [REDACTED] a from October 2002 until April 2004, however his labor certification states that he was unemployed from April 2003 until May 2004.

The petitioner failed to provide documentation to corroborate the beneficiary's assertions on appeal. 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)). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The beneficiary's explanation on appeal does not overcome the discrepancies discussed by the director. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. 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 Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Further, the documents submitted to establish the beneficiary's employment history do not meet the regulatory requirements of 8 C.F.R. § 204.5(l)(3) and 8 C.F.R. § 204.5(g)(1). For example, the documents do not state the hours worked or describe the duties performed by the beneficiary.

Therefore, due to the multiple unresolved inconsistencies in the record and the insufficient documentation of the beneficiary's prior employment experience, the decision of the director is affirmed.

While not specifically mentioned by the director, the petitioner has also failed to establish the beneficiary's satisfaction of the educational requirements for the offered position. The labor certification states that the offered position requires four years of high school education. However, the beneficiary did not mention his high school record on the labor certification, just his completion of a course at [REDACTED] in Korea. The petitioner did not provide any documentation detailing the nature and/or academic level of this institution, nor has the petitioner provided any documentation of the beneficiary's high school record. Thus, the petitioner has also not established that the beneficiary possesses the education required to perform the offered position.

Finally, it is noted that the beneficiary has held E-2 Treaty Investor status and appears to be a manager and/or owner of the petitioner. As is stated above, the beneficiary claimed to be the general manager of the petitioner on Form G-325A and his I-94 card. The petitioner's tax return and attached check payable to the treasurer of Guam appear to be signed by the beneficiary. The beneficiary signed the tax return as "Manager."

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden to establish that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000). Where the petitioner is managed and/or owned by the person applying for a position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).⁴

It also does not appear that the petitioner ever intended to employ the beneficiary as a cook. Instead, it appears that the beneficiary has always been a general manager of the enterprise. It is also not clear why a self-described fast food restaurant⁵ named "[REDACTED]" located in a mall food court would require a specialty cook for Korean-style dishes. Taken together, the evidence in the record does not establish that there is exists a *bona fide* job opportunity for a specialty cook of Korean-style dishes.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043; *see also Soltane v.*

⁴ It is also noted that the beneficiary has the same surname as the petitioner's Corporate Secretary who signed the labor certification and the Form I-140, Immigrant Petition for Alien Worker. This raises an additional question about whether a *bona fide* job offer exists.

⁵ The petitioner describes itself as a fast food restaurant on its 2005 tax return.

DOJ, 381 F.3d at 145

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.