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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**

B6

Date: JUN 15 2011 Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a fast food restaurant. It seeks to employ the beneficiary permanently in the United States as a shift manager. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (the DOL). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position. 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 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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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). Here, the labor certification application was accepted on April 30, 2001.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1993 and to currently employ six workers. On the Form ETA 750B, signed by the beneficiary on April 30, 2001, the beneficiary did not claim to have worked for the petitioner.

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.<sup>1</sup>

On appeal, counsel submits, *inter alia*, the following evidence and other documents: a letter from counsel dated April 17, 2009; a legal brief dated April 17, 2009; and a letter from the petitioner

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<sup>1</sup> 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 of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

dated April 1, 2009. Other relevant evidence in the record includes: the petitioner's support letter for the beneficiary dated November 1, 2007; the restaurant's take-out menu; the State of Illinois "Certificate of Registration" for the restaurant business (expiration date November 2007); [REDACTED] Establishment Operating Permit" for the restaurant issued June 29, 2007 (expiration date June 30, 2008); the [REDACTED] operating license for the restaurant business issued July 3, 2007 (expiration date June 30, 2008); a "Food Service Manager" certificate for the beneficiary (examination date October 6, 2004, with an expiration date October 6, 2009); and a [REDACTED] certification for the beneficiary (examination date October 6, 2004, with an expiration date October 6, 2009).

On December 22, 2008, the director requested additional evidence (RFE) from the petitioner. According to the RFE, the director noted that the Form ETA 750 Part A, Section 13 requires that the shift manager have three years of experience in that position, or one year of experience in an un-named related occupation in a restaurant, and additionally one month of job training in sandwich preparation. The evidence submitted by the petitioner tended to indicate that the beneficiary received such training *after* the priority date of April 30, 2001. Therefore, the director requested evidence that the beneficiary had three years of experience as a shift manager in a fast food restaurant, or one year of experience in an un-named related occupation in a restaurant, and additionally one month of job training in sandwich preparation. The director requested that any evidence submitted should conform to the regulation at 8 C.F.R. § 204.5(1)(3), i.e. letter(s) from current or former employer(s) providing the name, address, and title of the employer with a description of the job experience of the beneficiary including specific dates of that employment.

In response, counsel submitted a letter dated January 28, 2009; a letter dated January 26, 2009, from [REDACTED] and a statement from the petitioner dated January 21, 2009, concerning the beneficiary's training.

The record does not contain any other such evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts the petitioner submitted evidence that the beneficiary meets the terms of the labor certification as of the priority date.

To determine whether a beneficiary is eligible for an employment based immigrant visa, U.S. 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, Madany 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).

The job qualifications for the certified position of a shift manager are found on the Form ETA 750 Part A, Item 13, which describes the job duties to be performed as follows:

Include: Proper sandwich making, food prep. meat & veggie sliceing [sic], prepare backup bake bread and cookies, schedule employees for shift, cashier and general paper work and cleaning.

The job requires that an applicant have a high school diploma. According to the Form ETA 750, Part B, section 11, the beneficiary stated he attended a "govt" [government] high school, located at [REDACTED] Pakistan in general studies from 1965 to 1970 and received a certificate or degree of completion, but there is no certificate or diploma in the record substantiating this education.

According to the Form ETA 750, Part B, section 12, the beneficiary stated that his special qualifications and skills are: "construction: drywall, painting & minor carpentry." These job skills are not relevant to the job of shift manager of a fast food restaurant.

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, the beneficiary represented that he was employed fulltime by the [REDACTED] a fast food business, located at [REDACTED] as a sandwich maker from March 30, 1992 to December 12, 1997. He described his duties there as "Food prep., cashier, meat & veggie sliceing [sic], customer service and cleaning duties."

There is a paucity of information concerning the beneficiary in the record, and little information concerning his prior employment experience. The beneficiary does not provide any additional information concerning his employment background on the labor certification signed by the beneficiary on April 30, 2001, nor does the petitioner provide information concerning the beneficiary's employment experience, if any, from 1997 to 2007. According to a letter from the petitioner dated November 1, 2007, the beneficiary was already a shift manager with the petitioner, and his skills and experience qualified him for the permanent position of shift manager at the same restaurant. Furthermore, counsel submitted a letter dated January 21, 2009, from the petitioner that he "provided one month training [to the beneficiary] prior to changing his title to 'Shift manager' of my [REDACTED]..." The date(s) the training occurred, and what job title the beneficiary had before becoming shift manager, is not stated. There is no description of the petitioner's training regime in the record according to the regulation at 8 C.F.R. § 204.5(1)(3). Finally, the petitioner's letter dated April 1, 2009 indicates that the beneficiary began working for it in 1998, began working as a "shift supervisor" in 2001, and received "more than one month of training to handle supervisory duties" between 1998 and 2001. However, the Form ETA 750 requires one month training in "sandwich prep," not supervisory training. Importantly, the beneficiary did not list any work experience with the petitioner in the Form ETA 750. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by the DOL on the beneficiary's portion of the labor certification, lessens the credibility of the evidence and facts asserted. Accordingly, the petitioner's claim that it provided training (supervisory training or sandwich preparation training) to

the beneficiary before the priority date is not credible and will not be accepted by the AAO.<sup>2</sup>

The regulation at 8 C.F.R. § 204.5(1)(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.

(D) Other workers. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and any other requirements of the labor certification.

The counsel submitted a letter dated January 26, 2009, from [REDACTED] which describes the beneficiary's work experience as a night shift manager/cook from January 1993, to October 1996 at "my [REDACTED] which was located at [REDACTED]" According to the letter, the beneficiary's job duties there were:

[T]o take the customer's order and pass it on to fellow worker for food preparation, prepare vegetables, slice all the different kinds of meats, check that the food temperatures were at the proper levels, keep the restaurant clean, take final inventory at closing time, and take the final closing report from the cash register and prepare deposit slips for the bank.

The petitioner did not submit any additional or substantiating evidence that the beneficiary worked for [REDACTED] between the dates, January 1993, to October 1996, as a night shift manager/cook according to [REDACTED] or as a sandwich maker between the dates, March 30, 1992 to December 12, 1997, according to the beneficiary's sworn statement in the labor certification.

Further, the job duties at [REDACTED] stated by [REDACTED] are those of a manager, whereas the job duties at [REDACTED] as stated by the beneficiary in the labor certification were those of a sandwich maker.

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<sup>2</sup> The date of arrival of the beneficiary in the United States was May 28, 2005, according to information provided on the petition (i.e. Arrival/Departure [USCIS Form I-94] Document, [REDACTED]). His current nonimmigrant status and the date such status expired, if it existed, were left blank on the I-140 petition.

The AAO finds that [REDACTED] letter statement non-persuasive because of the inconsistency between the two differing job descriptions coupled with the inconsistency in work dates. Assuming one of these statements is true in whole or in part, the AAO does not have sufficient facts to determine the truth in the matter, or to fairly review and analyze the beneficiary's reputed work experience. 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. 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).

Notwithstanding which version of the beneficiary's employment history is accepted, it is apparent that there is a ten year interval from when the beneficiary last worked for [REDACTED] to when the petitioner states that he was employed at his restaurant. As stated in the Form ETA 750, Part B, section 12, in 2001, the beneficiary's special qualifications and skills are: "construction: drywall, painting & minor carpentry" and not those of a shift manager of a fast food restaurant. There is no direct evidence or statement in the record to indicate when the beneficiary commenced working for the petitioner before 2007,<sup>3</sup> or whether salary or wages that were presumably paid to him, were comparable to the proffered wage. The petitioner does state in the I-140 petition, Part 6, item 9, that the job wages per week are \$638.40, or \$33,196.80 per year. A review of the petitioner's tax returns in the record show that at no time did the petitioner pay that amount as total salary and wages to all his employees.

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired three years of experience as a shift manager in a fast food restaurant, or one year of experience in an un-named related occupation in a restaurant, and additionally one month of job training in sandwich preparation. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.

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<sup>3</sup> The record does state that the beneficiary received two certificates: a "Food Service Manager" certificate (examination date October 6, 2004, with an expiration date October 6, 2009), and a [REDACTED] (examination date October 6, 2004, with an expiration date October 6, 2009). Where the beneficiary was employed in 2004 is unknown.