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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



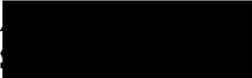
U.S. Citizenship
and Immigration
Services

B6



Date: **JUN 28 2011**

Office: TEXAS SERVICE CENTER

FILE: 

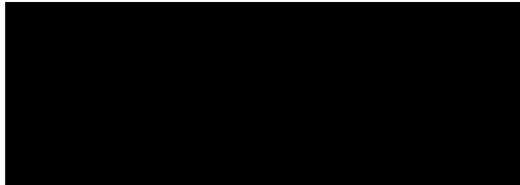
IN RE:

Petitioner: 

Beneficiary:

Petition: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO determined that the petitioner could overcome the basis for the petition's denial and that it could establish its ability to pay the beneficiary the proffered wage. The AAO remanded the petition to the director to allow the petitioner an opportunity to establish that the beneficiary met the experience requirement of the labor certification. The director denied the petition finding that the petitioner did not establish that the beneficiary had the experience for the position offered. The petitioner appealed to the AAO. The appeal will be sustained. The petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a food preparation worker ("Pantry Man," as stated on the Form ETA 750). As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with six months of qualifying employment experience. The director denied the petition accordingly.¹

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 December 9, 2009 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 other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

¹ The Form I-140 petition was initially denied by the director on September 1, 2007 on the grounds that the petitioner failed to establish its ability to pay the proffered wage as of the April 27, 2003 priority date. The petitioner appealed the director's decision to the AAO. By decision dated June 22, 2009, the AAO reversed the director's decision finding that, considering the totality of the circumstances, the petitioner had established its ability to pay the proffered wage from the priority date. The AAO, however, noted that the record did not establish that the beneficiary had six months experience in the proffered position or six months experience in the related occupation of "assistant cook." As such, the AAO remanded the matter to the director to obtain additional evidence as to the beneficiary's qualifications and to render a decision in that regard. Following consideration of the new evidence, the director again denied the petition on December 9, 2009 finding that the petitioner did not establish that the beneficiary had the qualifications required by the Form ETA 750. The petitioner then appealed that determination to the AAO.

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 27, 2003.

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 On appeal, counsel submits a brief, an employment verification letter from [REDACTED] (a purported coworker of the beneficiary at [REDACTED] d/b/a [REDACTED]) from August 1987 to September 1995, copies of numerous pay stubs from [REDACTED] to the beneficiary between July 17, 1990 and October 15, 1991, and the petitioner's payroll notes to show that the beneficiary received wages from the petitioner between May 13, 1998 and December 29, 1998.³

On appeal, counsel asserts that the evidence presented establishes that the beneficiary meets the experience requirements of the Form ETA 750.

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 six months experience in the proffered profession (food preparation worker – "Pantry Man") or six months experience in the related occupation of "assistant cook."

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 was employed by the petitioner as a "[REDACTED]" from September 1995 until the date of signature (April 14, 2001), and by [REDACTED] as a cook's assistant from August 1987 until September 1995. He does not provide any additional information concerning his employment background on that form.

² The submission of additional evidence on appeal is allowed by the instructions to the 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).

³ The majority of payroll sheets/notes show pay periods by month and day only with no year being designated. Some of the sheets, however, show that the payroll dates occurred in 1998.

The record of proceeding also contains a Form G-325, Biographic Information sheet submitted in connection with the beneficiary's Form I-485 Application to Register Permanent Residence or Adjust Status. On that form under a section eliciting information about the beneficiary's employment in the last five years, he represented that he was employed by the petitioner in food preparation from September 1995 until the date of signature (December 6, 2006) above a warning for knowingly and willfully falsifying or concealing a material fact.

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.

...

(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 other requirements of the labor certification.

As previously stated, this matter was remanded to the director by the AAO to provide the petitioner with an opportunity to demonstrate that the beneficiary had the minimum level of experience required by the Form ETA 750. 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). To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The AAO specifically noted that the record did not contain any documentation, such as earnings statements or W-2 Forms,⁴ to support or confirm the beneficiary's experience. On remand on August 27, 2009, the director issued a Request For Evidence (RFE) asking that the petitioner submit a letter or letters from the beneficiary's current or former employer or employers stating the beneficiary's job title, job duties and dates of employment. It was specified that any letters must contain the printed name and signature of the author, along with the author's position with the employer to show that the beneficiary met the experience requirements of the Form ETA 750 as of the April 27, 2003 priority date. A second RFE was issued on September 29, 2009 noting that the director had failed to request evidence of pay to the beneficiary in support of the requested experience letter and asking that the petitioner submit applicable W-2 Forms for the beneficiary from 1995 through 2003, or the

⁴ Such documentation would have verified prior experience in connection with letters that met the requirements of 8 C.F.R. § 204.5(l)(3).

employer's quarterly payroll taxes showing the beneficiary as an employee. The petitioner was cautioned that failure to submit the requested information may result in a denial of the petition.

In response to the requests for evidence, the petitioner submitted an employment letter dated September 1, 2009 from [REDACTED] [REDACTED] which stated that the beneficiary had been employed by his organization as a "[REDACTED]" since September 1995. The beneficiary's duties were listed on the letter and are virtually identical to the duties for the position listed on the Form ETA 750. In response to the second RFE, the petitioner submitted a letter which stated, in part, that "[n]o W-2 Forms or payroll records are available." No explanation was offered as to why those documents were not available. The petitioner asserts that the documentation submitted establishes the experience required by the Form ETA 750. The director then denied the petition because the petitioner failed to submit evidence of pay to additionally confirm the experience as specifically requested in the RFE and as stated by the AAO in its remand decision on June 22, 2009. The petitioner then appealed that decision. On appeal, the petitioner submitted copies of payroll sheets/notes which purport to show employees, including the beneficiary, who worked for the petitioner during 19 weeks from July 8, 1998 to December 29, 1998. The petitioner also submitted, on appeal, a sworn statement from [REDACTED] which states that [REDACTED] was employed by [REDACTED] from January 15, 1981 until September 1995 as a cook and copies of the beneficiary's pay stubs with [REDACTED] [REDACTED] for 56 weeks (from July 17, 1990 to October 15, 1991) were submitted in support of the employment letter.

Regarding the sworn statement from [REDACTED] it states that [REDACTED] was employed by [REDACTED] from January 15, 1981 until September 1995 as a cook. During that time frame [REDACTED] states that the beneficiary worked with him as a "cook's assistant" from August 1987 until September 1995 assisting in the seasoning, cooking and preparation of food items. In support of this claimed employment, as previously noted, the petitioner submitted copies of pay stubs from [REDACTED] to the beneficiary for 56 weeks from July 17, 1990 to October 15, 1991. As this sworn statement is accompanied by evidence of the beneficiary's pay, which reflects full-time employment at a wage commensurate of that of an assistant cook, this evidence collectively can be accepted to demonstrate that the beneficiary meets the experience required of the position offered.

Also, as previously stated, the petitioner submitted, on appeal, copies of payroll sheets/notes which purport to show employees, including the beneficiary, who worked for the petitioner during 19 weeks from July 8, 1998 to December 29, 1998. The petitioner also submitted an experience letter signed by the petitioner's [REDACTED] on September 1, 2009 which states that the beneficiary was employed by the petitioner from September 1995 onward as a "[REDACTED]" The pay stubs from the beneficiary's former employer ([REDACTED]) and pay records from the petitioner submitted on appeal were not specifically requested by the director in his request for evidence. The evidence will, therefore, be considered. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The duties of the beneficiary are set forth in the letter and are consistent with the duties required by the Form ETA 750. The letter complies with the requirements of 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). As previously noted, the

record also contains a Form G-325A which states that the beneficiary was employed by the petitioner in food preparation between September 1995 and December 6, 2006 (the date of signature).

Taking the evidence as a whole, it is concluded that it is more likely than not that the beneficiary has six months experience in the proffered position or six months experience as an assistant cook as required by the Form ETA 750. The director's decision in this regard shall be withdrawn and the petition shall be approved.

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 met that burden.

ORDER: The director's December 9, 2009 decision denying the petition is withdrawn. The appeal is sustained. The petition is approved.