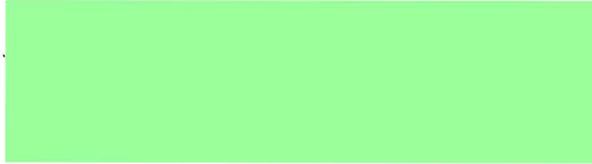


(b)(6)

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



DATE:

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OFFICE: TEXAS SERVICE CENTER

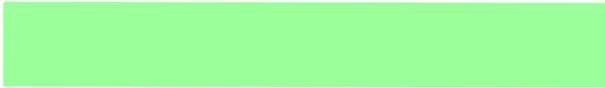
FILE:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

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.¹

The petitioner describes itself as a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), which 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 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, which is the date the DOL accepted the labor certification for processing, is August 29, 2002. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner did not establish that the beneficiary possessed the minimum experience required to perform the proffered position by the priority date. On appeal, the AAO has identified two additional issues, whether or not the petitioner established that it had the continuing ability to pay the proffered wage, and whether or not the petitioner is the successor-in-interest to the employer that filed the labor certification.

The record shows that the appeal is properly filed 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.

Beneficiary Qualifications: Experience

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, 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).

In evaluating the labor certification to determine the required qualifications for the position, U.S. 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'r 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).

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: None required.

High School: None required.

College: None required.

College Degree Required: Not Applicable.

Major Field of Study: Not Applicable.

TRAINING: None Required.

EXPERIENCE: Two (2) years in the job offered of cook.

OTHER SPECIAL REQUIREMENTS: Must be able to work weekends and holidays and arrange own transportation. References must be written and verifiable. Not [sic] smoking at job place. Must be drug tested.

The labor certification also states that the beneficiary qualifies for the offered position based on the following experience²:

1. As a cook in a cafeteria with [REDACTED] in Rio De Janeiro, Brazil from April 1997 until July 1999.
2. As a cook at [REDACTED] in Ellicott City, MD from September 2000 until June 2002.
3. As a cook at [REDACTED] in Pikesville, MD from June 2002 until August 27, 2002 when the beneficiary signed the labor certification.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

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.

The record contains the following experience letters:

² The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

1. Submitted with the petition was a copy of a foreign-language letter dated March 21, 2001 from an unidentified individual on [REDACTED] letterhead, listing its address as Rio de Janeiro, Brazil. According to the accompanying translation, the beneficiary worked for the restaurant [REDACTED] as a cook from April 8, 1997 until July 20, 1999 and the letter lists duties consistent with those of a cook. The letter does not indicate whether the beneficiary's employment was full- or part-time. Additionally, because the individual writing the letter is unidentified, it cannot not be determined if it was written by the employer.
2. Submitted in response to the director's August 26, 2009 Notice of Intent to Deny (Notice), was a letter dated September 15, 2009 from [REDACTED] on plain paper stating that the beneficiary worked at his restaurant [REDACTED] as a cook, working nights and weekends averaging 40 hours a week. [REDACTED] states that [REDACTED] was closed as of 2001, but that he opened another restaurant in another location and references the two enclosures that accompany the letter. The two enclosures are menus for a [REDACTED] located at [REDACTED]. The letter does not state the beneficiary's dates of employment and does not state at which location(s) the beneficiary worked. The letter does not list the beneficiary's duties. Additionally, the writer is not identified with a title, so it is not clear if [REDACTED] was the employer.
3. Also submitted in response to the director's Notice was a letter dated September 15, 2009 on plain paper from [REDACTED], one of the petitioner's shareholders. [REDACTED] states that he owned [REDACTED] when the beneficiary started working there as a cook. [REDACTED] states that he closed [REDACTED] and opened a new restaurant under the name of [REDACTED]. [REDACTED] states that he knew the beneficiary was also a salesman and that he started a business with a friend, but that these activities never interfered with the beneficiary's ability to work as a cook during the restaurant's busy hours. This letter fails to meet the regulatory-prescribed requirements for an experience letter as it does not provide a description of the beneficiary's duties or provide the address of the employer. Further, it does not state whether the beneficiary was employed full- or part-time.

The record contains the beneficiary's adjustment of status application which is accompanied by a Form G-325A which the beneficiary dated November 30, 2006. The Form G-325A requires the beneficiary to list all employment for the previous five years as well as list his last occupation abroad. The beneficiary listed that he worked as a salesman at [REDACTED] from July 2000 until September 2003, which conflicts with the labor certification on which the beneficiary listed he worked at [REDACTED] from September 2000 until June 2002 and at [REDACTED] from June 2002 until August 27, 2002. On the Form G-325-A, the beneficiary did not list any last occupation abroad, which conflicts with the labor certification on which the beneficiary listed he worked at [REDACTED] from April 1997 until July 1999.

As the director discussed in his denial, there are inconsistent employers and employment dates listed on the labor certification and the beneficiary's G-325A. Additionally, there is an inconsistency between the labor certification and the experience letter from [REDACTED] who states that

at [REDACTED] was closed as of 2001; therefore, the beneficiary could not have been working at that location from September 2000 until June 2002.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

[i]t is incumbent on 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, in fact, lies, will not suffice.

On appeal, counsel submits two additional experience letters as listed below and copies of the beneficiary's 2003 and 2004 federal income tax returns.

1. A foreign-language letter dated January 21, 2010 on plain paper from [REDACTED] which according to translation states that she was the owner of [REDACTED] until March 21, 2001 and that the beneficiary worked in her business from April 8, 1997 to July 20, 1999. She further states that "although my business was not a restaurant we had a large number of employees what forced us to have an industrial kitchen in which [REDACTED] worked and gained a lot of experience not only as a cook but also as a food preparer."³
2. A foreign-language letter dated January 21, 2010 on plain paper from [REDACTED] of [REDACTED] in Petropolis, Rio de Janeiro, which according to the accompanying translation states that the beneficiary worked from 1985 until 1996 with "a schedule of approximately 10 hours" and gained experience as a food preparer and cook.⁴

With regards to the letter from [REDACTED] it was written after the director's January 14, 2010 denial and as such does not provide independent objective evidence of the beneficiary's work experience. Independent objective evidence is that which is contemporaneous with the facts that are

³ This letter is accompanied by a second foreign-language document which is not accompanied by a full English translation. It is entitled "Short Translation" and appears to be the Articles of Incorporation of [REDACTED]. The translation of this second document does not comply with the terms of 8 C.F.R. § 103.2(b)(3) which states:

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

⁴ The labor certification states that the beneficiary was in elementary school in 1985 and in high school from 1986 to 1989. Further, the beneficiary's marriage certificate states that he was a "businessman" when he married in 1992. 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).

to be proven.⁵ This letter does not contain the address of the employer and does not state whether the beneficiary's employment was full- or part-time. Additionally, it does not list the beneficiary's duties. Further, the letter does not address the inconsistencies regarding the beneficiary's work experience.

With regards to [REDACTED] letter, the letter does not list exact dates of employment and, therefore, it is not clear how many hours the beneficiary worked.⁶ The letter does not indicate the title of [REDACTED] so it is not clear if he is the employer. The letter does not list the beneficiary's duties.⁷ Further, it does not address the inconsistencies regarding the beneficiary's work experience. Additionally, the letter references experience that is not listed on the labor certification. 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 DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. The letter is not independent, objective evidence of any experience listed on the labor certification.

Counsel also submitted copies of the beneficiary's 2003 and 2004 federal income tax returns as evidence of the beneficiary's experience as a cook. The tax returns list the beneficiary's occupation in each of these two years as cook. The returns report only self-employment income from the beneficiary's self-employment as a cook and are not accompanied by any Internal Revenue Service (IRS) Forms 1099 showing the source of the beneficiary's income. Further, the petitioner must establish the beneficiary had the required experience before the priority date of August 29, 2002, which is before the time period covered by these tax returns.⁸

⁵ In proving experience, contemporaneous independent objective evidence could be such evidence as payroll documents, paystubs or paychecks.

⁶ The letter indicates a schedule of approximately 10 hours, but it is not identify the timeframe, such as weekly, bi-weekly, monthly, or some other timeframe.

⁷ This letter is accompanied by a second foreign-language document which is not accompanied by a full English translation. It is entitled "Short Translation" and appears to be the amended Articles of Incorporation of [REDACTED]. The translation of this second document does not comply with the terms of 8 C.F.R. § 103.2(b)(3) which states:

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

⁸ It is noted that the tax returns are inconsistent with the beneficiary's Form G-325A which states that the beneficiary was working as a salesman in 2003 and the majority of 2004, yet the returns do not report any income other than the beneficiary's self-employment income as a cook. The petitioner has not resolved the inconsistencies with independent, objective evidence of the beneficiary's employment. See *Matter of Ho*, 19 I&N Dec. at 591-592 .

The petitioner has not resolved the inconsistencies regarding the beneficiary's experience with independent objective evidence.⁹ Therefore, the petitioner has not established that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date.

Continuing Ability to Pay the Proffered Wage

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.¹⁰ If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the petitioner did not establish that it employed the beneficiary, and its net income or its net current assets were not sufficient to pay the proffered wage for 2004 and 2005.¹¹ Further, the petitioner failed to establish that factors similar to *Sonogawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets.

Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

Successor-In-Interest - Petitioner Successor to Labor Certification Employer

Also beyond the decision of the director, the petitioner failed to establish that it is a successor-in-interest to the entity that filed the labor certification. The petitioner, [REDACTED] D/B/A [REDACTED] is a different entity from the employer listed on the labor certification, [REDACTED]

⁹ *See id.*

¹⁰ *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

¹¹ The record contains the petitioner's tax returns for the years 2002 through 2005 only.

A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor, it does not demonstrate that the job opportunity will be the same as originally offered¹², and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. Accordingly, the petition must also be denied because the petitioner has failed to establish that it is a successor-in-interest to the employer that filed the labor certification.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

¹² It is noted that the labor certification was filed for a position at [REDACTED] which [REDACTED] in his September 15, 2009 letter, states is closed.