

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

[REDACTED]

DATE: **DEC 26 2012** OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

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

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:

[REDACTED]

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
Acting 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 Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese specialty cook. 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 failed to establish that it had extended a bona fide job offer to the beneficiary, as the beneficiary is the brother of the petitioner's owner. The director denied the petition accordingly.

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 May 6, 2009 decision, an issue in this case is whether or not the petitioner established that it extended a bona fide job offer to the beneficiary.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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.

In the instant case, the Form ETA 750 was accepted on October 6, 2003. The Form ETA 750 states that the position requires two years of experience in the job offered as a Chinese specialty cook. On the Form ETA 750, signed by the beneficiary on September 1, 2003, 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.¹

The director issued a request for evidence (RFE) on March 6, 2009 in which he asked for the petitioner to provide documentary evidence that a bona fide job opportunity existed and was open to qualified U.S. workers. The director specifically asked for copies of all findings from and correspondence with the DOL regarding the labor certification and the relationship between the beneficiary and the petitioner's owner, copies of the petitioner's recruitment documentation, documentary evidence of the number of the petitioner's employees at the time it filed the labor

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 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).

certification, evidence that the petitioner gave notice of the filing of the labor certification, and either a list of the bargaining representatives in the area of intended employment or evidence of the administration of the posting notice.

In response, the petitioner stated that it no longer possessed the records of the advertisement for the position, as it had been over five years since it was posted. The petitioner also claimed that, during the recruitment period, it posted a notice of the job opportunity at the entrance to its restaurant and in its kitchen area for ten consecutive business days. The petitioner stated that it no longer possessed a copy of such notice. The petitioner claimed that approximately eleven applicants walked into its restaurant during the recruitment period, but that none of them submitted a resume. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The petitioner submitted a copy of correspondence from the Minnesota Department of Economic Security dated October 15, 2003, but the correspondence did not include any DOL findings or evidence showing that the DOL was aware of a familial relationship between the beneficiary and the petitioner's owner. The petitioner additionally submitted a copy of the birth certificate of Shuang Lin, the petitioner's owner, revealing that he is the brother of the beneficiary.

In the director's May 6, 2009 decision, he found that the DOL did not have an opportunity to conduct an inquiry as to whether the position offered to the petitioner's owner's family member was clearly open to qualified U.S. workers and into whether U.S. workers were rejected solely for lawful job-related reasons. The director concluded that, based on the evidence of record, it did not appear that the petitioner had extended a bona fide job offer to the beneficiary, which had been open to all qualified U.S. citizens.

On appeal, counsel for the petitioner again contends that the petitioner placed an ad in the local newspaper regarding the position and that the petitioner posted notice regarding the position for ten consecutive business days. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel contends that the Form ETA 750 does not ask whether there is a preexisting family relationship between the petitioner and the beneficiary. Counsel asserts that the petitioner never attempted to hide the relationship between the petitioner's owner and the beneficiary from U.S. Citizenship and Immigration Services (USCIS) or to mislead USCIS.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show 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). The AAO finds that the petitioner failed to establish the legitimacy of the job offer it extended to the beneficiary as requested by the director.

Beyond the decision of the director,² even if the beneficiary's job offer were to be considered bona fide, the AAO finds that the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2).

According to USCIS records, the petitioner has filed an I-140 petition on behalf of another beneficiary, which USCIS approved. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document the priority date, proffered wage or wages paid to the other beneficiary, whether his/her petition was withdrawn, revoked, or denied, or whether the other beneficiary has obtained lawful permanent residence. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wage to the beneficiary of its other petition.

Also beyond the decision of the director, the AAO finds that the evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date.

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'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 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. 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 requires two years of experience in the job offered as a Chinese specialty cook. On the labor certification, the beneficiary claims to qualify for the offered position based on his prior experience, which includes working as a Chinese foods cook for [REDACTED] China since May 1999.

² 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 beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The petitioner submitted a letter dated May 3, 2006 from manager [REDACTED] from [REDACTED] regarding the restaurant's employment of the beneficiary since May 1999. The AAO finds that the letter does not delineate the beneficiary's regular work hours or schedule (i.e., whether or not the beneficiary was engaged in full-time work). The AAO also finds that the letter fails to describe the beneficiary's duties there. Accordingly, the petitioner failed to demonstrate that the beneficiary possessed two full years of experience as a Chinese specialty cook before the October 6, 2003 priority date.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner failed to establish that the beneficiary is qualified for the offered position.

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.