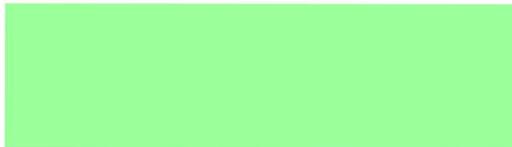


(b)(6)

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



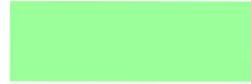
U.S. Citizenship
and Immigration
Services



DATE: **APR 05 2013**

OFFICE: TEXAS SERVICE CENTER

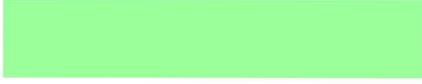
FILE:



IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled 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.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

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 The director's decision will be withdrawn. The appeal will be remanded to the director for further action, consideration, and the entry of a new decision in accordance with below.

The petitioner describes itself as an Indian restaurant. It seeks to permanently employ the beneficiary in the United States as an Indian Specialty Main 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 an ETA Form 9089, Application for Permanent 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 November 18, 2010. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that Form I-140 was not signed by the petitioner, and therefore, was not properly filed; as an additional ground, the director concluded that the petitioner had not demonstrated that the job offer was *bona fide*.

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.

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

Authority to Sign

By regulation, the petitioner must sign the I-140 petition. 8 C.F.R. § 103.2(a)(2) (a petitioner must sign the benefit request). In her denial, the director notes that the instructions to Form I-140 state: "If the petitioner is a corporation or other legal entity, only an individual who is an officer or employee of the entity who has knowledge of the facts alleged in the petitioner, and who has authority to sign documents on behalf of the entity, may sign the petitioner. 8 C.F.R. § 103.2(a)(1)

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), 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.

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 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).

(petitions must be filed in accordance with form instructions, which are incorporated by reference into the regulation).

On appeal, the petitioner indicates that Form I-140 was signed by the husband of one of the two owners of the petitioner. An annual report filed with the North Carolina Secretary of State, and tax records, indicate that the petitioner, [REDACTED] is wholly owned by two individuals, who are also its only officers. Payroll records in the record indicate that the person signing Form I-140 is an employee of the petitioner. Further, the record contains affidavits from both owners attesting that this employee is authorized to sign immigration related forms and documents on behalf of the petitioner. While the brief accompanying this appeal does not argue that the person signing Form I-140 is an employee of the petitioner, evidence in the record does indicate he was an employee at the time the labor certification and Form I-140 were signed.³ The affidavits provided corroborate as much, although they do not indicate an official title for this person. Therefore, as the person signing Form I-140 was an employee of the petitioner at the time the documents were signed, and as the two owners of the petitioner have attested that this employee was authorized to sign Form I-140 on the petitioner's behalf, the AAO concludes that it is more likely than not that the petitioner has established that Form I-140 was properly filed, as a duly authorized employee of the petitioner signed Form I-140 on its behalf, as required by regulation.

Bona Fide Job Offer

The director's decision questions whether the job offer is realistic. As the director notes, the beneficiary possesses a Master's of Business Administration from [REDACTED] in Ireland, as well as a Bachelor of Business Administration from [REDACTED] in Nepal. These academic credentials, as well as the beneficiary's past experience in business and finance, indicate that the job offered, as an Indian Specialty Main Cook, may not be realistic. The position offered does not require any education or training. The record contains affidavits from the owners, as well as an affidavit from the beneficiary, attesting that the job offer is *bona fide* and that the beneficiary desires and intends to be employed as a cook at the petitioner's restaurant, should he gain employment authorization to do so. The record also contains evidence that the petitioner asserts shows that the beneficiary possessed two years of experience as an assistant chef, as well as approximately one (1) year of culinary training, prior to the priority date. The beneficiary's training and experience are discussed below. The director notes that the beneficiary obtained his undergraduate degree in business administration prior to his experience in Indian cuisine, and that after said experience the beneficiary returned to college to complete a postgraduate degree in business administration.⁴ Thus, the petitioner asserts that the beneficiary possesses not only the minimum experience required for the position offered, but also possesses training, as well as the two degrees discussed above. According

³ The record contains the petitioner's payroll records from February 2011, which indicate that the signatory of the petition was hired by the petitioner on February 23, 2009, and continued to be employed during the time the relevant immigration documents were signed.

⁴ In his affidavit, the beneficiary stated that his intention in pursuing this degree was to "have a career in restaurant and hotel management."

to the record, the beneficiary has not been employed as a chef or in a position otherwise related to the position offered after completing his postgraduate degree. The petitioner indicates that it cannot currently employ the beneficiary until he has employment authorization.

The beneficiary attests that he has been unemployed for more than five years and is the primary caretaker of his child, and in support of the *bona fide* nature of the position, he states, “[t]he position of Indian Specialty Chef is not beneath me. If granted Lawful Permanent Resident status through this petitioner, diversity lottery, or any other way, I would gladly and happily work as an Indian Specialty Chef.” Whether the job offer is *bona fide* does appear to be questionable, given the beneficiary’s business experience, degrees, and expressed desire to be employed in restaurant management, however, the evidence in the record is sufficient to support the petitioner’s intent to employ the beneficiary in the position offered, and the beneficiary’s stated desire to be employed as an Indian Specialty Chef for the petitioner.

Based on the foregoing analysis, the AAO determines that the petitioner has overcome the grounds for denial in the director’s decision. Accordingly, the director’s decision of June 2, 2011, denying the petition, will be withdrawn.

However, the petition is not currently approvable as the record of proceeding does not establish that the beneficiary possessed the minimum experience required in the position offered by the terms of the labor certification as of the priority date.

Experience

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified for the offered position. 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 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 24 months of experience in the job offered, Indian Specialty Main Cook, or 24 months of experience in an alternate occupation, “Indian Specialty Cook/Chef/Assistant Chef.” The labor certification indicates that no training is required, and there are no academic requirements. The labor certification states that the petitioner will not accept an alternate combination of education and experience. However, the petitioner does state: “[a]ny suitable combination of education, training or experience will be accepted.” On the labor certification, the beneficiary claims to qualify for the offered position based on experience as an Assistant Chef at [REDACTED] in Kathmandu, Nepal, from April 2, 2004, to August

27, 2006.

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(I)(3)(ii)(A). The record contains a letter from [REDACTED], dated September 3, 2006, indicating that the beneficiary was employed from April 2, 2004, to August 27, 2006. The letter does not indicate the writer's title, therefore, the letter does not meet the regulatory requirements for an experience letter. *Id.* The AAO is unable to determine that the letter was written by someone with knowledge of the beneficiary's experience and the authority to attest to his experience.⁵ The AAO is unable to determine if the letter is written by an authorized representative of the [REDACTED]. The letter does not indicate a street number or a street name for the hotel, stating only a district within Kathmandu, which fails to comply with the regulation. *Id.* The letterhead indicates an email address, "[REDACTED]," which does not appear to be a valid email address. The letterhead indicates a website for the hotel, "www.npdirectory.com:[REDACTED]" that does not appear to be a valid website address. This casts doubt on the authenticity of the letter. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

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.

Markings on the letter suggest that the letterhead used may have been photocopied or the letter may have been otherwise altered. This casts additional doubt on the authenticity of the letter. On remand, the petitioner must provide independent, objective evidence that the [REDACTED] was a business in operation at the time of the beneficiary's purported employment, in addition to providing an experience letter which meets the regulatory requirements at 8 C.F.R. § 204.5(I)(3)(ii)(A). *Matter of Ho*, 19 I&N at 591-592, states:

[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Further, the AAO notes that the experience letter does not indicate whether the beneficiary's employment was full-time or part-time. Therefore, the AAO is unable to determine if the beneficiary possessed 24 months of full-time experience in the position offered as of the priority date. Therefore, even if this letter had otherwise met the regulatory requirements, it would not document the beneficiary possessed the minimum requirements for the position offered.

⁵ While the instructions to ETA Form 9089 clearly state that the beneficiary should include the phone number and name of the beneficiary's supervisor for each qualifying work experience, the beneficiary did not provide this information on the labor certification, thereby preventing corroboration of the identification of the writer of the letter.

In addition, the record contains a "Certificate of Completion," purporting to document that the beneficiary completed a one-year advanced course in commercial cookery from the [REDACTED] Limited company, in Lalitpur, Nepal, beginning June 27, 2003, and ending May 14, 2004. Further, the record contains a letter, dated March 22, 2004, from [REDACTED], in Kathmandu, Nepal, which states that the beneficiary was enrolled in "Industrial Training" in the "Food Production department" of that hotel from November 25, 2003 to March 21, 2004. These dates conflict with the dates of employment claimed by the beneficiary, casting additional doubt on his purported employment with the [REDACTED]. *Matter of Ho*, 19 I&N at 591.

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 has failed to establish that the beneficiary is qualified for the offered position. As the petitioner has not had an opportunity to address this issue, the petition will be remanded to the director in consideration of the foregoing. Therefore, on remand, in addition to an experience letter that meets the regulatory requirements, the petitioner should provide independent, objective evidence of the beneficiary's experience, such as payroll records, documenting that the beneficiary possessed at least 24 months of full-time experience in the position offered, or the alternate occupation, as of the priority date.

As always in visa petition proceedings, the burden of proof rests entirely with the petitioner. See section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision of June 2, 2011, is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision, which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.