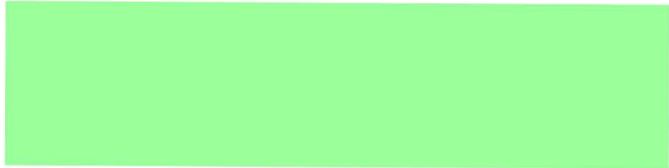


(b)(6)

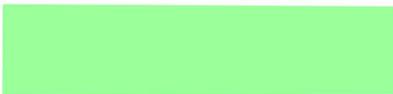
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



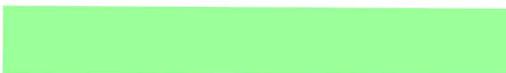
U.S. Citizenship
and Immigration
Services



Date: **AUG 01 2013** Office: TEXAS SERVICE CENTER

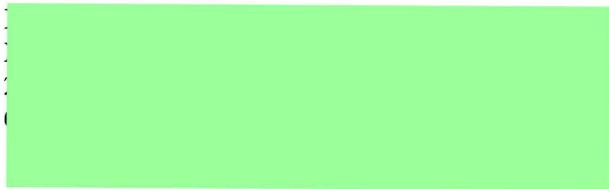


IN RE: Petitioner:
Beneficiary:



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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a restaurant. It seeks to permanently employ the beneficiary in the United States as a chef. The petitioner requests classification of the beneficiary 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 a Form ETA 750, Application for Alien Employment 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 April 30, 2001. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum qualification required to perform the offered position by the priority date. Specifically, the director determined that the beneficiary did not meet the requirements of the labor certification as he did not possess and maintain a valid driver's license as of the priority date.

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

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 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

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

¹ 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.

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).

may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate about the beneficiary’s qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

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

EDUCATION

Grade School: 8 years

High School: 4 years

TRAINING: None Required.

EXPERIENCE: Nine (9) months in the job offered or in the related occupation of Chef.

OTHER SPECIAL REQUIREMENTS: Must possess and maintain valid driver’s license.

In the instant case, the Form I-750, Application for Alien Employment Certification, states that the offered position requires the beneficiary to perform the duties of a chef. Specifically, the duties to be performed are as follows:

Plans the menu. Prepares all the main dishes for Mexican restaurant. Responsible for inventory and control. Supervises kitchen staff. Creates house specialties according to [REDACTED] recipes for Mexican restaurant.

The labor certification also states that the beneficiary must possess and maintain valid driver’s license. No other experience is listed. The beneficiary signed the labor certification on April 27, 2001 under a declaration that the contents are true and correct under the penalty of perjury.

The record does not reflect that the beneficiary possessed and maintained a valid driver’s license as of the priority date. The beneficiary’s claimed qualifying experience must be supported by letters from previous 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).

On appeal, counsel asserts that the record establishes that the beneficiary has a valid driver license.

The record, however, lacks evidence to establish that the beneficiary possessed and maintained a valid driver's license as of the priority date, April 30, 2001. The record contains a State of North Carolina Learner Permit issued to the beneficiary on May 5, 2005; and, a State of North Carolina Driver License issued to the beneficiary on July 19, 2005. The evidence provided does not satisfy the minimum requirements of the proffered position as of the priority date.

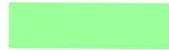
The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as an other qualified immigrant worker under section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii).

Beyond the decision of the director, the petitioner has not established the ability to pay the proffered wage of the chef as of the priority date. The regulation at 8 C.F.R. § 204.5(g)(2) provides as follows:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Thus, the petitioner must establish it has the continuing ability to pay the proffered wage of \$20,800 (\$400 per week x 52 weeks) from the priority date of April 30, 2001, up to the present. The priority date is the date the labor certification application was filed with the DOL. There is insufficient evidence in the record of the petitioner's ability to pay the proffered wage – \$20,800 per year – since the priority date. It is noted that the record includes Federal Individual Income Tax Return, Form(s) 1040 for the petitioner's owner for 2001, 2002, and 2003. The petitioner's owner's Adjusted Gross Income was insufficient in any year 2001, 2002 or 2003 to cover the proffered wage and the petitioner's owner's personal expenses. The petitioner has not provided copies of the Form W-2, Wage and Tax Statement(s), it may have issued to the beneficiary from the priority date, April 30, 2001, and has not provided evidence of its financial ability to pay the proffered wage from the priority date. The petitioner indicated on the Form I-140 that it has an annual gross income of \$379,385, annual income of \$17,009, and has seven (7) employees. The Form Schedule(s) C indicates that the petitioner paid wages \$58,602 in 2002, and \$58,602 in 2003.³ However, the record lacks evidence to establish wages paid to the beneficiary during these periods. Also, the petitioner's owner does not provide a list of personal expenses for his family of four. Therefore, the record lacks

The 2001 Form 1040 does not include a Schedule C.



sufficient evidence to establish the petitioner's ability to pay the \$20,800 proffered wage from the April 30, 2001 priority date.

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.