



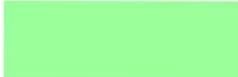
U.S. Citizenship
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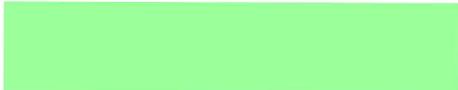
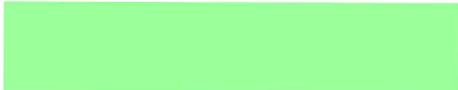
(b)(6)



DATE: OFFICE: NEBRASKA SERVICE CENTER

FEB 28 2013

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
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 petitioner describes itself as a restaurant. It seeks to permanently employ the beneficiary in the United States as a kitchen manager. The petitioner requests classification of the beneficiary as a professional or 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 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 April 26, 2001. 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 offered position by 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).

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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).

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. 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 requires a minimum of two years experience as a kitchen manager. The labor certification also states that the beneficiary qualifies for the offered position based on his experience as a cook for [REDACTED] from March 1996 through September 1999, as a part-time cook for [REDACTED] from June 1996 through September 1999, and as a kitchen manager for the petitioner since September 1999. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(1)(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 evidence:

- An October 12, 2007, letter from [REDACTED] who identified himself as current owner of [REDACTED] and former co-worker of the beneficiary at [REDACTED]. [REDACTED] stated that the beneficiary “worked at [REDACTED] as a full time Cook” from July 1999 to July 2000.
- An October 8, 2007, letter from [REDACTED], who identified himself as a former co-worker of the beneficiary at [REDACTED]. [REDACTED] stated that the

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beneficiary worked at [REDACTED] “for about a year and a half, from March of 1997 to September of 1998.”

- An October 10, 2007, letter from [REDACTED] who identified himself as a restaurant training and operations consultant. [REDACTED] stated that he was aware of the beneficiary’s employment at [REDACTED] and for the petitioner, and that he had known the beneficiary since the late 1990’s “as both a cook and kitchen supervisor.”
- A November 6, 2007, letter from [REDACTED], who identified himself as owner/president of the petitioning company. [REDACTED] affirmed that the beneficiary began employment for the petitioner in “1999 when he started working as a Cook. By 2001 [the beneficiary] was promoted to the position of Kitchen Manager.”
- A November 6, 2007, letter from the petitioner to the beneficiary. The letter offers the beneficiary “continued employment...in the position of Kitchen Manager.”
- A July 15, 2009, letter from [REDACTED] [REDACTED] stated that the petitioning company hired the beneficiary in 1999 as a cook, and subsequently promoted him to kitchen manager. [REDACTED] further explained that the “positions are dissimilar on many levels.”

The evidence contained in the record of proceedings contains numerous inconsistencies. The beneficiary claimed on the labor certification to have worked at [REDACTED] from March 1996 through September 1999; however, the evidence submitted in support of his claim suggests that he worked there from March 1997 through September 1998. The beneficiary also claimed on the labor certification that he worked 20 hours per week at [REDACTED] from June 1996 through September 1999; however, the evidence submitted in support of this claim suggests that he worked there full-time from July 1999 through July 2000. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), 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.

In a Notice of Intent to Deny dated June 26, 2009, the director detailed the discrepancies between the experience claimed on the labor certification and the facts stated in the submitted documentation. The director summarized that the record of proceedings was “wrought with inconsistencies in dates of employment, job titles, and employers.” In response, former counsel reasserted the beneficiary’s qualifications for the offered job, but did not address the discrepancies in the submitted evidence.

The director concluded that the evidence submitted lacked credibility and denied the petition on December 29, 2009. On appeal, counsel states that the director “rejected the letters as insufficient on the basis that they were not issued by an actual employer but rather by co-workers.” However, counsel misstated the director’s reasons for questioning the credibility of the submitted evidence and counsel again failed to address the discrepancies between the claims on the labor certification and the submitted evidence.

Even if the submitted evidence were to be accepted at face value, it would still be insufficient to establish the beneficiary's qualification for the offered job. 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 (Acting Reg'l Comm'r 1977). Employment letters must include a specific description of the duties performed by the beneficiary. See 8 C.F.R. §§ 204.5(g)(1) and (1)(3)(ii)(A).

The employment letter from [REDACTED] asserts [REDACTED] direct knowledge of the beneficiary's employment at [REDACTED] and for the petitioner "as both a cook and kitchen supervisor." [REDACTED] listed numerous duties he says were performed by the beneficiary, but does not mention the beneficiary's dates of employment, nor does he indicate how much time the beneficiary spent working as a chef and how much time was spent on supervisory and management duties. [REDACTED] suggestion that the beneficiary was both cook and kitchen supervisor is further complicated by the fact that the beneficiary indicated on Form ETA 750B that he only worked 20 hours per week at [REDACTED]

The employment letter from [REDACTED] attests to [REDACTED] direct knowledge of the beneficiary's employment at [REDACTED]. [REDACTED] listed numerous duties he says were performed by the beneficiary, including kitchen management duties in addition to cooking duties; however, [REDACTED] lists the beneficiary's title only as "chef." [REDACTED] does not indicate how much time the beneficiary spent working as a chef and how much time was spent on supervisory and management duties. His suggestion that the beneficiary was both cook and kitchen supervisor is further complicated by the fact that the beneficiary indicated on Form ETA 750B that he only worked 20 hours per week at [REDACTED]

In this case, the priority date is April 26, 2001, and the labor certification states that the position requires two years of experience as a kitchen manager. While the employment letters state that the beneficiary sometimes performed duties related to the management of the kitchens, all affiants specifically stated that his job was that of a cook. The petitioner specified that the beneficiary did not start work there as a kitchen manager until 2001 and stated that the positions of cook and kitchen manager are "distinct and separate" and that the "positions are dissimilar on many levels."

The evidence submitted, even at face value, does not provide information regarding the beneficiary's work history that is expressly required by 8 C.F.R. §§ 204.5(g)(1) and (1)(3)(ii)(A). In addition, the petitioner has failed to provide any independent objective evidence to resolve the inconsistencies in the submitted evidence that were detailed above. Therefore, the submitted evidence does not establish that the beneficiary possessed two years of experience as a kitchen manager as of April 26, 2001.

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 a professional or skilled worker under section 203(b)(3)(A) of the Act.

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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 not met that burden.

ORDER: The appeal is dismissed.