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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:

JAN 24 2013

OFFICE: NEBRASKA 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,

Rachel Miron
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (the director), denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a caterer. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by Form ETA 750, Application for Alien Employment Certification (labor certification) approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the petition requires at least two years of training or experience and, therefore, that the beneficiary cannot be found qualified for classification as a skilled worker. 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 January 13, 2009 denial, the single issue in this case is whether or not the petitioner has established that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

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. Section 203(b)(3)(A)(iii) of 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.

Here, the Form I-140 was filed on August 15, 2007. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker.

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

On appeal, counsel submits a brief; an excerpt from O*Net Online for cooks; a table which explains Standard Vocational Preparation (SVP) levels and O*Net Job Zones; three newspaper advertisements for an unnamed restaurant; and an undated letter from [REDACTED]. On appeal,

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).

counsel and the petitioner assert that the petitioner complied with the directions issued by the DOL and that the beneficiary possesses the requisite experience.

The regulation at 8 C.F.R. § 204.5(l) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, 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). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* 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. *See 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 alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education:

Grade School: 6

High School: Left Blank
College: Not Applicable

Experience:

Job Offered: 1 year

Related Occupation: Not Applicable

Block 15: Left Blank

As set forth above, the labor certification indicates that the proffered position requires six years of grade school and one year of experience in the job offered. The petitioner identifies no additional requirements for training or education and no special requirements in Section 15 of Part A. However, the petitioner checked block 2.e on Form I-140, requesting classification as either a professional or a skilled worker.

Part A of the Form ETA 750 indicates that the DOL assigned the occupational code of 313.361-014 with accompanying job title cook, to the proffered position. The occupation of the offered position is determined by the DOL, and its classification code is notated on the labor certification. The DOL previously used the Dictionary of Occupational Titles (DOT) to classify occupations. O*NET is the current occupational classification system in use by the DOL.² O*NET incorporates the Standard Occupational Classification (SOC) system,³ which is designed to cover all occupations in the United States.⁴ The SOC classifies workers at four levels of aggregation: major group; minor group; broad occupation; and detailed occupation. All SOC occupations are assigned a six-digit code. The first and second digits represent the major group; the third digit represents the minor group; the fourth and fifth digits represent the broad occupation; and the sixth digit represents the detailed occupation.⁵ In cases where the O*NET-SOC occupation is more detailed than the original SOC detailed occupation, it is assigned the six-digit SOC code from which it originated, along with a two-digit extension starting with .01, depending on the number of detailed O*NET-SOC occupations linked to the particular SOC detailed occupation.⁶ For older labor certifications that were assigned a DOT code instead of an O*NET-SOC code, O*NET contains a crosswalk that translates DOT codes

² O*NET, located at <http://online.onetcenter.org>, is described as "the nation's primary source of occupational information... containing information on hundreds of standardized and occupation-specific descriptors." <http://www.onetcenter.org/overview.html> (accessed March 29, 2011).

³ See <http://www.onetcenter.org/taxonomy.html> (accessed September 24, 2012).

⁴ See <http://www.bls.gov/soc/socguide.htm> (accessed September 24, 2012)(relating to the 2000 SOC); <http://www.bls.gov/soc/home.htm> (accessed September 24, 2012) (relating to the 2010 SOC).

⁵ See http://www.onetcenter.org/dl_files/UpdatingTaxonomy2009_Summary.pdf (accessed September 24, 2012).

⁶ *Id.*

into the current O*NET-SOC codes.⁷

In the instant case, the DOL categorized the offered position under 313.361-014 of the DOT. Using the DOT crosswalk, this equates to the O*NET-SOC code of 35-2014.00, which falls under the SOC detailed occupation of cooks, restaurant.

The O*NET online database states that this occupation falls within Job Zone Two, requiring “some preparation.”

The DOL assigns an SVP of 4.0, but less than 6.0 (4.0 to < 6.0) to the occupation. According to the DOL, an SVP of 4.0 signifies that the position requires over three months of preparation and up to and including six months of preparation. An SVP of 6.0 signifies that the position requires over one year and up to and including two years of preparation.⁸

Additionally, the DOL states the following concerning the training and overall experience required for these occupations:

Education: These occupations usually require a high school diploma.

Related Experience: Some previous work-related skill, knowledge, or experience is usually needed. For example, a teller would benefit from experience working directly with the public.

Job Training: Employees in these occupations need anywhere from a few months to one year of working with experienced employees. A recognized apprenticeship program may be associated with these occupations.

See id.

According to Form ETA 750, the position requires only six years of grade school and one year of experience in the job offered with no allowance for experience in alternate occupations. According to the DOL’s classification and assignment of educational and experiential requirements for the occupation, the certified position is not considered skilled labor, in accordance with 8 C.F.R. § 204.5(1)(3) and (4), because the DOL sets the minimum vocational preparation for cooks at SVP 4.0, indicating that they would require at least three months of preparation, but sets the higher limit at less than 6.0, indicating that the position would require less than two years of preparation. Based upon the requirements for the position, as stipulated on Form ETA 750 and based upon the code assigned by the DOL, the proffered position does not meet the regulatory definition of skilled labor.

On appeal, counsel does not specifically assert that the director erred in concluding that the position does not qualify as skilled labor. Rather, counsel asserts “the denial is based on the finding that the applicant [sic] does not have the requisite experience.” Counsel states:

⁷ See <http://online.onetcenter.org/crosswalk/DOT> (accessed September 24, 2012).

⁸ See <http://www.onetonline.org/help/online/svp> (accessed December 11, 2012).

The experience requested in this particular case complied with the requirements for this occupation when the Petitioner submitted the case to the Department of Labor (back in 2004). (See attached copy of the O.Net Summary Report dated 3/16/2004) in which JOB ZONE are [sic] between the SVP ranges (4.0 to <6.0) (see attached SVP table) meaning 3 months to 1 year of experience. In fact the Petitioner requested the 2 years of experience for the position according to the 8 C.F.R. § 204.5(1)(4) (See attached copy of publications).

However, as has already been noted, a petitioner is required to “state in detail the MINIMUM education, training, and experience for a worker to perform satisfactorily the job duties described in item 13” in Section 14 of Part A of the ETA 750 (emphasis in the original).⁹

In the directions to Form ETA 750, the petitioner was instructed to identify the specific educational, training, or experiential requirements of the proffered position in Section 14 of Form ETA 750. Indeed, the petitioner indicated that the position requires only six years of grade school and one year of experience in the job offered: cook. Section 15 is provided for purposes of identifying “other special requirements,” that is, “the job related requirements.” Examples of such requirements are “shorthand and typing speeds, specific foreign language proficiency, test results” and documenting a “business necessity for a foreign language requirement.”¹⁰ The petitioner identified no special requirements. Further, the issue upon which the petition was denied involved solely the position requirements and not the experiential qualifications of the beneficiary.

On appeal, counsel asserts that the beneficiary worked for an employer in Colombia, “in the capacity of Chef in Gourmet Jewish Food, from February 1994 through February 1996, and performed the same duties that he performs in his current position (complying with the 2 years experience requirement).”

However, the beneficiary’s experience is not at issue in this case. The issue is whether or not the proffered position qualifies as skilled work or a professional occupation. In order to make such a determination 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*, 696 F.2d 1008; *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).

Therefore, the educational and experiential requirements which the petitioner identifies and which the DOL has certified as being required to perform the proffered position will be the determining factor in assigning the proffered position the appropriate classification. In the instant case, the petitioner indicated that the proffered position requires one year of experience in the job offered and the DOL certified this requirement as corresponding with the nature of the position as described in

⁹ Taken from the directions in Section 14 of Part A of the Form ETA 750.

¹⁰ See <http://www.foreignlaborcert.doleta.gov/750inst.cfm> (accessed December 11, 2012).

O*Net as explained above. According to the certified experiential requirements, the proffered position qualifies as neither a profession nor as skilled work.

On appeal, counsel submitted an excerpt from O*Net, describing the position: Cooks, Institution and Cafeteria with the associated SOC code: 35-2012.00. First, the SOC code identified on the excerpt provided on appeal does not correspond with the occupational code assigned to the proffered position by the DOL. As indicated above, the DOL assigned the occupational code: 313.361-014. According to O*Net Online's crosswalk, the occupational code assigned by the DOL corresponds with the SOC code: 35-2014.00 and the job title: Cooks, Restaurant. Second, the Job Zone and SVP levels for both positions are identical. In fact, counsel states that, according to the SVP table provided on appeal, the SVP level associated with the proffered position is indicative of 3 months to 1 year of experience required. Therefore, even at counsel's admission, the Job Zone and SVP levels assigned to the proffered position do not correspond with skilled work as defined by the regulations. Therefore, the petitioner has not demonstrated that the proffered position meets the regulatory requirements for skilled work.

The evidence submitted does not establish that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

In this case, the labor certification indicates that the proffered position requires only one year of experience in the job offered. However, the petitioner requested the skilled worker classification on the Form I-140. There is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

The evidence submitted does not establish that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

Beyond the decision of the director,¹¹ the petitioner has also failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date, March 25, 2004, and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

Further, according to USCIS records, the petitioner has filed four additional I-140 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing

¹¹ 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).

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 record before the director closed on August 15, 2007 with the receipt by the director of the petitioner's initial petition submission. As of that date, the petitioner's 2006 federal income tax return was the most recent return available. However, the evidence in the record shows that the petitioner is structured as an S corporation and accordingly would be required to file Schedule K along with its federal income tax return.¹² The record only contains the first and fourth pages of the petitioner's tax returns for 2004, 2005, and 2006, and Schedule K is not among them.

The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

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

Further, the evidence in the record does not document the priority date, proffered wage, or wages paid to each beneficiary of the additional I-140 petitions, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have 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 wages to the beneficiaries of its other petitions.

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 Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions, or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions, or other adjustments, net income is found on line 17e (2004-2005) and line 18 (2006-2010) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed September 24, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.).