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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 31 2014

OFFICE: NEBRASKA SERVICE CENTER

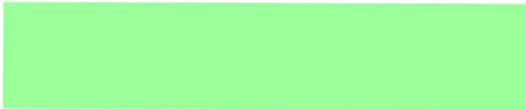
FILE:



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 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.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

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

Ron Rosenberg
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 petition will be remanded to the director in accordance with the following.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner did not demonstrate its ability to pay the beneficiary's proffered wage from the priority date onward and denied the petition accordingly.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.

To be eligible for approval, the petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date onward. *See* 8 C.F.R. § 204.5(g)(2). The ETA Form 9089 was accepted on January 10, 2012, the priority date. The proffered wage stated on the ETA Form 9089 is \$11.80 per hour (\$24,544.00 per year based on working 40 hours per week). On appeal, and in response to the AAO's request for evidence, the petitioner submitted its 2012 Form 1120 corporate tax return. Upon review of the evidence, the petitioner has established its ability to pay the beneficiary's proffered wage from the priority date.

As stated previously, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review by the AAO, the petitioner has not submitted sufficient evidence to establish that the beneficiary has the required twelve months of experience in the job offered to establish that the beneficiary meets the experience requirements.

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 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 12 months of

experience in the job offered as a cook.

The labor certification also states that the beneficiary qualifies for the offered position based on the following experience:

- As a cook for the petitioner, [REDACTED] beginning October 17, 2005.
- As a cook for [REDACTED] located at [REDACTED] from April 15, 2003 to December 31, 2004.
- As a cook for [REDACTED] located at [REDACTED] from May 1, 2002 to December 20, 2003.

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(l)(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.

Prior to the director's decision, the record contained the following letters regarding the beneficiary's prior work experience:

- A letter from the owner of the petitioner, [REDACTED], dated October 30, 2012, on the petitioner's letterhead, stating that the company employed the beneficiary as a cook from October 17, 2005 until the present time.
- A letter on letterhead for [REDACTED], dated December 6, 2012, that appears to be from the manager of the [REDACTED] at [REDACTED] [REDACTED] stating that the beneficiary worked at this [REDACTED] from May 1, 2002 to December 20, 2003.

The director issued a request for evidence (RFE) on March 21, 2013, requesting that the petitioner submit evidence to demonstrate that the beneficiary meets the experience requirements of the labor certification. The director noted that the two experience letters on [REDACTED] letterhead, dated October 30, 2012 and December 6, 2012, were insufficient to establish that the beneficiary was qualified for the instant position because Part J.21 of the labor certification states that the beneficiary had not gained any of the qualifying experience while working for the petitioner. In response to the director's RFE, the petitioner submitted a letter from the office manager for "[REDACTED] [REDACTED]" dated April 20, 2013, stating that the beneficiary worked 40 hours per week at the [REDACTED] at the [REDACTED] address from April 15, 2003 to December 31, 2004 and 40 hours per week at the [REDACTED] at the [REDACTED] address from May 1, 2002 to December 20, 2003.

Regarding the instant appeal, the AAO issued the petitioner a notice of intent to dismiss (NOID) and request for evidence on November 14, 2013 regarding its ability to pay the beneficiary's proffered wage and to resolve discrepancies in the record regarding the beneficiary's employment experience. In this NOID, the AAO inquired as to why the December 6, 2012 experience letter is printed on letterhead for [REDACTED] when the letter appears to be from the manager of the [REDACTED] at the [REDACTED] location, a different employer from the petitioner. The AAO indicated that the ETA Form 9089 and the October 30, 2012 letter from the owner of [REDACTED] both state that the beneficiary began working for [REDACTED] on October 17, 2005, nearly two years after the beneficiary left the [REDACTED] location.

The AAO also noted in its NOID that the April 20, 2013 letter from the office manager for [REDACTED] indicates that the [REDACTED] location is affiliated with [REDACTED] and the December 6, 2012 letter, which appears to be from the manager of the [REDACTED] in [REDACTED] conflicts with this information and indicates an affiliation with [REDACTED] as it is printed on letterhead for [REDACTED]. In response to the AAO's NOID, the owner of the petitioner submitted a letter, dated December 9, 2013, in which he states the following:

The beneficiary previously worked for [REDACTED] and that was where he obtained the required experience. When he requested a letter of previous employment from [REDACTED] he was unable to obtain one. His current employer provided the letter based upon evidence that he had worked there. There is an informal relationship between [REDACTED] and [REDACTED] since they are both franchisees, they often attend the same meetings for executives to discuss franchise-related issues. We can understand why this is a source of confusion and suspicion to CIS. However, there can be no doubt that the beneficiary did work for [REDACTED] because as the Service states, there is evidence of direct deposit for salaries during the requisite period of time.

As stated above, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states that "any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or *employers*." (Emphasis added). Here, it appears that the owner of the petitioner wrote the experience letter, dated December 6, 2012, and misrepresented that it is from the manager of the [REDACTED] at [REDACTED]. He states in his December 9, 2013 letter that he "provided the letter based upon evidence that [the beneficiary] had worked there" and because of the "informal relationship between [REDACTED] and [REDACTED]". The AAO finds that the misrepresented December 6, 2012 letter is insufficient to establish the beneficiary's claims of employment with the [REDACTED] at the [REDACTED] location. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.*

Furthermore, the record contains direct deposit earnings statements from [REDACTED] which indicate that the beneficiary worked fewer than 40 hours per week. This contradicts the information contained in both the December 6, 2012 letter on [REDACTED] letterhead and the April 20, 2013 letter from the office manager for [REDACTED] both of which indicate that the beneficiary worked 40 hours per week at two locations.¹

The beneficiary's paystubs from January to June 2004 also demonstrate that the beneficiary worked less than 40 hours per week. As it does not appear that the beneficiary was employed full-time from May 2002 to at least June 2004, this casts doubt on whether the beneficiary actually gained the required 12 months of experience during this time. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591-592.

In view of the foregoing, the previous decision of the director will be withdrawn. The petitioner has established that it had the ability to pay the beneficiary's proffered wage from the priority date. However, the petition is remanded to the director for consideration of the inconsistencies in the record regarding the beneficiary's experience noted above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

¹ The experience letters indicate that the beneficiary was working 80 hours per week from April 15, 2003 to December 20, 2003, as there is an overlap in the dates he worked full-time in both [REDACTED] and [REDACTED]. The beneficiary's paystubs show that he worked the following hours:

<u>Pay Period</u>	<u>Hours</u>
4/21/2003 – 5/4/2003	21.49
5/19/2003 – 6/1/2003	49.9
6/2/2003 – 6/15/2003	50.46
8/25/2003 – 9/7/2003	48.72
10/20/2003 – 11/2/2003	49.97
11/3/2003 – 11/16/2003	48.47
11/17/2003 – 11/30/2003	12.88

Not only do the paystubs demonstrate that the beneficiary worked less than the claimed 80 hours per week during this period, the paystubs appear to indicate that the beneficiary was not employed full-time at either location during this time.



In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The director's decision of July 3, 2013, 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.