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U.S. Department of Homeland Security
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Washington, DC 20529



**U.S. Citizenship
and Immigration
Services**

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FILE: WAC 02 289 52998 Office: CALIFORNIA SERVICE CENTER Date: **MAR 26 2007**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

**Robert P. Wiemann, Chief
Administrative Appeals Office**

DISCUSSION: The Director, California Service Center, initially denied the preference visa petition. A subsequent appeal was remanded to the director to make a determination of fraud and to invalidate the labor certification or to affirm the denial without a finding of fraud. The matter is now before the Administrative Appeals Office (AAO) on appeal for a second time. The appeal will be dismissed, the director's decision will be affirmed, and the petition will remain denied.

The petitioner is a Mexican style bakery. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. On remand, the director determined that the beneficiary was not clearly eligible for the benefit sought due to fraud. The director denied the petition and invalidated the Form ETA 750, 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 July 15, 2005 denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The director noted inconsistencies in information pertaining to the beneficiary's employment experience and the investigation conducted by the U.S. Embassy in Mexico.

On appeal, counsel submits a statement and indicates that a brief would be submitted within thirty days. However, in response to a fax, dated December 28, 2006, counsel states that her brief was included on July 15, 2005 in Item #3 (Briefly, state the reason(s) for this appeal) of Form I-290B, Notice of Appeal to the Administrative Appeals Office. Therefore, a decision will be determined based on the record, as it is currently constituted.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

(ii) *Other documentation – (A) General.* 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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date.¹ The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is November 23, 1999.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal².

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 requires that the beneficiary must possess two years of experience in the job offered. Block 15 has no additional requirements.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of baker must have two years of experience in the job offered.

The beneficiary, in this matter, claims, on Form ETA-750 Part B, that his prior employment included work as a baker for [REDACTED] from November 10, 1994 through October 15, 1996 (40 hours per week). The beneficiary further claims to have been unemployed from November 1996 through November 1999.

In the instant case, counsel submitted a letter, dated September 17, 1999, with an unsigned translation from [REDACTED] stating that the beneficiary was employed as a baker at [REDACTED] from November 10, 1994 through October 15, 1996.

In response to a request for evidence by the director, counsel submitted another letter, dated February 10, 2003, with translation from [REDACTED] of [REDACTED] stating that the beneficiary was employed by [REDACTED] as a baker from September 10, 1994 through October 15, 1996. [REDACTED]'s title or relationship to the petitioner was not provided.

In response to a notice of intent to deny based in part on a field investigation conducted by the fraud investigation unit at the U.S. Embassy in Mexico, counsel submitted a third letter, dated November 4, 2003, with translation from [REDACTED], co-owner of [REDACTED] Mexico stating that the beneficiary had worked at this establishment as a baker from September 10, 1994 to October 15, 1996. [REDACTED] further stated:

¹ Citizenship and Immigration Services (CIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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, Mandany 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).

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 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).

It should be noted that I run this business since December 12th, 1992, and due to the financial recession it was closed in that place, at the same time it should be noted that the now Cucapah Road former Guaycura Road and to the present in the place number [REDACTED] there is not a restaurant but a furniture store. I annex some official documents of opening of this business.

I acknowledge having made a big mistake in the original letter where the date were wrong since the date of issuing that reads September 17th, 1999, it should have been November 17th, 1999, and the date of starting to work that was mixed was September 10th, 1994.

All of the additional documents submitted by [REDACTED] show the owner of Panaderia La Gloria as [REDACTED]

The director denied the petition on November 22, 2003, and a subsequent appeal to the AAO was remanded to the director for entry of a new decision to make a determination of fraud and invalidate the labor certification or to affirm the denial without a finding of fraud. Upon reevaluation on remand, the director determined that the beneficiary is not clearly eligible for the benefit sought and denied the petition accordingly. The director also invalidated the labor certification due to fraud.

On a second appeal filed August 11, 2005, counsel states:

[CIS] erred and abused its discretion in its finding of fraud as it relates to the alien's letter of prior experience. [CIS] further determined that the evidence submitted was spurious and therefore, decertified and invalidated the ETA 750. [CIS] further erred in stating that there were inconsistencies in the ETA 750 which it states casts doubt upon its reliability, creditability and validity despite the documentation to the contrary. It is argued that the alien and the petitioner did not meet their burden of proof in so far as it relates to the alien's prior experience despite his young age which seems to be the problem that the service is having in many similar cases despite the fact that it is well known that in third world countries such as Mexico it is not uncommon for children to work at a very young age.

It is further the position of the alien and the petitioner that [CIS] in its decision is acting in a discriminatory manner in so far as alien's from third world countries because [CIS] is attempting to use United States standards in situations where they simply cannot be applied. Therefore, it is the position that [CIS] has erred, is acting discriminatorily, has placed an undue burden on the petitioner and alien, has acted in an overreaching and broad manner in its decision of July 15, 2005.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "It is incumbent on 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."

As discussed in the director's two denials and the AAO's remand, the explanations provided for the inconsistencies in the record are not credible. Both the director and the AAO have pointed out where those inconsistencies lie, and no additional evidence to support the beneficiary's claims has been supplied on counsel's second appeal. The evidence to the contrary is overwhelming. CIS provided counsel and the petitioner a copy of the field investigation conducted by the fraud unit at the U.S. Embassy in Mexico that states:

Please be advised that the letter of employment presented by subject [beneficiary] is a bogus document. There is not [sic] such bakery in Tijuana and never has been a bakery under that name. The address provided on the employment letter is bogus. There is no such address in Tijuana.

I contacted the telephone company for a possible telephone number for [REDACTED] and no listing was found under the name. I searched the local phonebook and no name of such bakery was found.

In rebuttal, counsel asserted that “employers make mistakes relating to dates of employment if they don’t have their records in front of them or perhaps they may not keep good records” and that “[t]he problem with the addresses is due in part as stated in the employer’s clarification letter to the fact that the street name changed.” However, there is no evidence in the record that the street name had changed (i.e., nothing was submitted from the city or state verifying the change in street name, no business records from the relevant time period such as tax returns showing a street name change, no printed menus showing a street name change, etc.). In addition, the petitioner has had many opportunities through requests for evidence, notice of intent to deny, appeal, etc. to provide the correct dates of employment for the beneficiary. Verifiable documentation could have included payroll checks, tax returns, etc. With regard to the affidavit from [REDACTED] there is no verifiable evidence in the record that corroborates [REDACTED] statement of being co-owner of [REDACTED] or of his having employed the beneficiary. The birth certificate submitted showing the birth of [REDACTED] and [REDACTED] child is not evidence of co-ownership of [REDACTED]. In fact, the only thing that the birth certificate proves is that [REDACTED] and [REDACTED] had a child together. Again, there are no tax returns, menus, business records, client records, etc. for [REDACTED] for the years 1994 through 1999 and no certifiable evidence of the beneficiary’s employment with [REDACTED] or legal documentation that [REDACTED] is co-owner of [REDACTED].

The regulation at 8 C.F.R. § 103.2 also provides guidance in evidentiary matters. It states in pertinent part:

(b) Evidence and processing—

(1) *General.* An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form. Any evidence submitted is considered part of the relating application or petition.

(2) Submitting secondary evidence and affidavits—

(i) General. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the

unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

If primary evidence such as an employer letter is not available, then the petitioner should demonstrate its unavailability and submit relevant secondary evidence. If secondary evidence, such as pay stubs or tax documents verifying the alien's employment, is unavailable, the petitioner must demonstrate the unavailability of such evidence and then may submit affidavits pursuant to the requirements of 8 C.F.R. § 103.2(b)(2). It is noted that two or more affidavits from individuals who are not parties to the petition and who have direct personal knowledge of an event are only acceptable after the petitioner demonstrates the unavailability of the required primary and relevant secondary evidence.

In the instant case, the petitioner has not shown that an experience letter conforming to the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) from [REDACTED] is not available, nor has he provided any secondary evidence or affidavits. In addition, the petitioner has not provided any evidence to corroborate his claim that [REDACTED] employed the beneficiary from September 10, 1994 through October 15, 1996 instead of November 10, 1994 through October 15, 1996 as originally entered on Form ETA 750. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

It is noted that the fraud unit at the U.S. Embassy in Mexico was given the wrong address for [REDACTED] as a result of a translation error of the first letter, dated September 17, 1999, provided by [REDACTED]. The street address should have been [REDACTED] and not [REDACTED]. In spite of this error by the petitioner's own translation, its occurrence had no direct bearing on the director's decision as the report from the fraud unit at the U.S. Embassy in Mexico specifically stated that the investigator contacted the telephone company for a possible telephone number for [REDACTED] with no results, and he also searched the local phonebook, and the bakery was not found in the phonebook. Again, *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on 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.

In the instant case, it is not reasonable to believe that a successful business would not be listed in the local phonebook or that the telephone company would not have a number for that business that would permit client contact.

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 sustained that burden. Accordingly, the appeal is dismissed, the decision of the director will be affirmed, and the petition will remain denied.

ORDER: The appeal is dismissed, the decision of the director is affirmed, and the petition will remain denied.