

B10

U.S. Department of Homeland Security

Citizenship and Immigration Services

Identifying data deleted to
prevent identity theft and prevent
invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536



DEC 16 2003

File: EAC 02 008 52476 Office: VERMONT SERVICE CENTER Date:

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

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: [Redacted]

PUBLIC COPY

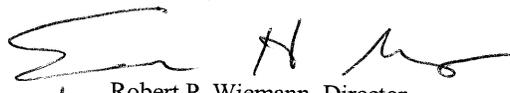
INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reopen. The motion will be granted. The previous decisions of the director and Associate Commissioner will be affirmed. The petition will be denied.

The petitioner is a Chinese restaurant. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a specialty cook. The director determined that the petitioner had not established that the beneficiary was qualified for the proffered position pursuant to the requirements stated on the labor certification.

In support of the motion, counsel submits additional evidence.

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.

8 CFR § 204.5(1)(3)(ii) states, in pertinent part:

(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 occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Eligibility in this matter hinges on the petitioner demonstrating that the beneficiary was eligible for the proffered position on the priority date of the petition, the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the request for labor certification was accepted for processing on April 24, 2001. The labor certification states that the position requires two years experience as a cook in an authentic Szechuan/Hunan restaurant preparing authentic Szechuan/Hunan dishes.

Part B of the Form ETA 750 labor certification states that the beneficiary worked; (1) from March of 1994 to July of 1997 as the owner and manager of the Hong Kong Chinese Express restaurant in Monroeville, Pennsylvania, (2) as a waiter in a Japanese restaurant from August of 1997 to April of 2000, and (3) as a cook in a Chinese restaurant from April 2000 until the application for labor certification was filed on April 24, 2001. With the petition counsel submitted no evidence of the beneficiary's work experience. The information on that form indicates that the beneficiary worked as a cook only at that third position. This office notes that, at the time the Form ETA 750 was filed, the beneficiary had approximately one year of experience in that position.

Because the evidence submitted did not demonstrate that the beneficiary has the requisite two years work experience preparing authentic Szechuan/Hunan dishes, the Vermont Service Center, on November 19, 2001, requested pertinent evidence. Consistent with the requirements of 8 C.F.R. 204.5 § (1)(3)(ii), the Service Center requested that evidence of the beneficiary's experience be in the form of 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.

In her response, counsel submitted no evidence of the beneficiary's claimed employment.

On March 18, 2002, the director denied the petition, finding that counsel had submitted no evidence that the beneficiary has the requisite two years of experience as a Szechuan/Hunan cook.

On appeal, counsel stated that evidence of the beneficiary's work experience was not provided in response to the request for evidence because her files reflect that the evidence was provided with the petition. With the appeal, counsel provided (1) a copy

of the menu of the restaurant the beneficiary owned and managed in Monroeville, Pennsylvania, (2) copies of the 1994, 1995, 1996, and 1997 business licenses of that restaurant, showing the beneficiary as the proprietor, and (3) a copy of the articles of incorporation of that restaurant, showing the beneficiary as the sole incorporator.

Counsel stated that the beneficiary worked as cook at his own restaurant, but provided no evidence of that assertion.

On January 24, 2003, the AAO dismissed the appeal, finding that the evidence submitted did not establish that the beneficiary worked for the requisite two years as a Szechuan/Hunan cook.

With the motion, counsel submits a letter, dated February 18, 2003, from the owner of the King Wu Chinese Restaurant in Monroeville, Pennsylvania. That letter states that the beneficiary worked at that restaurant as a cook from April 1989 to May 1993. Counsel notes that the Form ETA 750 Part B only asks that the beneficiary list his employment during the previous three years. Counsel stated that the beneficiary did not list his employment at the King Wu Chinese Restaurant on that form as:

it was either outside of the required three (3) year period and/or, at the time of the filing of the labor certification application, (the) (b)eneficiary was unable to obtain verification of his employment.

Counsel argued that, with the introduction of this letter, the petitioner had demonstrated that the beneficiary is qualified for the proffered position.

A petitioner raises serious questions of credibility when asserting a new claim to eligibility on motion to reopen/reconsider. Counsel did not assert the beneficiary's claim of employment as cook at the King Wu Chinese Restaurant on the Form ETA Application for Labor Certification, with the initial petition, in response to the request for evidence, or on appeal.

8 CFR § 204.5(1)(3)(ii) does not encourage petitioners to hold evidence in abeyance and submit it on appeal or on a post-appeal motion. Rather, it clearly states that evidence of the beneficiary's experience **must accompany** the petition.

In this case, the experience claimed when the petition was submitted does not qualify the beneficiary for the proffered position. In response to that finding, counsel has submitted evidence of other, previous employment, never before mentioned in

conjunction with this application. The two reasons counsel submits for the previous failure to claim this work experience do not overcome the credibility problem inherent in this late submission.

Further still, counsel stated, in response to the request for evidence, that evidence of two years of qualifying employment had been submitted with the petition. Given that the three jobs listed on the Form ETA 750 Part B contain one year of qualifying employment between them, this statement appears to conflict with counsel's subsequent statement, that evidence of the beneficiary's employment at the King Wu Chinese Restaurant was not submitted with the petition because it was not then available.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the evidence offered in support of the visa petition. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The employment claimed when the petition was submitted, in response to the request for evidence, and on appeal does not qualify the beneficiary for the proffered position. The new claim of employment, submitted on the motion, is not credible. Therefore, the evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience as a Szechuan/Hunan cook, and the petitioner has not established that the beneficiary is eligible for the proffered position.

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 Administrative Appeals Office's decision of January 24, 2003 is affirmed. The petition is denied.