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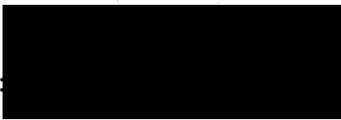
U.S. Citizenship  
and Immigration  
Services



FILE: EAC 02 002 51164 Office: VERMONT SERVICE CENTER

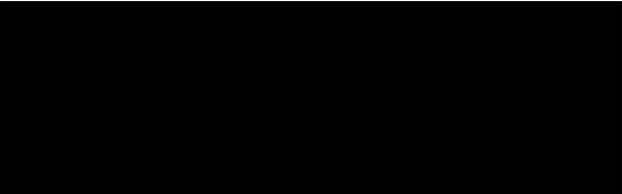
Date: APR 13 2004

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as 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:

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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

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 a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification.

On appeal, counsel submits a statement and 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 nature, for which qualified workers are not available in the United States.

8 CFR § 204.5(l)(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. Here, the request for labor certification was accepted for processing on April 29, 1997. The labor certification states that the position requires two years of experience in the proffered position.

With the petition counsel submitted a notarized statement, dated April 4, 1997, from an alleged coworker. That alleged coworker stated that he and the beneficiary had worked at the Eredeum Bar/Club Restaurant in New York City. He stated that the beneficiary worked there full-time from December 1990 through February 1993 as a cook. The petitioner submitted no other evidence of the beneficiary's work experience.

Because the evidence submitted did not satisfactorily demonstrate that the beneficiary has the requisite two years work experience, the Vermont Service Center, on November 9, 2001, requested additional pertinent evidence. Consistent with the requirements of 8 C.F.R. 204.5 § (l)(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 response, counsel submitted a letter, dated December 6, 2001, purportedly from the administrator of a restaurant in Puebla, Puebla, Mexico. The letter states that the beneficiary worked full-time at that restaurant as a cook from April 1993 to May 1995.

On March 19, 2002, the director denied the petition, finding that the evidence submitted did not demonstrate satisfactorily that the beneficiary has the requisite two years of salient work experience. The director noted that the employment documentation submitted with the petition is from an alleged coworker, rather than from the beneficiary's alleged former employer, as is required by 8 C.F.R. 204.5 § (l)(3)(ii).

The director further noted that other evidence in the record flatly contradicts the beneficiary's claim of employment in the city of Puebla.

The director observed that on Part B of the Form ETA 750, the beneficiary stated that he lived continuously in Brooklyn New York from January 1994 until February 25, 1997, the date he signed the Form ETA 750. That information, as the director observed, is inconsistent with the beneficiary's claim of employment as a cook in Puebla, Mexico from April 1993 to May 1995.

On appeal, counsel submits an additional notarized statement from the same alleged coworker who submitted the first notarized statement. The new statement attests to substantially the same facts. Counsel also provides copies of pay stubs purporting to show that the affiant worked for ERS Enterprises dba Iridium Restaurants during the pay periods ending December 25, 1993, June 11, 1994, March 5, 1995, and June 28, 1998.

This office notes that the beneficiary and the affiant both claim to have worked for Eredium Bar/Club Restaurant, whereas the pay stubs are from Iridium Restaurants. No explanation was offered for this discrepancy. This office will decline to dwell on its significance, however, in view of the other considerably more damning evidence in the record.

The pay stub for the pay period ending December 25, 1993 indicates that the affiant was paid \$325 during that pay period. The year-to-date total indicates that the same \$325 was the only amount the affiant had earned at that restaurant up to that late date in 1993. This indicates that the affiant did not work at that restaurant prior to the pay period that ended December 25, 1993. This information contradicts the affiant's assertion that he and the beneficiary worked together at that restaurant until the beneficiary left during February 1993.

Counsel argues that the beneficiary worked at the Eredeum Bar/Club Restaurant and subsequently returned to Mexico to work in the restaurant in Puebla. Counsel explains the discrepancy between this employment history and the employment history to which the beneficiary previously attested by stating that the beneficiary asserts that the information on the Form ETA 750, Part B is incorrect. Counsel did not address the discrepancy between the affiant's claimed employment history and the affiant's check stubs.

With the petition, the petitioner submitted only a coworker affidavit attesting to the beneficiary's employment claim. When the Service Center sought additional documentation of that claim, the petitioner submitted evidence of a different claim, not previously asserted. Neither counsel, nor the petitioner, nor the beneficiary ever provided any reason for the failure to provide additional documentation of the first claim, rather than seeking documentation of a new and more distant claim. This is inherently suspicious. Further, the petitioner has provided no evidence of that first claim from the beneficiary's alleged previous employer, and offered no reason for this failure.

The second claim is directly contradicted by information the beneficiary previously provided under the penalty of perjury. Counsel asserts that the beneficiary now asserts that information was in error.

On appeal, the petitioner provided additional evidence intended to bolster the original claim. Some of that evidence, the pay stub for the pay period ending December 25, 1993, contradicts the affiant's two sworn statements.

The evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience. To the contrary, the evidence strongly suggests that both of the beneficiary's employment claims are fraudulent. Therefore, 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 appeal is dismissed.