



U.S. Citizenship
and Immigration
Services

B-2

[Redacted]

FILE: WAC 99 033 50854 Office: CALIFORNIA SERVICE CENTER Date: *July 8 2004*

[Redacted]

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

PETITION: 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]

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
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, California Service Center. In connection with the beneficiary's Application to Register Permanent Residence or Adjust Status (Form I-485), the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. The petition is not accompanied by an original individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor (DOL). Citizenship and Immigration Services (CIS), formerly the Service or INS, denied the petitioner's prior Immigrant Petition for Alien Worker (I-140). The DOL provided a duplicate of the Form ETA 750, as eventually issued.¹

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.

Eligibility in this matter turns on whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date. A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. See 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this instance, an amendment to Form ETA 750 states that the priority date is November 11, 1997.

The Form ETA 750 states that the position of chef required high school education through four (4) years and two (2) years of training or a chef's certificate. Also, it exacted two (2) years of experience in the job offered, and the experience is the issue. The beneficiary's salary as stated on the labor certification is \$8 per hour or \$16,640 per year.

The director issued a Notice of Intent to Revoke (NOIR) on August 9, 2002 and cited results of the investigation by the U.S. Department of State's Consul in Beijing, dated December 16, 1999 (1999 investigation) of two (2) of the beneficiary's five (5) claimed employers. One telephone number related to ABC Restaurant in Lengshuitan, Hunan (ABC Hunan), and it resulted in no answer at all. A new business answered the second number, which also had the same address as Beijing Tiangong Restaurant (Beijing), another of the claimed former employers of the beneficiary. The lady at the site of the former Beijing, however, did not know the chef who signed the beneficiary's experience letter, or the beneficiary.

The investigator reviewed a resume of the beneficiary on Beijing's letterhead, dated December 4, 1996 (resume), and concluded, further, that:

¹ CIS denied the prior I-140 in WAC 98 040 52854, on June 3, 1998, precisely because the petitioner submitted a "skeletal" I-140 without the requisite, original Form ETA 750.

[The beneficiary's] work experience was unable to be verified. Moreover, it is unusual that [the beneficiary's] resume was written on [redacted]'s letter paper, while it was sealed with [redacted]. What is the relationship between [redacted] and [redacted] is unknown. [redacted] the lady who informed me the dissolve [sic] of Beijing [redacted] never heard of ABC Hotel. .

The petitioner countered the NOIR with statements of [redacted] They asserted that they were, respectively, the head chef and a co-worker when the beneficiary claimed to work at [redacted] (August 1988 to January 1993). The head chef said that he was there upon the dissolution in 1999. Neither statement constitutes an affidavit or declaration, as claimed in counsel's response to the NOIR. An employee's identity card, issued December 12, 1988, related to Beijing, but the petitioner showed no entry thereafter in respect to the beneficiary. In all, the petitioner offered seven (7) exhibits in response to the NOIR.

The director determined that no competent, independent, and objective evidence, such as tax returns, employment records, or telephone listings, rebutted the 1999 investigation or supported the beneficiary's employment with either [redacted]. The director concluded that the petitioner had not overcome the grounds stated in the NOIR and denied the petition.

On appeal, counsel disparages the "information" in the 1999 investigation and specifies that:

Investigators placed telephone calls to only two restaurants, evidently in 1999, years after the experience cited.

The pertinent authority requires that the director show simply good and sufficient cause in the NOIR to revoke the approval of visa petition. The evidence for good and sufficient cause suffices if, unexplained and un rebutted, it would warrant a denial. *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987); *Matter of Arias*, 19 I&N Dec. 568, 569 (BIA 1998).

AAO has reviewed the record and finds that the director did not have good and sufficient cause. Man For Kwong, the owner of [redacted] issued a letter dated January 3, 1997 (Man Wah), declaring the beneficiary's service as an adequate cook at [redacted] from January 1993 to January 1996. Form ETA 750, Part B, block 14, similarly, records the beneficiary's employer as [redacted] at that time.

The director did not question the fact of full-time employment for two (2) years, or the authenticity of the Man Wah letter. The Form ETA 750 indicated that the position of chef required two (2) years of experience in the job offered. The issue is whether the beneficiary met all of the requirements stated by the petitioner in Part A, block 14 of the labor certification as of the priority date. The petitioner established with competent and credible documentary evidence that the beneficiary worked two (2) years at Man Wah.

While the 1999 investigation was unable to verify the beneficiary's employment in China, the investigation did not suggest that documentation regarding that employment was fraudulent. For example, the investigator failed to inquire when Beijing was dissolved or whether the person being questioned had any connection to Beijing or any occasion to know individual chefs at Beijing, except that Beijing had existed at the location where the person being questioned was found. As the investigation does not diminish the beneficiary's credibility, there is no reason to discount the Man Wah letter.

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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 met that burden.

ORDER: The appeal is sustained and the petition is approved.