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U.S. Department of Homeland Security
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Washington, DC 20536



U.S. Citizenship
and Immigration
Services

[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: MAY 26 2004

IN RE:

Petitioner:
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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign specialty cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

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. 8 C.F.R. § 204.5(d). In the instant case, the Form ETA 750 indicates that the position of foreign specialty cook requires two years of experience in the job offered.

Eligibility in this matter turns on the petitioner's ability to pay the proffered wage as of the petition's priority date and on the beneficiary's qualifications as of that date. The priority date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is September 12, 2000. The beneficiary's salary as stated on the labor certification is \$2,010 per month or \$24,120 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. With the I-140 petition the petitioner submitted a copy of the petitioner's Form 1065 U.S. tax return of partnership income for the year 2000 and a letter dated January 16, 2000 from the Baodu Hotel attesting to the beneficiary's employment as a cook with that hotel from May 1994 to the present.

In a request for evidence (RFE) dated June 22, 2001 the director requested additional evidence. The RFE requested copies of the petitioner's California quarterly wage reports for the most recent four quarters, copies of the petitioner's payroll summary, evidence that the beneficiary will be employed as full-time and permanent, and a list of all of the petitioner's employees.

Counsel responded to the RFE with a letter dated July 9, 2001, accompanied by copies of the petitioner's quarterly wage reports for the quarters ending September 30, 2000, December 31, 2000, March 31, 2001 and June 30, 2001; a copy of the petitioner's yearly wage report for the year ending December 31, 2000; a copy of the petitioner's Form W-3 transmittal of wage and tax statements for 2000; copies of Form W-2 wage and tax statements for the petitioner's employees for the year 2000; and a letter dated July 9, 2001 from the petitioner stating an offer of full-time permanent employment to the beneficiary at the proffered wage.

In a second RFE dated June 26, 2002, the director requested additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The second RFE specifically requested evidence for the year 2001. The second RFE also requested the petitioner to provide an explanation for an inconsistency between the petitioner's tax number as shown on the I-140 petition and a different tax number for the petitioner which appears on the petitioner's tax return for the year 2000.

Counsel responded to the second RFE with a letter dated July 22, 2002, accompanied by a copy of the petitioner's Form 1065 U.S. tax return of partnership income for the year 2001. Counsel's letter explained the inconsistent employer identification numbers for the petitioner by stating that on the I-140 petition the petitioner's California tax identification number had been erroneously typed in, rather than the petitioner's federal tax identification number.

The director determined that the evidence did not establish that the beneficiary had the required two years of experience as a cook as of the priority date. The director stated that an investigation by the anti-fraud unit of the U.S. "embassy" in Guangzhou, China had determined that the letter from the Hotel Baodu confirming the beneficiary's experience is fraudulent. The director then denied the petition.

On appeal, counsel submits a letter dated December 20, 2002 from one of the petitioner's owners captioned as Motion to Reopen and Reconsider, and additional evidence consisting of a copy of a letter dated December 6, 2002 from the Baodu Hotel, Shenzhen City, China, attesting to the beneficiary's experience as a cook with that hotel from May 1994 to February 2000 and describing the beneficiary's duties; a copy of another letter also dated December 6, 2002 from the Baodu Hotel, Shenzhen City, China, attesting to the beneficiary's experience as a cook with that hotel from May 1994 to February 2000 and describing the hotel and its ownership; a copy of a business license dated June 8, 1993 for the Baodu Restaurant, Shenzhen City, China; originals of four photographs dated "98 1 3," showing a man in a cook's uniform preparing food dishes in what appears to be a commercial kitchen, with another man similarly dressed in the background of each photograph; and additional copies of the petitioner's Form 1065 U.S. tax return of partnership income for the years 2000 and 2001.

The petitioner states on appeal that the director's decision provided only a conclusion that the letter of experience was fraudulent, without providing the petitioner with any explanation of the manner by which the investigator had attempted to verify the beneficiary's employment with the Baodu Restaurant. The petitioner states that the additional evidence on appeal is being submitted in rebuttal to the director's finding that the letter certifying the beneficiary's experience is fraudulent.

The AAO will first evaluate the decision of the director based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In his decision the director made no mention of the petitioner's ability to pay the proffered wage, apparently finding that the evidence on that issue was sufficient. As noted above, the record contains the petitioner's tax returns for the years 2000 and 2001.

Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983).

In the instant case the petitioner's returns show the following amounts on line 22 for ordinary income: \$39,883 for 2000 and \$36,442 for 2001. Each of those amounts is higher than the proffered wage of \$24,120. Therefore

the petitioner's tax returns are sufficient to establish the ability of the petitioner to pay the proffered wage during the relevant time period.

The other issue in this case concerns the beneficiary's qualifications for the job offered. In evaluating the beneficiary's qualifications, Citizenship and Immigration Services (CIS) must look to the job offer portion of the alien 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).

In the instant case, the ETA 750 requires two years of experience in the job offered. The evidence to establish that the beneficiary had two years of experience as a cook consists of a letter from the Baodu Hotel, Gangzhou, China, dated January 16, 2000, which was submitted with the I-140 petition.

With regard to the beneficiary's qualifications, the director's decision states the following:

[CIS] is in possession of the following information: A letter from Shenzhen Bao'an Distric [sic] Baodu Hotel was included in the I-140 petition as verification of the beneficiary's experience as a specialty cook. The letter stated that "[the beneficiary], grade III cook, (Native of Wuhua County, Guangdong Provine [sic], born on October 16, 1968) has worked in the Chinese Kitchen Department of Shenzhen Bao'an District Baodu Hotel since May 1994." An investigation conducted by the Anti-Fraud Unit of the United States Embassy Guangzhou, China revealed that the letter of experience submitted with the I-140 was fraudulent. This investigation revealed that the letter of experience submitted with the I-140 was fraudulent.

(Repetitive language in the original).

The record in the instant case contains a copy of a report of investigation dated March 20, 2002 by an anti-fraud unit investigator at the United States consulate in Guangzhou, China. A cover memorandum accompanying that report states that the investigation was made in response to a request by the California Service Center. The report contains the following description of the investigation made in an attempt to verify the work experience of the beneficiary:

On November 3, 2001, this writer made a phone call to the Kitchen Department of the Baodu Hotel asking to talk to subject. A lady under the surname of "Chen" answered the phone. She checked the name list of the cooks and could not find someone under the name of [the beneficiary]. But she also informed this writer that a group of cooks had been replaced recently.

On November 6, 2001, this writer sent a call-in letter to subject to the address of Baodu Hotel. But so far subject hasn't appeared for an interview.

The report contains no further information describing the investigation, nor does the report contain any reference to the letter from the Baodu Hotel attesting to the beneficiary's experience with that hotel. The director's decision states that the investigation by the "United States Embassy" found that the letter of experience was fraudulent. However, no such finding is contained in the investigative report in the record. The report does not even mention the letter. Moreover, the report contains no facts which are inconsistent with the content of the letter of experience. According to the letter, the beneficiary was still employed by the Baodu Hotel as of the date of the letter, January 16, 2000. The telephone inquiry by the consulate's investigator was made on November 3, 2001, twenty-two months later. The report records an inquiry as to whether the beneficiary was then employed by the Baodu Hotel, an inquiry which produced a negative response from the person who answered the telephone at the

hotel. But the report records no inquiry as to the title of that person, nor any effort to speak to the manager of the restaurant or the personnel department to ascertain whether the beneficiary had been employed by the Baodu Hotel as of January 16, 2000 or for the six years prior to that date, as stated in the letter in question. Moreover, the information from the person who answered the telephone was not inconsistent with the content of the letter of experience, since the report records her as saying that a group of cooks had recently left the hotel.

For the foregoing reasons, the investigative report from the U.S. consulate in Guangzhou, China, provides insufficient basis for the director's conclusion that the letter of experience submitted with the I-140 petition is fraudulent. No other basis is offered in the director's decision for the director's conclusion that the letter of experience submitted with the I-140 petition is fraudulent.

Although the director presumably had good reasons for requesting an investigative report on the instant petition from the U.S. consulate in Guangzhou, China, the results of that investigation failed to produce a finding that the documentary evidence submitted in support of the petition is fraudulent and failed to discover facts which are inconsistent with those described in the petitioner's documentary evidence.

If the director had other evidence available which indicated that the letter confirming the beneficiary's experience was fraudulent, that evidence should have been made a part of the record of proceeding in the instant petition. But the record of proceeding lacks any such evidence.

The director's finding that the letter of experience fails to establish the beneficiary's requisite two years of experience as a cook is therefore in error.

On appeal the petitioner submits additional evidence, listed above. The evidence is submitted in rebuttal to the director's finding that the letter of experience submitted with the I-140 petition is fraudulent. Prior to the director's decision the petitioner had no notice that the director intended to find the letter of experience to be fraudulent. For this reason the AAO finds that the additional evidence submitted for the first time on appeal in rebuttal to the finding made in the decision is not precluded from consideration on appeal by *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988). The AAO will therefore evaluate the evidence submitted for the first time on appeal.

Each of the two letters of experience dated December 6, 2002 from the Baodu Hotel contains information which is consistent with the earlier letter of experience and with the information in the investigative report from the U.S. consulate in Guangzhou. The two new letters each state that the beneficiary worked at the Baodu Hotel until February 2000. The copy of the business license for the Baodu Hotel also contains information which is consistent with the earlier letter of experience and with the information in the investigative report. The business license was valid from June 8, 1998 to December 31, 2000, dates which are consistent with the claim that the beneficiary worked as a cook with the Baodu Hotel from May 1994 until February 2000.

The photographs submitted for the first time on appeal also appear to be consistent with the information in other documents in the record. The photographs show a man in a cook's uniform preparing food in what appears to be a commercial kitchen. The man is presumably the beneficiary. Each of the photographs is dated "98 1 3," a date consistent with the claim that the beneficiary worked as a cook at the Baodu Hotel from 1994 until 2000. Nonetheless, the photographs are of little probative value, since nothing in the photographs identifies the setting as the Baodu Hotel. The dates on each photograph appear to have been imprinted by a camera. But date settings on cameras can be adjusted manually, therefore the imprinted dates are unreliable evidence of the actual dates of the photographs submitted as evidence.

The petitioner's evidence contains no explanation of the occasion for taking the four photographs submitted in evidence. In none of the photographs is the subject looking at the camera or apparently posing for the

photograph. The other man shown in the background similarly appears to be ignoring the presence of the camera. The back of each photograph states Kodak paper as the brand name for the photographic prints. But the photographs submitted in evidence are each encased in plastic laminate, a fact which makes it impossible to physically analyze the front or the back of each picture to confirm the type of paper used.

Documents submitted after the date of a director's decision are inherently less persuasive than documents submitted prior to the date of a director's decision, since a petitioner which is inclined to submit fraudulent documents could tailor the newly-submitted documents to be consistent with the documents previously submitted for the record. Nonetheless, in the instant case, no evidence of fraud is found in the record. The evidence submitted prior to the decision of the director was sufficient to establish the petitioner's ability to pay the proffered wage and to establish that the beneficiary possessed the requisite experience as of the priority date. The evidence submitted for the first time on appeal provides additional evidence to establish the latter fact, notwithstanding the evidentiary weaknesses in the photographs submitted on appeal, as discussed above.

The issue is whether the beneficiary met all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has established that the beneficiary had two years of experience as a cook on September 12, 2000. Therefore, the petitioner has overcome this portion of the director's decision.

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. The petition is approved.