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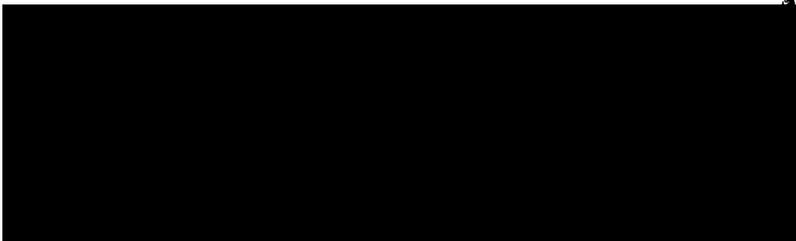
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

PETITION COPY

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APR 29 2005

FILE: EAC 01 124 50304 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]

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 Director, Vermont Service Center, initially approved the employment-based preference visa petition. Subsequent to an investigation conducted by the Consulate, Guangzhou, China, 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 remanded for further consideration.

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). A Notice of Intent to Revoke is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Notwithstanding the CIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

On appeal, the petitioner, through counsel, requests oral argument. Oral argument is limited to cases in which cause is shown. A petitioner or his counsel must show that a case involves unique facts or issues of law that cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. Therefore, the petitioner's request for oral argument is denied. On appeal, counsel also submits a statement and indicates that a brief would be submitted within thirty days. To date, no additional documentation has been received; therefore, a decision will be determined based on the record, as it is currently constituted.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as cook, specialty foreign food. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary met the experience requirements as a cook as stated on the Form ETA 750, but instead, misrepresented her true occupation as a teacher. The director revoked the approval of the petition accordingly.

The record indicates that the Immigrant Petition for Alien Worker (I-140) was filed with the Service Center on March 8, 2001. It was initially approved on August 8, 2001. Following the receipt of information from the American Consulate in Guangzhou, China relevant to the beneficiary's experience, the director concluded that the I-140 was approved in error and issued an intent to revoke the petition on October 23, 2002.

In response to the NOIR, counsel submitted a verification letter from [REDACTED] stating that the beneficiary was a kindergarten teacher from September 1985 to January 1990, but left to be a cook in January 1990; a copy of a business license and operation contract for the Fujian Provincial Construction Hotel; eight affidavits from the beneficiary's current employer, supervisors, and co-workers attesting to the beneficiary's employment; and three photos showing the beneficiary working as a cook in the restaurant. Counsel states:

As indicated by the verification letter from [REDACTED] former supervisor in the Kindergarten Affiliated with the Department of Construction, Supplies of Fujian Province (the Department is a provincial government agency), [REDACTED] left the kindergarten in 1990 to work as a cook for various restaurants. However, for reasons stated below, her personal archive has never been transferred to her new employers. Therefore, her official record shows that she has been a kindergarten teacher until the present time. In order for the Immigration officers to better understand the intricacy of this case, a brief introduction about the personnel policy of the People's Republic of China, especially the personal archive system, is offered below.

\* \* \*

According to the personnel policy of the People's Republic of China, the personal archive of an employee shall be kept by his/her former employer until it is transferred to the new employer. As a general rule, if an individual who originally works in a State-owned enterprise seeks employment in a private-owned enterprise, his/her personal archive will not be transferred to the new employer, primarily because owners of private enterprises do not accept or care about the person's background, especially his political position. Also, for the purpose of passport application, the verification from a private sector employer regarding the applicant's employment status is generally not accepted by the local Public Security Bureau which issues passport.

. . . In addition, [REDACTED] has never submitted any resignation letter to give up her position as a Kindergarten teacher to the Department of Construction Supplies. Therefore, at the time when she applied for her passport in 1997, her former employer, the Kindergarten, still maintained her position and title although it had stopped paying wages to her. Her personal archive was, and still has been, kept by her former employer and she was, and still has been considered officially a no-pay employee of the kindergarten. Since the personal information of any passport applicant is derived directly from his/her personal archive, her passport correctly shows her profession as "teacher."

\* \* \*

Although the official record shows [REDACTED] profession as teacher, she has, in reality, been working as a cook for over twelve years and has been working with her current employer for over five years.

The director concluded that the petitioner had failed to establish that the beneficiary met the requirements of the labor certification as of the visa priority date. The director revoked the petition's approval on January 29, 2003, pursuant to section 205 of the Act, 8 U.S.C. § 1155.

On appeal, counsel indicates that a brief will be forthcoming within thirty days<sup>1</sup> and states:

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<sup>1</sup> It is noted that as of this date, approximately two years and two months later, no brief has been received by this office.

Respondent requests oral argument before the Administrative Appeals Unit in order for an expert on the personnel policy, personnel archives and the issuance of passports in the People's Republic of China may be duly heard in regard to this I-140 Petition.

Please see one page attachment for reasons for this appeal.

1. The Service erred when it revoked the approval of Respondent's I-140 petition as a Chinese Specialty Cook solely based on the incorrect and outdated listing of the Beneficiary as a teacher on her passport and Non-visa application.
2. The Service erred in failing to consider all supporting evidence submitted with Respondent's letter of rebuttal, which directly refute the Service's claim that Respondent is teacher and not a cook.
3. The Service erred in failing to consider evidence submitted concerning the personnel policy of China and personal employment archives, which were relied upon by the Public Security Bureau in issuing passports to citizens of the People's Republic of China.

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. 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 May 30, 2000. As noted on the labor certification, the beneficiary must have two years experience in the job offered as set forth on Block 14 of the ETA 750.

Section 203(b)(3)(A)(i) of 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) additionally provides:

(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 occupation designation. The minimum

requirements for this classification are at least two years of training or experience.

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.

On appeal, counsel asserts that the evidence shows that the beneficiary has the required two years of experience. In this case, counsel has provided several affidavits in support of the beneficiary's work experience as a cook as well as an employment letter from the beneficiary's previous employer.

It appears from its report that the Consulate considered only the documentation concerning the beneficiary's visa applications and did not thoroughly look into the beneficiary's work experience. There is no evidence in the record of

proceeding that shows that any of the beneficiary's claimed employment with the two restaurants listed on the labor certification were investigated and no mention of China's personnel or archive policy was made by the investigator.

Again, *Matter of Estime, supra*, states that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial. In the instant case, the reason why the beneficiary's employment information listed "teacher" instead of "cook" was explained and possibly rebutted by counsel's response to the NOIR.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of the beneficiary's experience as a cook. It is recommended that a thorough investigation of the beneficiary's claims be conducted. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's January 29, 2003 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.