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FEB 10 2005

FILE:



Office: VERMONT SERVICE CENTER

Date:

EAC-01-223-53904

IN RE:

Petitioner:



Beneficiary:

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:



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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, Vermont Service Center. The director later obtained information which indicated that the beneficiary did not qualify for the offered position. The director issued a notice of intent to revoke, and later issued a decision revoking the petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded to the director.

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).

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

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)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien’s experience or training will be considered.

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. § 103.2(b)(1), (12). *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In this petition, the priority date is December 30, 1999.

The Form ETA 750 indicates that the position of cook requires six years of grade school education and two years of experience in the job offered. On the Form ETA 750B signed by the beneficiary on December 21, 1996 the beneficiary listed the only relevant experience as that of a cook, from June 1993 to the date of the form. But the block for the name and address of the employer for that position was left blank on the form.

On the I-140 petition, the petitioner claimed to have been established on May 2, 1995, to have a gross annual income of \$194,782.00, to have a net annual income of \$31,000.00, and to currently have five employees.

In support of the petition, the petitioner submitted copies of the petitioner’s Form 1120-A U.S. Corporation Short-Form Income Tax Returns for 1998 and 1999; a copy of a certificate from the Fujian West Lake Hotel, Fuzhou, Fujian, China, dated December 15, 2000 and signed by the manager [REDACTED] stating the beneficiary’s experience with that hotel from January 1998 to May 2000 as a cook, with a certified English

translation; and a copy of a Certificate of No Criminal Record for the beneficiary dated November 10, 2000 signed by a notary public of the Lianjiang Notary Public Office, Fujian Province, China.

In a request for evidence (RFE) dated September 9, 2001 the director requested information on the number of workers the petitioner employed in 1999 and on whether the prospective employee would fill a newly created position.

In response, counsel submitted a letter dated October 15, 2001, accompanied by a letter dated October 11, 2001 from the petitioner's president stating its number of employees in 1999 as five, and stating that the position to be filled by the beneficiary is a newly created position. The president also stated that counsel had erroneously spelled the first name of the beneficiary on the Form ETA 750 and on the I-140 petition as [REDACTED] whereas the correct spelling [REDACTED]

The director approved the petition on November 23, 2001.

Concurrent with the actions described above, removal proceedings had been pending against the beneficiary. The record in those removal proceedings indicates that the beneficiary entered the United States at or near St. John, U.S. Virgin Islands, on or about August 6, 2000, along with twenty-four other Chinese persons who swam ashore that day from a boat off the coast. The beneficiary and twenty-four other persons were detained and were placed in removal proceedings. Venue in the beneficiary's case was later changed to New York City, and then later changed to Baltimore, where the proceedings remain pending.

As part of the immigration proceedings, an immigration judge in New York had ordered a psychological evaluation of the beneficiary, which was done. A report by a clinical psychologist dated October 17, 2002 is found in the record of the removal proceedings.

On December 6, 2002, an INS assistant district counsel in Baltimore sent a request to the U.S. Department of State for an evaluation of the work experience certificate for the beneficiary dated December 15, 2000 from the Fujian West Lake Hotel. In reply, the chief of the Fraud Prevention Unit at the U.S. Consulate in Guangzhou, China sent a electronic mail communication dated January 9, 2003 reporting on the results of an investigation of the work experience certificate. In that communication the official reported that he had sent a copy of the work experience certificate to the manager of the personnel department of the Fujian West Lake Hotel, and that the manager of that department had replied that neither the beneficiary nor the person who had signed the certificate as manager were employees of that hotel. The personnel department manager also stated that the seal on the certificate was false.

The beneficiary's A-file indicates that a request was made on January 9, 2003 by the Baltimore CIS district office to the Vermont Service Center to commence a revocation action of the instant petition. The Baltimore CIS district office made a second request for the consideration of revocation actions on October 27, 2003. On December 27, 2003 the director issued a notice of intent to revoke (ITR), summarizing evidence which indicated that the beneficiary was not qualified for the offered position, including a finding that a document in evidence was fraudulent. The ITR gave the petitioner a period of thirty days within which to submit any evidence that it believed would overcome the reasons for revocation.

The record contains no indication of a response received by CIS to the ITR.

On July 21, 2004 the director issued a decision noting the absence of any response to the ITR and revoking the petition.

The petitioner's form I-290B notice of appeal was received by CIS on August 5, 2004. With the notice of appeal counsel submits a brief and the following documents: a copy of the I-140 approval notice of the instant petition dated November 7, 2001; a copy of an Airborne Express shipping label showing an overnight express package sent on January 13, 2004 from counsel's office to the Vermont Service Center; a copy of a letter from counsel dated January 13, 2004 responding to the issues raised in the ITR; and a certificate dated December 31, 2003 from the personnel department of the Westlake Hotel of Fujian Province, signed [REDACTED] stating the beneficiary's employment as a cook with that hotel from January 1998 to May 2000.

Counsel states on appeal that the petitioner timely responded to the ITR and that the director failed to consider the petitioner's response. Counsel also states that the petitioner had requested a copy of the investigation report that was the basis for the finding that a document submitted by the petitioner was fraudulent. Counsel states that the beneficiary also has worked in the United States as a cook. Finally, counsel states that the director failed to properly evaluate the psychological report on the beneficiary.

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

The regulation at 8 C.F.R. § 205.2 states in pertinent part:

(a) *General.* Any [CIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of [CIS].

(b) *Notice of intent.* Revocation of the approval of a petition of self-petition under paragraph (a) of this section will be made only on notice to the petitioner or self-petitioner. The petitioner or self-petitioner must be given the opportunity to offer evidence in support of the petition or self-petition and in opposition to the grounds alleged for revocation of the approval.

(c) *Notification of revocation.* If, upon reconsideration, the approval previously granted is revoked, the director shall provide the petitioner or the self-petitioner with a written notification of the decision that explains the specific reasons for the revocation. The director shall notify the consular officer having jurisdiction over the visa application, if applicable, of the revocation of an approval.

In the instant case, the director properly followed the procedure set forth in 8 C.F.R. § 205.2 and issued an ITR to the petitioner. With regard to the beneficiary's qualifications, the ITR stated the following:

It has now come to the attention of this service that the letter submitted to verify that the beneficiary has the required two years of work experience is fraudulent. Further, it is noted that the beneficiary was given a psychological examination, and it was determined that he suffers from serious mental issues that would prevent him from competently assuming the duties of a cook. Given these two factors, it does not appear that the beneficiary qualifies for the benefit he was initially granted.

With regard to the allegedly fraudulent certificate on the beneficiary's work experience, the ITR contained no further information. Nor does it appear that a copy of the January 9, 2003 electronic mail communication

from the chief of the Fraud Prevention Unit at the U.S. Consulate in Guangzhou, China was provided to the petitioner.

The regulation at 8 C.F.R. § 103.2(b)(16)(i) states in pertinent part:

Inspection of Evidence. An applicant or petitioner shall be permitted to inspect the record of proceeding which constitutes the basis for the decision, except as provided in the following paragraphs.

(i) *Derogatory information unknown to petitioner or applicant.* If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [CIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

(ii) *Determination of statutory eligibility.* A determination of statutory eligibility shall be based only on information contained in the record of proceeding which is disclosed to the applicant or petitioner, except as provided in paragraph (b)(16)(iv) of this section.

Subparagraphs (b)(iii) and (b)(iv) referenced in the preceding quotation provide exceptions to the disclosure of derogatory information to an applicant or a petitioner where the information is classified under Executive Order No. 12356 (47 FR 14874; April 6, 1982). None of the information in the record of the instant petition is marked "classified," therefore those subparagraphs do not apply in the instant petition.

Concerning the disclosure of derogatory information unknown to the petitioner, the Board of Immigration Appeals, in *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987), has stated the following:

Under section 205 of the Act, 8 U.S.C. § 1155 (1982), the Attorney General may, at any time, for what he deems 'good and sufficient cause,' revoke the approval of any visa petition. Those portions of the regulations relating to evidentiary requirements in visa petition proceedings apply, of course, to the revocation of approved visa petitions. Thus, with exceptions relating to classified information, the petitioner must be permitted to inspect the record of proceedings, must be advised of derogatory evidence of which he is unaware, and must be offered an opportunity to rebut such evidence and to present evidence in his behalf. Any such explanation, rebuttal, or evidence must be included in the record of proceedings. A determination of statutory ineligibility is not valid unless based on evidence contained in the record of proceedings.

Matter of Estime, 19 I&N Dec. at 451.

Later in that opinion the Board stated:

Where a notice of intention to revoke is based on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained, even if the petitioner did not respond to the notice of intention to revoke.

Id. at 452. The Board repeated the foregoing statement nearly word for word in another case involving a notice of intent to revoke an approved petition. *Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988);

In the instant petition, the ITR advised the petitioner that the beneficiary's work experience letter "is fraudulent." However, the ITR failed to advise the petitioner of any of the evidence supporting that conclusion. The ITR did not refer to the electronic mail communication from the American consular official, nor did it disclose the contents of that communication. The petitioner thereby was left unaware of the statement from the present personnel manager of the hotel regarding the beneficiary's prior claimed employment that neither the beneficiary nor the person who signed the experience certificate on his behalf was an employee of the hotel. The electronic communication also states, "The seal on the certificate is also fake." (Chief, Fraud Prevention Unit, U.S. Consulate, Guangzhou, China, electronic mail communication, January 9, 2003).

Since the ITR failed to disclose the foregoing evidence to the petitioner, the ITR failed to satisfy the requirements of the regulation at 8 C.F.R. § 103.2(b)(16)(i). The matter therefore must be remanded to the director for the issuance of an ITR that advises the petitioner of the derogatory evidence of which the petitioner is unaware, as required by that regulation.

The ITR also alleged that in the psychological report on the beneficiary "it was determined that he suffers from serious mental issues that would prevent him from competently assuming the duties of a cook." However, this office has found no such finding in that report.

The introductory portion of the psychological report states that it was prepared in order "to have a competency evaluation of [the beneficiary's] ability to testify in legal proceedings." (Report, [REDACTED] Ph.D., October 17, 2002, page 1). The report found that the beneficiary's ability to communicate "was severely impaired because of what appears to be a limited intellectual capacity." (Report, page 3).

With regard to the beneficiary's ability to manage his life outside the context of legal proceedings, the report states concerning the beneficiary that, "He is capable of living a normal and simple life and is probably employable and capable of making his own living in a limited work environment with which he has [sic] familiar." (Report, page 4). The report contains no specific reference to the beneficiary's ability to work as a cook.

The contents of the psychological report do not establish that the beneficiary lacks the ability to work as a cook. It was therefore error for the director to base the ITR in part on that report, an error compounded by the director's inaccurate summary of the contents of the report.

In summary, the submission of fraudulent documentation of the beneficiary's work experience would be sufficient grounds to revoke the petition, but the petitioner must be informed of the evidence which the director relied upon in reaching the conclusion that the beneficiary's work experience certificate was fraudulent. The information in the psychological report on the beneficiary does not provide grounds for revoking the petition.

On appeal, counsel submits additional evidence, including a new work experience certificate signed by the same person who signed the work experience certificate submitted previously. Counsel also submits a copy of a letter which he allegedly sent to CIS in responses to the ITR, and a copy of an Airborne Express shipping label indicating a package shipment to the Vermont Service Center which was to arrive before the deadline for any response to the ITR.

In light of the above conclusion that the ITR was deficient, it is not necessary to evaluate whether the petitioner did in fact respond to the ITR, and if so, whether that response was timely. It is also not necessary to evaluate the newly-submitted work experience certificate.

Upon remand, the director may consider all of the petitioner's submissions, including the newly-submitted work experience certificate, in determining whether to issue a new ITR, and, if so, the content of any new ITR.

For the foregoing reasons, the petition must be remanded to the director.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.