

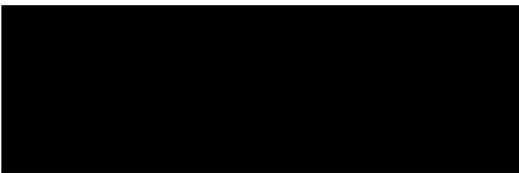
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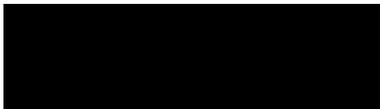
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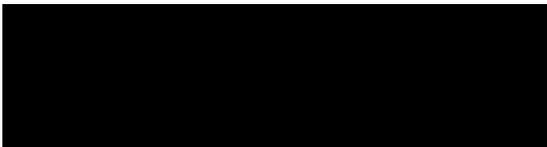
FILE: WAC-02-289-52998 Office: CALIFORNIA SERVICE CENTER Date: JUN 07 2005

IN RE: Petitioner:
Beneficiary:



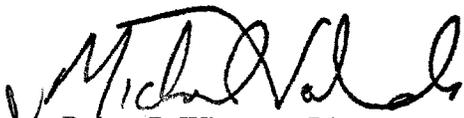
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 employment-based preference visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The petition will be remanded to the director.

The petitioner is a Mexican style bakery. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. After the results of an investigation undertaken by a fraud investigator working for the U.S. Embassy in Mexico, the director determined that the petitioner had not established that the beneficiary was qualified for the proffered position and denied the petition accordingly.

On appeal, counsel submits a brief and 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.

The issue to be discussed in this case is whether or not the petitioner established the beneficiary's qualifications for the proffered position. 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, which is November 23, 1999. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the 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 Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of baker. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	0
	High School	0
	College	0
	College Degree Required	Not Required
	Major Field of Study	Not Required

The applicant must have two years of training in order to perform the job duties listed in Item 13, which states, in pertinent part, "Mix and bake ingredients according to prescribed Mexican recipes to produce a variety of Mexican breads, rolls, and pastries (empanada, calabaza, borrachos, pan molido, birote, concha mediana) will be required to roll, cut and shape dough to form bread, rolls, buns, etc., preparatory to baking." No special requirements were set forth under Item 15.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he indicated that he was employed at [REDACTED] as a baker from November 10, 1994 through October 15, 1996. His job duties were similar to the duties of the proffered position.

With the initial petition, the petitioner submitted a letter in Spanish, with an accompanying certified English translation, stating that the beneficiary worked for [REDACTED] from November 10, 1994 through October 15, 1996. The letter was on [REDACTED] letterhead with an address at Clz. Gy No. 29491 in Tijuana, Baja California (B.C.), in Mexico, and was dated September 17, 1999. The letter did not have an identified signatory.

Because the evidence was insufficient, the director requested additional evidence concerning the evidence of the beneficiary's qualifications on January 8, 2003. The director requested an experience letter showing the name and title of the person verifying the information as well as corroborating evidence of actual employment.

In response to the director's request for evidence, the petitioner submitted an additional translated letter from [REDACTED] with an address at Clz. Gy No. 29491 in Tijuana, B.C., Mexico, stating that the beneficiary worked as a baker for 40 hours per week, five days per week, from September 10, 1994 through October 15, 1996, and provided a description of his experience that matched the duties of the proffered position as delineated on the ETA 750A. The letter was signed by [REDACTED]

Because of the inconsistencies in information represented in the two letters from [REDACTED] and because the dates of employment indicated that the beneficiary was only 16 years old at the time he was allegedly working full-time as a baker for [REDACTED] without starting out in lesser positions, the director requested an investigation from the fraud investigation unit at the U.S. Embassy in Mexico.

The results of the investigation were submitted to the director on August 21, 2003, and the report stated the following, in pertinent part:

Please be advised that the letter of employment presented by SUBJECT [beneficiary] is a bogus document. There is not [sic] such bakery in Tijuana and never has been a bakery under that name. The address provided on the employment letter is bogus. There is no such address in Tijuana.

I contacted the telephone company for a possible telephone number for [REDACTED] and no listing was found under the name. I searched the local phonebook and no name of such bakery was found.

The director notified the petitioner of the results of the fraud investigation and his intent to deny the petition because the beneficiary was not clearly eligible for the immigration benefit sought on October 9, 2003.

In response, counsel stated that the petitioner is not responsible for checking the authenticity of employment letters and the director erred by accusing the petitioner of perpetrating fraud. Counsel stated that new submissions would show that the beneficiary acquired the requisite employment experience with [REDACTED]. She stated that a past and present co-owner of [REDACTED] explains in a letter that on December 12, 1992, "he started his business at that location given on the original letter of experience however due to financial recession he was forced to move in March of 1995." Counsel asserted that [REDACTED] was an employee of [REDACTED] who provided the letter at the time due to the absence of [REDACTED].

The petitioner submitted a notarized letter in Spanish, with a certified English translation, from [REDACTED] on La [REDACTED] letterhead with an address on Guaycura Road in Tijuana, B.C., Mexico, who states that he is a co-owner of [REDACTED] and confirms the beneficiary's employment there from September 10, 1994 through October 15, 1996 as a baker up to 44 hours per week. He states the following, in pertinent part:

It should be noted that I run this business since December 12th. [sic], 1992, and due to the financial recession it was closed in that place, at the same time it should be noted that the now Cucapah Road former was Guaycura Road and to the present in the place number 20491-5 there is not a RESTAURANT but a Furniture Store. I annex some official documents of opening of this business.

I acknowledge having made a big mistake in the original letter where the dates were wrong since the date of issuing that reads September 17th. [sic], 1999, it should have been November 17th. [sic], 1999, and the date of starting to work that was mixed was September 10th. [sic], 1994.

(Emphasis in original).

The petitioner also submitted documents in Spanish, with certified English translations, for [REDACTED] operation permit, certificate of regulatory compliance, public health certificate, and tax registration, all at 20491-5 Guaycura, listing [REDACTED] as its owner, and dated at various times in 1992 through 1995.

The director denied the petition on November 22, 2003 stating that the petitioner submitted evidence reflecting that [REDACTED] existed from 1992 to 1995 at Guaycura No. 20491-5 in Tijuana, B.C., Mexico, but that the petitioner represented that [REDACTED] was located at Clz. Gy. "No. 29291." (Emphasis added). The director noted that the September 17, 1999 experience letter and a letter from counsel, dated April 25, 2000, used that same address to represent La Gloria Bakery's address. The director also noted that the owner of [REDACTED] as reflected on the translated government filings submitted in response to his notice of intent to deny, but [REDACTED] claimed to run the business and be a co-owner in his letter submitted in response to the director's notice of intent to deny. Finally, the director notes that [REDACTED] claimed to make a "big mistake" by stating the beneficiary's employment dates as November 1994 to October 1996, which he noted is less than the two years required by the proffered position on Form ETA 750A, but those same dates were also represented on the Form ETA 750B and

counsel's representative in a letter dated April 25, 2000, not the September 1994 date as was later represented. The director also noted that no corroborating evidence was presented, such as evidence that the beneficiary paid into the country or government social system as [REDACTED] employee. The director cited the numerous inconsistencies and implausible representations made throughout evidentiary submissions contained in the record of proceeding for his finding that the petitioner submitted fraudulent documentation, and denied the petition for the petitioner's failure to establish the beneficiary's qualifications to perform the duties of the proffered position.

On appeal, counsel asserts that "employers make mistakes relating to dates of employment if they don't have their records in front of them or perhaps they may not keep good records," and that "[t]he problem with the addresses is due in part as stated in the employer's clarification letter to the fact that the street name changed." Counsel also asserts that "it was felt at the time it was not necessary to provide further information as to who the other co-owner was, however, the other co-owner is [REDACTED] spouse." Counsel explains that [REDACTED] are unmarried but share a home, a business, and a child. Counsel also asserts that [REDACTED] explanation in his letter submitted in response to the director's notice of intent to deny provided sufficient explanation to overcome prior inconsistent representations. The petitioner submits a birth certificate in Spanish, with a certified English translation, showing that [REDACTED] was born in Tijuana, B.C., Mexico to [REDACTED] 1989 and copies of previously submitted evidence.

The regulation at 8 C.F.R. § 204.5(1)(3) 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 AAO concurs with the director's findings and determinations. The director correctly cites to *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), which states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) also states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

Three experience letters are in the record of proceeding. One uses the November 1994 date as the initial date of employment while the others use the September 1994 date as the initial date of employment. If the November 1994 representation was the result of sloppy record-keeping as counsel asserts on appeal, then it does not follow that the beneficiary would also represent on the ETA 750B that November 1994 was his initial employment date at [REDACTED] a fact also asserted by counsel in her correspondence. If the beneficiary worked for [REDACTED] from November 1994 to October 1996, then he did not obtain the requisite two years of qualifying employment experience as required by the proffered position.

Additionally, neither the petitioner nor [REDACTED] addressed the identity of [REDACTED] who signed the second experience letter contained in the record of proceeding. Only counsel stated that [REDACTED] had permission to sign on [REDACTED] behalf. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). No documentation illustrates that [REDACTED] is a co-owner and authorized representative of [REDACTED]. Contrary to the statements of counsel, showing that [REDACTED] fathered a child with [REDACTED] does not evidence his ownership of a business with [REDACTED].

The AAO also finds it curious that [REDACTED] would use the old address for [REDACTED] since the regulation requires contact information for a prior employer. If the bakery is still in business, a [REDACTED] claims and represents as an alleged co-owner, then the new address, with the changed street name, should have been reflected on its letterhead. Neither counsel nor the petitioner or [REDACTED] representative addressed using different numbers for the business' location. If the business actually did shut down and moved to a private residence in 1995, it seems doubtful that it could continue to employ the beneficiary and [REDACTED]. Even if the record of proceeding did not contain multiple inconsistencies, the AAO concurs with the director's determination that no other corroborating document establishes that the beneficiary has two years of experience as a baker. The AAO notes that the director was correct in seeking corroborating evidence and the petitioner's failure to submit evidence is a critical omission. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The inconsistent representations and evidentiary submissions indicate the commission of fraud in this case. In addition to our independent review, the AAO relies upon the director's findings in making such a determination, as well as the investigative report undertaken by the fraud investigative unit at the U.S. Embassy in Mexico as relevant and probative evidence of fraud. Fraud results in inadmissibility and permits the director to invalidate a labor certificate. *See* 8 U.S.C. § 1182(a)(6)(C) and 20 C.F.R. §§ 656.30(d) and 656.31(d). The director is entitled to invalidate the labor certificate based upon a finding of fraud. The AAO determines that fraud has been committed in this case and the director should consider invalidating the labor certificate. Thus, the AAO will remand the case to the director accordingly.

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 petition is remanded to the director for entry of a new decision to make a determination of fraud and invalidate the labor certification or to affirm the denial without a finding of fraud.