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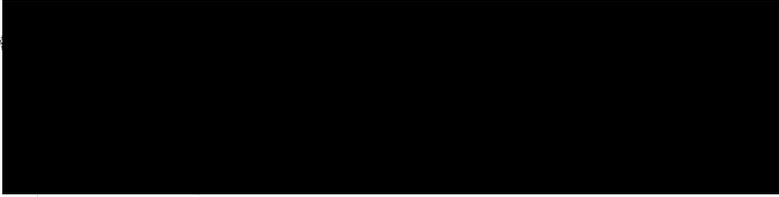
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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

B6



FILE: EAC 02 054 54750 Office: VERMONT SERVICE CENTER

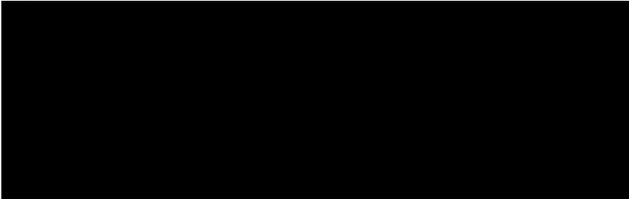
Date: JUN 16 2005

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**DISCUSSION:** The preference visa petition was revoked by the Director, Vermont Service Center, and is now before the Administrative Appeals Office. The decision of the director will be affirmed. The petition will remain revoked.

A Notice of Intent to Deny, which included a request for additional evidence, was issued in this matter on April 28, 2003. Pursuant to 8 C.F.R. § 103.2(b)(13), the petitioner was obliged to respond to that request. That section states that, in the event that a petitioner does not respond to such a notice, the petition shall be considered abandoned and shall be denied. The director erroneously found that the petitioner had not responded, that it had abandoned the petition, and revoked the petition accordingly by notice to petitioner dated August 25, 2003.

Subsequently, the Service Center found petitioner had responded to the Notice of Intent to Deny by petitioner's letter dated May 27, 2003, as received May 29, 2003. Petitioner did file a timely appeal of the revocation of the petition. The appeal on Form I-290B was received on August 26, 2003.<sup>1</sup>

Acknowledging the May 29, 2003 response and the appeal, the Service Center moved to reopen/reconsider the decision dated August 25, 2003. Thereafter, the director ordered the petition be revoked on December 30, 2003, determining that the beneficiary did not meet the qualifications for the position of cook. The director then forwarded the file to the AAO for review.

Pursuant to 8 C.F.R. § 103.2(b)(15), no appeal shall lie from a denial of a petition based upon abandonment. However, there was no abandonment here. Because the petitioner established that it responded to the Notice of Intent to Deny, it has overcome the sole reason for that revocation. The Form I-290B appeal was treated as a motion to reopen/reconsider and the petition adjudicated on the merits by the Service Center, and, the petition was revoked.

The petitioner is a Middle Eastern restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies the petition. The director determined that petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

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 regulation 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

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<sup>1</sup> Certain of the grounds for the appeal related to the issue of abandonment based upon the Service's erroneous belief that petitioner had not responded to the Notice of Intent to Deny when in fact petitioner made a response. The Service Center rectified this error, and moved to reopen/reconsider the decision dated August 25, 2003 based upon the record of proceedings.

obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The regulation 8 C.F.R § 204.5(l)(3)(ii) states in pertinent part:

(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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on June 6, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour. (\$24,960.00 per year.) The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of petitioner's Form 1120 U.S. Corporation Income Tax Return for 2000, an income statement for the first half of 2001, bank statements and copies of documentation concerning the beneficiary's qualifications and proffered salary.

Because the Director determined the evidence insufficient to show that the beneficiary had the requisite two years work experience, and, that the Service had information that the beneficiary had no experience in the type of cooking stated in Form ETA 750, the Vermont Service Center on April 28, 2003, issued a notice of its intent to revoke the previously approved petition.

In response to the notice of its intent to revoke the previously approved petition, counsel for the petitioner by his letter dated May 27, 2003, provided explanations to refute the Service Centers statements without providing additional documentary evidence other than counsel's assertions.

In summary, counsel qualifies and also contradicts, the veracity of the beneficiary's prior statements and certified documents submitted to support his claim that he has experience as a foreign foods cook. For example, the beneficiary has submitted in support of the petition a "Document of Profession Confirmation" signed, sealed and dated November 29, 2000, attesting the beneficiary "... has been employed as chef of Arabic, Moroccan and Lebanese food for eight year at my [the affiant's] establishment in Sweida with satisfactory conduct and experience...." Counsel attempts to qualify that affidavit by asserting he was not employed eight years but just worked "off and on" in that position for eight years. There is a second affidavit given by the same affiant two years later who swears "...that [the beneficiary] has worked in my shop located at Souieda in profession of Cook

of Arab, Morocco and Lebanese Food about nine years.” Counsel is silent concerning this second affidavit. Meanwhile, as counsel admits, the beneficiary stated to Service on a previous family based immigration petition that the beneficiary was unemployed during this period. So in this one instance we are presented with four contradictory statements about the beneficiary’s experience as a foreign foods cook. The beneficiary’s prior inconsistent statements have placed his credibility at issue<sup>2</sup>.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) 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.

No competent objective evidence was introduced by counsel to explain the above inconsistencies. The weight of the evidence, chief of which is the beneficiary’s own statement, demonstrates that he does not have the cooking experience that counsel asserts the beneficiary acquired through employment. There is no credible evidence in the record of proceedings presented by petitioner or for the beneficiary to refute the adverse consular investigation that was disclosed to the petitioner.

The evidence submitted does not demonstrate credibly that the beneficiary had the requisite two years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

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 decision of the director is affirmed. The petition will remain revoked.

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<sup>2</sup> There is another instance in the record of proceedings where the beneficiary holds himself out as unmarried but, in fact, he was in a marital relationship. Counsel’s explanation for this inconsistent statement is not credible.