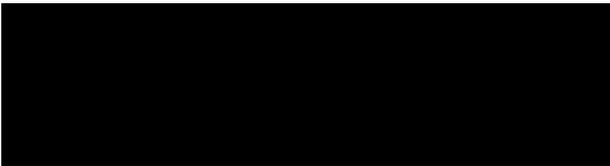


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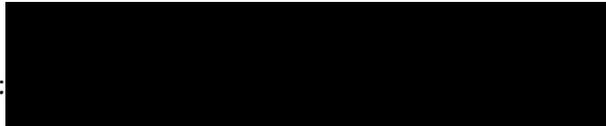
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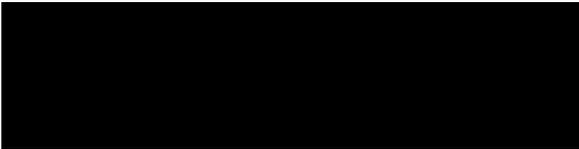
FILE: WAC-03-113-55331 Office: CALIFORNIA SERVICE CENTER Date: NOV 17 2005

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 denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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. 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 additional 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 April 16, 2001. 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 cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	6
	High School	N/A
	College	N/A
	College Degree Required	Blank
	Major Field of Study	Blank

The applicant must also have two years of experience in the job offered in order to perform the job duties listed in Item 13, which are incorporated into the record of proceeding and will not be recited here. Item 15 indicates that there are no special requirements.

The beneficiary set forth her credentials on Form ETA-750B and signed her 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, she listed the following:

- a. Dragon Palace – Kempinski Hotel, Beijing Lufthansa Center No. 50, Liangmaqiao Rd, Chaoyang District, Beijing, 100016, China, as a cook from February 1995 through June 1998.

With the initial petition, the petitioner submitted no evidence of the beneficiary's qualifications for the proffered position.

Because the evidence was insufficient, the director requested additional evidence concerning the evidence of the beneficiary's qualifications on June 13, 2003<sup>1</sup>. Pursuant to the requirements set forth at 8 C.F.R. § 204.5(1)(3), the director requested a letter from the beneficiary's prior employer with details conforming to the regulatory requirements.

In response to the director's request for evidence, the petitioner submitted a letter on Kempinski Hotel letterhead, Beijing Lufthansa Center, dated August 30, 1998, in English, that certified the beneficiary's employment as a cook in Dragon Palace from February 1995 to June 1998. The letter is signed by Wang, Xin (Mr. Xin), in his capacity as Executive Manager. The petitioner also submitted an uncertified translation of a page from the beneficiary's passport titled "Advance Technical Grade Certificate" issued by the "Labor Department, West City District, Beijing" in 1995 stating the beneficiary's occupation as a Chinese cook.

The director requested a consular investigation of the beneficiary's claimed employment experience on June 13, 2003 and again on April 30, 2004. According to the record of proceeding, on July 15, 2003, a CIS investigator stationed in Beijing called the Kempinski Hotel, Beijing Lufthansa Center, and "inquired Ms. LIU [(Ms. Liu)], Personnel Assistant, regarding [the beneficiary's] claimed employment history." The investigator stated that the results of her investigation disclosed negative findings as the beneficiary was "a hall waitress from 1995 to 1997 in" the hotel and that Mr. Xin was a "Deputy Director of Food & Beverage (not as "Executive Manager" disclosed in the letter) from 1990 to 1995."

The director denied the petition on May 27, 2004 describing the results of the investigation and determining that the beneficiary was not qualified to perform the duties of the proffered position.

On appeal, counsel assigns no specific error to the director's decision and submits additional evidence and previously submitted evidence. The evidence submitted on appeal consists of letters and documents in Kanji characters with certified translations. One letter is allegedly from Mr. Xin who asserts that he was an executive manager of the Kempinski Hotel and now owns a restaurant in Shandong Province, China. He states that the beneficiary was employed as a cook since March 1995 and has "a [sic] Advance Technical Grade Certificate issued by Labor

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<sup>1</sup> The director issued another request for evidence subsequent to this one to obtain additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Since that issue is not before the AAO on appeal, it will not be discussed within this decision.

Department of Beijing.” He also states that the beneficiary was still working at the restaurant when he left in 1997. Another appellate documentary submission is a business license verifying Mr. Xin’s ownership of a restaurant valid from 2003 through 2007<sup>2</sup>.

An additional appellate submission is a final letter allegedly from Ms. Liu who states that she is employed by the Kempinski Hotel in the Personnel Department. She states that she received a telephone call from the American Embassy in the middle of 2003 asking if the beneficiary was employed by the Kempinski Hotel. She states that she told them that the beneficiary “was worked [sic] here before.” After asking for which department the beneficiary worked, Ms. Liu states that since the beneficiary had “already left the company, . . . there is no detail [sic] information for her. In addition, I don’t know her, therefore, I said I was not sure.” Her affidavit also states that “I did not tell the American Embassy that [the beneficiary] worked as a waitress.” The affidavit provides her contact information.

At the outset, it is noted that the uncertified translation of a page from the beneficiary’s passport titled “Advance Technical Grade Certificate” issued by the “Labor Department, West City District, Beijing” in 1995 stating the beneficiary’s occupation as a Chinese cook cannot be considered as probative and credible evidence because its translation did not comply with the terms of 8 C.F.R. § 103.2(b)(3): “*Translations.* Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator’s certification that he or she is competent to translate from the foreign language into English.”

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for “skilled workers,” states the following:

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.

Thus, for petitioners seeking to qualify a beneficiary for the third preference “skilled worker” category, the petitioner must produce evidence that the beneficiary meets the “educational, training or experience, and any other requirements of the individual labor certification” as clearly directed by the plain meaning of the regulatory provision.

Additionally, the regulation at 8 C.F.R. § 204.5(l)(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.

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<sup>2</sup> Mr. Xin’s restaurant is of no relevance to these proceedings.

(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 affirms the director's decision. Counsel does not explain on appeal how the evidentiary submissions overcome the results of a consular investigation undertaken by CIS officials. It is unclear how Mr. Xin could issue an employment verification letter on Kempinski Hotel letterhead dated August 30, 1998 when he claims in the affidavit on appeal that he left the hotel's employ in 1997. The AAO is loath to overturn the results of a formal investigation undertaken by sworn officers of CIS stationed overseas who are in a better situation to assess the veracity and credibility of statements made by witnesses to factual assertions. Other than additional statements conflicting with testimony obtained through the local investigation by CIS officials, the petitioner submitted no corroborating evidence of the beneficiary's employment at the Kempinski Hotel's Dragon Palace restaurant as a cook, such as payroll records, personnel records, pay stubs, tax documents, or labor department certificates<sup>3</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."

The petitioner has failed to demonstrate that the beneficiary is qualified for the proffered position with two years of experience as delineated as a requirement on the ETA 750A.

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 appeal is dismissed.

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<sup>3</sup> This list is not exhaustive and merely exemplary.