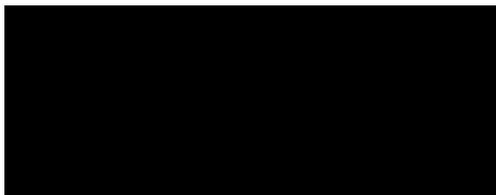




U.S. Citizenship
and Immigration
Services

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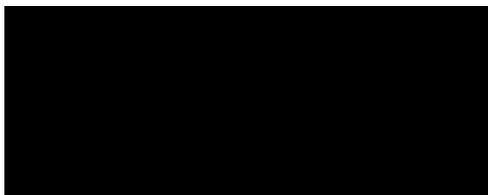
IN RE:

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 initially approved by the Director, California Service Center. Based on a report of investigation conducted by an officer in charge in Guangzhou received from the American Consulate General Guangzhou, China, the director consequently 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 dismissed. The petition will remain revoked.

The petitioner is a full-service specialty restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign specialty cook (Malaysia style). 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 a brief and previously submitted 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 July 31, 1995. 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 foreign specialty cook (Malaysian style). In the instant case, item 14 describes the requirements of the proffered position are two (2) years experience in the job offered.

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 Huado City New Century Hotel (Huadu

Hotel) Gourmet Hall in Huado City, Guangdong, China as a chef from March 1984 to November 2000. His job duties were similar to the duties of the proffered position.

With the initial petition, the petitioner submitted a letter on Huado Hotel letterhead, signed by [REDACTED] as Manager, with the hotel's seal and dated December 2, 2000, along with its English translation, which corroborated the beneficiary's represented employment with them.

The petition was approved on August 6, 2002. The beneficiary filed an application to adjust to lawful permanent resident on September 5, 2002. The director received a Report of Investigation from the American Consulate General Guangzhou, China on May 26, 2004 and issued a NOIR on June 9, 2004 giving the petitioner 30 days to submit evidence in opposition to the proposed revocation. A response to the director's NOIR was received on July 12, 2004 from counsel and included a letter from the financial department of Huado Hotel, dated June 24, 2004, stating that due to change of management, the hotel does not have any personnel record prior to January of 2001, an investigation report from [REDACTED] attorney of Law Offices of Guangdong Yuexing, confirming that January 2001 change of management and the lack of personnel record before January of 2001, and two letters from former co-workers of the beneficiary confirming the beneficiary's employment with the hotel.

The director revoked the petition on July 20, 2004 stating that the response to his NOIR failed to adequately confirm the beneficiary's prior experience and the petitioner did not submit evidence to substantiate the beneficiary's prior experience with Huado Hotel, such as tax records, pay stubs or other evidence.

On appeal, counsel asserts that previously submitted evidence establishes the beneficiary's qualifications.

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 AAO finds that the director had good and sufficient cause to revoke the approval of this petition. The petitioner's evidentiary submissions and counsel's assertions are non-responsive to the critical issue and material fact of this case: the beneficiary's qualifications for the proffered position. Although requested by the director, the petitioner failed to present additional independent, probative, and relevant corroborative evidence of the beneficiary's employment at Huado Hotel.

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.

While the [REDACTED] letter submitted initially with the petition appears to meet most of the regulatory requirements at 8 C.F.R. § 204.5(l)(3) on its face, the letter itself raised suspicions concerning the authenticity of the factual assertions and the issue whether the job offer was realistic as of the priority date and remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence which resulted in an investigation. First, the letter was written on December 2, 2000 either within a week of the beneficiary's first entry into the United States under B-1 status on November 26, 2000 or prior to his second entry under B-2 status on March 25, 2001. The beneficiary's other immigration documents were also obtained during or about this period.¹ Second, the author, [REDACTED] did not identify himself correctly. He misrepresented himself to appear to be a person in charge of the hotel by signing the letter as Manager and using the hotel's seal. A letter from [REDACTED] submitted in response to the NOIR indicates that [REDACTED] was the manager of the Dining Department then. A verification letter from the Finance Department of Huadu Hotel dated June 24, 2004 bares the seal of the department. [REDACTED] should have titled himself as the department manager and used his department seal or the letter should have come from the personnel manager or a person in charge of the hotel with the hotel's seal. Moreover, the director's decision references the Report of Investigation conducted by an officer in charge in Guangzhou, China that indicated that the investigator contacted Huadu Hotel for employment verification. The Food & Beverage Department and the Personnel Department both claimed that they did not know or hear of a chef named [REDACTED] or of a manager named [REDACTED]. Furthermore, they informed the investigator that the hotel had been restructured at the end of 2000; the owner of the hotel had been changed and new staff had been hired; records for old staff were not able to check.

The petitioner must 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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.

In the instant case, the investigation indicated that the evidence relating to qualifying experience or training required under 8 C.F.R. § 204.5(g)(1) is unavailable or not verifiable, it is the petitioner who must submit other documentation relating to the alien's experience or training to be considered. The petitioner could have attempted to overcome the grounds of the proposed revocation. The petitioner did not present any additional evidence, such as paystubs, tax records, personnel file records, additional sworn testimony, or any other form of documentation to corroborate the beneficiary's claimed employment experience at Huadu Hotel.

¹ The beneficiary's notarized Birth Certificate was issued by Huadu District Notary Public Office on October 19, 2000 and his notarized Divorce Certificate on March 26, 2001.

The record of proceeding contains Chinese letters along with English translation submitted by counsel in rebuttal to the director's NOIR. Counsel claims that the evidence has overcome the ground for revocation. The letter from the Financial Department of Huadu Hotel dated June 24, 2004 states that: "Any employment records and other records of the company prior to the management changes in January 2001 is not available." The investigation report from [REDACTED] an attorney from Law Offices of Guangdong Yuexing, quotes Tao Liu, the manager of Huadu Hotel, as follows: "The management of Huadu City New Century Hotel of Guangzhou changed in January of 2001. Its employment records and other records prior to January 2001 is [are] no longer available." These two letters do not provide any information or verification of the beneficiary's employment with Huadu Hotel but confirms the statement in the Report of Investigation from an officer in Guangzhou that the investigator was unable to verify employment through old staff records. Counsel does not explain how these two letters prove that the letter from [REDACTED] is true or verify the beneficiary's employment with Huadu Hotel.

Counsel also submitted two letters from [REDACTED] and [REDACTED] claiming to be former co-workers of the beneficiary are confirming the beneficiary's employment with the hotel. Although 8 C.F.R. § 204.5(g)(1) permits the consideration of other documentation of the beneficiary's qualifying experience in the circumstances that the required evidence is not available, it still requires other documentation to meet certain evidentiary standards. The letters are computer-created in Chinese language on plain paper, without authors' identification, without the origin of the letters, and are not notarized. The declarations that have been provided on motion are not affidavits as they were not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. See *Black's Law Dictionary* 58 (7th Ed., West 1999). Because of these defects, the letters from the two former co-workers of the beneficiary will be given little weight in these proceedings. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) 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."

The AAO concurs with the director's decision and determines that the director had good and sufficient cause to revoke the petition based on the insufficient evidence in factual assertions presented by the beneficiary concerning his qualifications 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 appeal is dismissed. The director's decision on July 20, 2004 is affirmed. The petition is revoked.