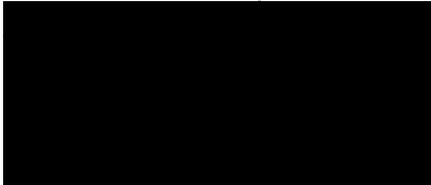


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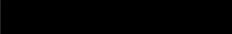


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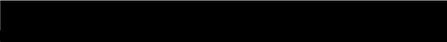
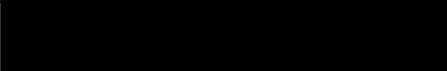


B6

FILE: 
EAC 01 013 51667

Office: VERMONT SERVICE CENTER

Date: **SEP 20 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DISCUSSION: The preference visa petition approval was revoked by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be remanded to the director for entry of a new decision.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an Italian foods cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director approved the petition on December 6, 2001. Subsequent to the approval, based upon a recommendation from the Department of State, the director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition and that the beneficiary knowingly attempted to commit fraud to circumvent immigration laws. The director revoked the petition approval accordingly.

On appeal, the counsel submits additional evidence.

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).

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.

8 CFR § 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.

Section 212(a)(6)(c)(i) the Act states:

[Misrepresentation] IN GENERAL. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

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 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 February 25, 2000. The proffered wage as stated on the Form ETA 750 is \$11.47 per hour (\$23,857.60 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, and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The I-140 petition is dated September 18, 2003. After two Requests for Evidence, the petition was approved on December 6, 2001, and, it was sent to the U.S. Embassy in Tunis, Tunisia. The consulate conducted an interview of beneficiary, and after obtaining conflicting sworn statements of beneficiary's experience as a cook from the beneficiary, suspended the issuance of the immigrant visa according to 22 C.F.R. § 42.43(a)(1). The Service Center issued a Notice of Intent to Revoke the petition approval as a result of the interview admissions by the beneficiary that demonstrated his lack of occupational experience. Although counsel requested additional time to respond, which was granted, no additional evidence or response was received by the Service Center. On October 1, 2003, the Service Center issued its decision to revoke the approval of the petition for immigrant visa. On October 31, 2003, an appeal was filed of the director's decision and counsel requested additional time to respond which was granted, but no additional evidence or response was received by the Service Center until the AAO on August 15, 2005 requested that response from counsel. Counsel submitted additional evidence, which was a support letter from the beneficiary's brother who is the petitioner, an affidavit statement from the beneficiary disputing the investigation findings, and, another employment experience certificate.

The issue to be discussed in this case is whether or not the petitioner had established that the beneficiary has the requisite experience as stated on the labor certification and whether or not the beneficiary knowingly attempted to commit fraud to circumvent immigration laws. 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 and submitted with the instant petition. *Matter of Wing's Tea House*. 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,¹ 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).

¹ In the present case and visa matter, the petitioner and the beneficiary are brothers. Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000).



In the instant case, the Application for Alien Employment Certification, Form ETA-750A, sections 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of Italian foods cook.

In the instant case, ETS Form 750 A, section 14 describes the requirements of the proffered position as follows:

- 14. Education
 - Grade School Blank
 - High School Blank
 - College Blank
 - College Degree Required Blank
 - Major Field of Study Blank
 - Training Blank
 - Experience
 - Training
 - Years Two Years

The beneficiary set forth his work experience on Form ETA-750 Part B, and dated and then signed the form on January 15, 2000.

In the instant case, the Application for Alien Employment Certification, Form ETA-750, Part B, section 15, sets forth work experience that an applicant listed for the position of Italian foods cook.

15. WORK EXPERIENCE

a. NAME AND ADDRESS OF EMPLOYER

Le Golfe Restaurant, Centre Boujaafar, A. V. Habib Bourguiba, Sousse, Tunis, Tunisia

NAME OF JOB

Cook

DATE STARTED

Month - Jan Year - 1997

DATE LEFT

Month - Present

KIND OF BUSINESS

Restaurant

DESCRIBE IN DETAIL DUTIES...

Prepare & cook all Italian style dishes according to menu of the restaurant and customer specification. Responsible for preparing and cooking all meats, pasta, vegetables, seafood, soups and sauces including desert items.

NO. OF HOURS PER WEEK

40

There was no other job experience listed on Form ETA 750B for beneficiary.

In this case each of the affidavits that the petitioner submits to prove the beneficiary's work experience conflicts with the other. During the consular interview the beneficiary made two affidavits on March 5, 2003.

One of the affidavits states:

I [the beneficiary] worked in Abou Nawes, learning how to cook food for a period of one year. After that I worked in the restaurant "El Khalige" (the Golf) in the kitchen for nearly 7 years. I became tenured in that job in 01-01-1997. I am now having my annual leave because the restaurant is being repaired and renovated. I was working as cook and that restaurant closed 15 days ago

* * *

I am specialized in bread making, all different pasta, lamp [sic lamb] couscous and sweets. I am specialized in Tunisian and Italian food but more in the Tunisian one for the last 7 years

The other affidavit given the same day by the beneficiary states in contravention to the above:

I work in the coffee shop as a waiter from 1995 until this day (5 March 2003). That coffee shop and the restaurant are owned by the same owner, and I worked in the restaurant for two years from 1993 until 1995 as a cook helper

According to the consular officer's report, at the consular interview the beneficiary signed the first mentioned statement that he later recanted, therefore he knowingly and willfully falsified a material fact of his lack of pertinent work experience.

With the appeal, the beneficiary now makes a third affidavit, re-stating that he has had work experience with an Tunisian employer between January 1, 1995 through January 1, 1998. This statement is in direct conflict with the second sworn affidavit.

Turning to two employment certificates made for the beneficiary found in the record of proceedings, one was submitted dated September 1, 1999, stating that the beneficiary "... has been an employee of our establishment [the "Golf" restaurant] in the position of CHEF/COOK from 1/1/1997 to this date [September 1, 1999]"

The second employment certificate states that the beneficiary "... is employed in the Restaurant "LE GAULF" as a COOK since the 1st of January 1995 up to the 1st of January 1998 the date of closing"

The above two certificates are inconsistent with the beneficiary's varying sworn statements.

The problem that arises in this case is the multiple inconsistencies in information provided by the beneficiary. *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. at 591-592 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."

Even if the record of proceeding did not contain multiple inconsistencies, the AAO concurs with the director's determination that no probative evidence establishes that the beneficiary has two years of experience as an Italian foods cook. No document, letter, or pay stub contained in the record of proceeding establishes that the beneficiary was employed for two years in an employment capacity with duties of the proffered position.

As stated above, and, as found in the record of proceedings, the investigation conducted by the United States Embassy – Tunis, Tunisia revealed that the employment certificates of experience and sworn statements submitted with the I-140 were fraudulent. Therefore, the parallel statements of occupational experience in Form ETA 750B were also fraudulent. The Alien Employment Certification should be invalidated as it was procured by fraudulent statements made under penalty of perjury. See 8 U.S.C. § 1182(a)(6)(c), and, 20 C.F.R. §§ 656.30(d) and 656.31(d).

The AAO determines that fraud has been committed in this case and the director should reexamine the instant petition and consider invalidating the labor certificate. Thus, the AAO will remand the case to the director and the director can undertake any procedural mechanisms or request any additional information or evidence necessary to make an additional determination.

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.