

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

B6

**PUBLIC COPY**



FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

02 2007

WAC 01 283 54703

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, revoked approval of the employment-based visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is an adult residential home for the developmentally disabled. 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 (DOL) accompanied the petition. The director found that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director also determined that no valid job offer existed. The director revoked approval of the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's decision of revocation the sole issues in this case are whether or not the petitioner has demonstrated that the beneficiary has the requisite experience as specified in the approved Form ETA 750 labor certification and whether or not an actual permanent full-time job offer exists.

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 or seasonal nature, for which qualified workers are unavailable in the United States.

The regulation at 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.

Eligibility in this matter hinges on the petitioner demonstrating 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. DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the DOL. Here, the request for labor certification was

accepted for processing on November 13, 1997. The labor certification states that the position requires two years of experience in the job offered.<sup>1</sup>

The Form I-140 petition in this matter was submitted on August 11, 2001. On the Form ETA 750, Part B, signed by the beneficiary on October 28, 2007, the beneficiary claimed to have worked for [REDACTED] Tea House, Ermita, Manilla Branch, Philippines as a cook from February 1994 to May 1997. The beneficiary stated that he worked 25 hours per week.

The instructions to the Form ETA 750B require that the beneficiary "List all jobs held during the past three (3) years [and] any other jobs related to the occupation for which the [beneficiary] is seeking certification . . . ." The beneficiary listed no other experience on that form.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.<sup>2</sup>

In the instant case the record contains (1) letters, one dated May 22, 1997 and one undated, from a branch manager for [REDACTED]s Tea House, and (2) state licenses for various facilities operated by the petitioner's owners. The record does not contain any other evidence relevant to the beneficiary's qualifying employment experience.

Both letters from [REDACTED] Tea House confirm the beneficiary's claim of employment with the company, that is; it states that the beneficiary worked for [REDACTED] from February 5, 1994 to May 20, 1997 and that he worked 25 hours per week during that period. Those letters are signed by different individuals, both of whom are represented to be branch managers for [REDACTED]. The letters state that the beneficiary's duties were to assist the head cook in all duties generally performed by a cook. Whether those letters indicate that the beneficiary worked as a cook or as an assistant cook is unclear.

The state licenses show the addresses and patient capacities of the petitioner and various other adult residential facilities operated by Mr. and Mrs. [REDACTED] the petitioner's owners.

---

<sup>1</sup> To determine whether a beneficiary is eligible for a third preference immigrant visa, the Service must ascertain whether the alien is in fact qualified for the certified job. In evaluating the beneficiary's qualifications, the Service must look to the job offer portion of the labor certification to determine the required qualifications for the position. The Service 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 Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

During an interview pertinent to adjudication of a Form I-485 Application for Adjustment of Status, the beneficiary stated that, although the petitioner's owners own other facilities, he works only at the facility at 1627 West Catherine Drive in Anaheim. The beneficiary further stated that the facility at which he works is licensed for five residents, and that it then had four residents. Finally, the beneficiary stated that the facility employs one other full-time cook in addition to the beneficiary.

The director found that the evidence does not support the beneficiary's claim of two years of full-time employment as a cook and that the beneficiary's statements at his interview demonstrated that no valid full-time job offer exists in this case. The director revoked approval of the petition on October 19, 2002.<sup>3</sup>

Section 205 of the Immigration and Nationality Act (the Act) provides, in pertinent part,

The attorney general 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. Such revocation shall be effective as of the date of approval of any such petition.

On appeal, counsel asserted that the evidence demonstrates that the beneficiary has the experience required by the approved labor certification. Counsel also argued that, before relying on the statements the beneficiary made at his interview, CIS was obliged to inform the petitioner of those statements. Finally, counsel argued that CIS does not have the authority to revoke approval of the Form I-140 visa petition based on the finding that no valid full-time job offer exists, stating that this determination is solely and squarely within the jurisdiction of the DOL.

The employment verification letters submitted state that the beneficiary worked as a cook for 25 hours per week from February 4, 1994 to May 20, 1997, a period of slightly more than three and one quarter years. That the beneficiary was employed as stated has never been questioned, rather, the issue as to the beneficiary's employment has been whether it constituted the equivalent of two years of full-time employment.

Full-time employment is typically forty hours per week.<sup>4</sup> Forty hours of work per week for two years would encompass 4,160 work hours.<sup>5</sup> The beneficiary's claim of qualifying experience is slightly more than three and one quarter years of 25 work hours per week, which would encompass 4,225 work hours.<sup>6</sup> The beneficiary's claimed employment is the equivalent of somewhat more than two years of full-time employment.

---

<sup>3</sup> Previously, on March 19, 2002, the acting director denied the petition. The petition was subsequently approved on May 1, 2002 pursuant to a motion to reopen/reconsider.

<sup>4</sup> Various decisions, including BALCA decisions, support the proposition that 35 – 40 hours of work per week constitutes full-time employment. *Matter of Walters*, 94-INA-7 (ALJ Nov. 30, 1994), *Matter of Central Korean Evangelical Church*, 88-INA 336 (BALCA 1988).

<sup>5</sup> Two years times 52 weeks per year times 40 hours per week equals 4,160 work hours.

<sup>6</sup> Three and one quarter years times 52 weeks per year times 25 hours per week equals 4,225 working hours.

The Form ETA 750, however, requires that the employment be in the job offered, to wit, cook. The beneficiary's employment verification letters appear to show that he worked only as a cook's assistant. The evidence does not demonstrate that the beneficiary has the experience stated as mandatory in the Form ETA 750. The petition's approval was correctly revoked for good and sufficient cause on this basis, which has not been overcome on appeal.

The remaining ground for the decision of revocation is based on the beneficiary's statements at his interview that the petitioner is licensed for five residents, that it currently has four residents, and that it employs the beneficiary and another person both as full-time cooks. The decision was based on the common-sense observation that a facility housing four or five residents will not employ two full-time cooks to feed them.

Counsel does not contest the numbers provided, but asserts that they should not have been used in the decision of revocation without notice to the petitioner and an opportunity to respond, and that they do not support the finding that no *bona fide* job offer exists in this case.

The regulation at 8 C.F.R. § 103.2(b)(16)(i) requires that derogatory information must, if the petitioner is unaware of it, be disclosed to the petitioner prior to being relied upon in an adverse decision. In the instant case, the number of residents the petitioner is licensed to house, the number of residents it actually houses, and the number of full-time cooks it employs are matters of which the petitioner had constructive notice, at least, and no further notice was required.<sup>7</sup>

Even if notice were required, it was given. The record contains a Notice of Intent to Revoke issued July 6, 2005. That notice states,

At the interview conducted, the beneficiary was asked how many people in the facility [as occupants], the beneficiary answered "four people." For the record it is not feasible that the petitioner has requested the services of a full-time employee, when already there is another full-time employee and when the facility only has four occupants for adult care.

That notice informed the petitioner that the director intended to revoke the petition for good and sufficient cause and also informed the petitioner of the substance of the evidence upon which the decision of revocation subsequently relied.

When a denial is to be based on adverse evidence of which the petitioner is unaware the petitioner must first be informed of the adverse evidence and accorded an opportunity to rebut the adverse evidence and to present his or her own evidence. 8 C.F.R. § 103.2(b)(18)(i). No notice was required in this instance, but, in any event, the notice of intent to revoke issued in this matter contained notice.

---

<sup>7</sup> As to the number of residents for whom the petitioner is licensed, counsel provided a copy of the petitioner's business license, which indicates that it is licensed for five people. Clearly, the petitioner was entitled to no further notice of that fact.

This office approves of the director's notice of the fact that a facility such as the petitioner would not employ two full-time cooks to feed a capacity of five residents. This office disagrees with counsel's assertion that the director's conclusion, that the job offer in the instant case is not *bona fide*, does not follow, or that the determination is reserved to DOL rather than CIS.

Pursuant to 20 C.F.R. §656.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). Approval of the petition was correctly revoked for good and sufficient cause on that additional basis, which has not been overcome on appeal.

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.