

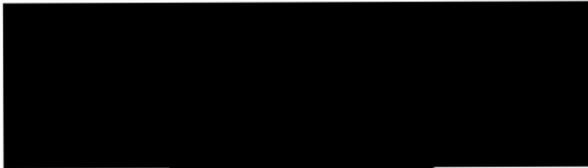


U.S. Citizenship  
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: JUL 13 2007

WAC-02-182-52019

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 employment-based preference visa petition was initially approved by the Director, California Service Center. Based on the result of a permanent residence interview at the Santa Ana District Office, 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 board and care facility for the elderly. It seeks to employ the beneficiary permanently in the United States as a cook (diet cook). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. As set forth in the director's January 27, 2006 NOR, the director determined that the petitioner has not submitted sufficient evidence in rebuttal to the NOIR and has not overcome the grounds for revocation. The director revoked the approval of the petition accordingly.

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

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 petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence.

The Form ETA 750 states a different capacity than the one in which the petitioner intends to employ the beneficiary. The petitioner is not in compliance with the terms of the Form ETA 750 and has not established that the employment will be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966).

The beneficiary must engage in the profession relevant to the Form ETA 750 and applicable to this Immigrant Petition for Alien Worker (I-140). As stated in *Matter of Semerjian*, 11 I&N Dec. 751, 754 (Reg. Comm. 1966):

It does not appear to have been the wish of the Congress to award such a preference to an alien who, although fully qualified as member of the professions, had no intention of engaging in his profession or, at least, in a related field for which he was fitted by virtue of his professional education or experience.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO

considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>. On appeal, counsel submits a brief without any additional evidence. Other relevant evidence in the record includes a job offer letter dated November 30, 2002 from the petitioner submitted with the initial filing. The petitioner also submitted the following as evidence to rebut the grounds of revocation in response to the NOIR: a copy of an undated job offer letter from the petitioner and an undated statement from the petitioner detailing the beneficiary's duties with number of hours and times she needs to perform each of the duties. The record does not contain any other evidence relevant to the petitioner's job offer of a permanent, full-time diet cook.

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, was filed on April 25, 2001 and the job offer consists of the name of job title: "Cook/Diet"; number of working hours per week: 40; the wage offered: \$10.96 per hour; the name of employer: "[REDACTED]", the instant petitioner; the location of the employment: "[REDACTED]" and the duties:

Plan, prepare and cook low sodium, non-fat and no-cholesterol meals according to proper therapeutic diets. Prepare, clean, measure and mix ingredients following dietary requirements. Observe and test foods being prepared to check for consistent taste and quality. Bake, steam, broil or roast meats, fish and poultry. Cook and season vegetables, soups, stews, desserts, etc. **Bake pies, cookies, muffins and breads. Weigh portion.** Estimate consumption and requisition supplies. Plan and develop recipes and menus for therapeutic diets. Plan and follow weekly menu guide to prepare and cook foods following prescribed diets for individual trays for patients.

The labor certification was approved for the beneficiary to fill the full-time cook position with the petitioner at the location mentioned above to perform the above quoted duties. The petitioner submitted a job offer letter with the initial filing. The job offered letter dated October 21, 2005 states in pertinent part that:

This letter is to confirm that the job offer to [the beneficiary] is still valid. She will be employed on a full-time permanent basis earning \$10.96 per hour once having obtained legal permanent residency in the United States. She will assume the position of Cook.

Her job duties are as follows:

Plan, prepare and cook low sodium, non-fat and no-cholesterol meals according to proper therapeutic diets. Observe and test foods being prepared checking for consistent taste and quality. Bake, steam, broil or roast meats, fish and poultry. Cook and season vegetables, soups, stews, desserts, etc. Bake pies, cookies, muffins and breads. Plan and develop recipes and menus for therapeutic diets. Plan and follow weekly menu guide. Prepare,

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

clean, measure and mix ingredients following dietary requirements. Weigh portion. Estimate consumption and requisition supplies.

The record shows that on October 26, 2005, CIS conducted an interview with the beneficiary regarding her Form I-485 application. During the interview the beneficiary stated that she was currently employed by the petitioner as a cook preparing three meals a day for residents of the care facility (1/2 to 1 hour) with the remainder of the day (7-7 1/2 hours) spending on patient care. The beneficiary also stated that she would continue to perform the same duties as presently assigned upon approval of her adjustment of status application. The beneficiary provided inconsistent information about the permanent, full-time job offer in the position of diet cook with the petitioner. 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 (BIA 1988).

On appeal counsel asserts that the district Adjudication Officer misunderstood and misconstrued the statements the beneficiary made during the interview as to the duties and the amount of time she spends on those duties. She stated that she spends 1/2 to 1 hour per meal (plus one snack) per day on her cooking duties, for a total of 2 to 4 hours per day and that the remainder of her day is spent planning, shopping, serving, and cleaning. The record does not show that counsel attended the interview. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel did not submit any affidavit of the beneficiary regarding the alleged error in communication between the interviewing officer and the beneficiary. While the AAO concurs with counsel's argument that the beneficiary is not required to be employed in the proffered position while the I-140 and /or I-485 is pending, the petitioner must establish that a permanent, full time diet cook position exists and the job offer is *bona fide* and thus, must resolve the inconsistency caused by the beneficiary's statement during the interview.

Counsel also asserts that the petitioner's job offer letter and statement detailing the beneficiary's duties with hours she needs to perform each of duties submitted in response to the NOIR as *prima facie* evidence established that the petitioner offers a permanent, full-time diet cook position to the beneficiary and that the beneficiary would perform the duties as set forth on the Form ETA 750 as a full-time diet cook. Counsel submitted an undated job offer letter from [REDACTED], Administrator/Licensee of the petitioner. This job offer letter is a copy of the job offer letter dated November 30, 2002 and submitted with the initial filing but without a date. The job offer letter confirms that the beneficiary would be employed on a full-time permanent basis earning \$10.96 per hour and performing the duties set forth on the Form ETA 750 once having obtained legal permanent residency in the United States. The detailed job description and time schedule indicates that the beneficiary will work 9 hours per day during the week days and some hours on Saturdays. The petitioner did not submit any independent objective evidence, such as size and location of the facility, number of patients, and menus of diets, to support her assertions, nor did the petitioner explain how a small care facility with six residents requires a diet cook to work more than 45 hours a week. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, the declarations that have been provided on appeal 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). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of an appeal are not evidence and thus, as is the case with the arguments of counsel, are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). *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 job offer letter and job description with schedule submitted in rebuttal are not notarized, and thus, do not suffice to resolve any inconsistencies in the instant case.

Counsel's assertions on appeal cannot overcome grounds of the director's revocation. The AAO concurs with the director's decision that the petitioner failed to establish that the full-time permanent diet cook position existed when the labor certification application was filed and continues to exist presently, and that the beneficiary will be employed as a full-time permanent diet cook with the petitioner. The director had good and sufficient cause to revoke the approval of the petition. Accordingly the director's revocation of the approval of the petition is affirmed.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility. We will discuss whether or not the petitioner has demonstrated that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date as set forth on the Form ETA 750. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The certified Form ETA 750 in the instant case indicates that the position offered is "Diet Cook" and that the position requires two (2) years of experience in the job offered as a diet cook. The Form ETA 750 does not indicate that the petitioner will accept any experience in a related occupation in lieu of the one in the job offered.

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.

The record of proceeding contains a faxed copy of an experience letter from [REDACTED] Manager of Peach Blossom Restaurant in Quezon City, Philippines. This undated letter states in pertinent part that:

This letter is to certify that [the beneficiary] has worked at the Peach Blossom Restaurant, in Quezon City, Philippines, as a cook. She has been employed from 1993 to 1998 at this restaurant establishment.

The experience letter certifies the beneficiary's five years of experience as a cook, however, it does not include a specific description of the duties performed by the beneficiary as required by the regulation at 8 C.F.R. § 204.5(g)(1). Without a specific description of the duties performed by the beneficiary in the position of cook at Peach Blossom Restaurant, it is not clear whether or not the beneficiary possessed the requisite two years of experience in the position of diet cook to perform the duties described in Part 13 of the Form ETA 750. Therefore, the petitioner failed to demonstrate that the beneficiary qualified for the proffered position with the experience letter from Peach Blossom Restaurant.

In addition, the experience letter provides inconsistent information about the beneficiary's employment with the restaurant. The letter certifies that the beneficiary worked as a cook for 5 years from 1993 to 1998, while on the Form ETA 750B the beneficiary claimed to have worked for the restaurant from June 1995 to April 1998. The beneficiary also represented on that form that she attended Centro Escolar University in Manila, Philippines from June 1992 to March 1997. The record does not contain any explanation how the beneficiary managed both full-time studies in Manila and a job as a full-time cook in Quezon City at the same time during the period from 1993 to March 1997. 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. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The AAO is not convinced with the experience letter from Peach Blossom Restaurant that the beneficiary worked for at least two years prior to the priority date of April 25, 2001 as a full-time cook. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed. The director's decision on January 27, 2006 is affirmed. The approval of the petition remains revoked.