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U.S. Citizenship
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JUN 05 2007

FILE: WAC 01 258 50922 Office: CALIFORNIA SERVICE CENTER

Date:

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 for

Robert P. Wiemann, Chief
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/Chinese, foreign specialty. 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 determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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.

As set forth in the director's March 10, 2005, denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The director noted inconsistencies in information pertaining to the beneficiary's employment experience.

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 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 March 8, 2001.

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.¹

On appeal, counsel submits two declarations to prove that the beneficiary has met the two years of experience in the job cook/Chinese, foreign specialty as required by the terms of the labor certification.

Other relevant evidence in the record includes the following documents: the Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor; a Certificate of Employment made September 28, 2000 as translated; a certificate of attainment stating that the beneficiary had passed "the required technology examination" qualifying him as a 2nd level cook, from Tianjin City, P.R. China dated April 30, 1993; the petitioner's restaurant menu; a copy of the biographic page from the beneficiary's passport and the beneficiary's U.S. entry visa; and a letter outlining the job offer from the petitioner to the beneficiary

¹ 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).

dated June 11, 2001. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the beneficiary was employed at the [REDACTED] from August 1988 to August 1996. Counsel contends that the [REDACTED] was demolished in the first half of 2004.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and 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/Chinese, foreign specialty. In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education
- Grade School X
- High School X
- College Blank
- College Degree Required Blank
- Major Field of Study Blank

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A relating to other special requirements is blank.

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 relevant work experience, he represented that he had been employed as a cook/Chinese cuisine at the [REDACTED], Tianjin City, China from August 1988 to August 1996. The job duties stated are similar to the job duties stated in ETA 750, Part B, of the labor certification. Other than foregoing, the beneficiary indicated he was unemployed from September 1996 to February 1997, and, that he was an English language student in the United States from March 1997 to present (i.e. February 20, 2001).

The regulation at 8 C.F.R. § 204.5(1)(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.

(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.

With the petition, the petitioner submitted, a Certificate of Employment made by the general manager of the [REDACTED], Tianjin City, China as dated September 28, 2000. The translated Chinese language certificate stated that the beneficiary had worked as a cook at that location from August 1988 to August 1996 and that the beneficiary's job duties were similar to those stated in the labor certification. The certification did not conflict with the Form ETA 750, Part B information stated above.

The director requested that the U.S. Embassy Consular Section, Beijing, China, investigate this reference. The investigator reported to the director on November 17, 2004, and on November 26, 2004, the results of this investigation. The telephone number provided by the petitioner was not the [REDACTED] but a private residence. A woman at that number stated that she did not know the beneficiary. A second telephone call to the same woman resident revealed that she had that telephone number for three to four years (i.e. since 2000/2001). The woman's address, while in [REDACTED] Tianjin, P.R. China, was different from that given for the restaurant. The investigator then received the telephone numbers for the address given, that is the [REDACTED] [REDACTED] Tianjin City, P.R. China. According to the investigator there were two separate companies at that address at [REDACTED]. These were the [REDACTED] Trading Company and a Labor Service Center. A respondent at the Labor Service Center stated that there had never been a restaurant existing in that neighborhood. [REDACTED] did not have a telephone listing in the Tianjin local telephone directory.

As already stated, counsel submits two declarations to prove that the beneficiary has met the two years of experience in the job cook/Chinese, foreign specialty as required by the terms of the labor certification.

The Declaration of [REDACTED]

[REDACTED] declares on March 31, 2005, that he is a resident of Heping District, Tianjin City, P.R. China, and, that he had worked with the beneficiary at the [REDACTED] from 1988 to 1992. He states that the beneficiary worked at the restaurant as a cook from 1988 to August 1996. [REDACTED] verifies the address of the [REDACTED], Tianjin City, China, and its telephone number to be 28191011, that is the same address and number provided by [REDACTED] in his certificate dated September 28, 2000. [REDACTED] stated that the [REDACTED] was demolished in the first half of 2004.

The Declaration of [REDACTED]

[REDACTED] declares on March 31, 2005, that he is a resident of Heping District, Tianjin City, P.R. China, and, that he had worked as a cook with the beneficiary at the [REDACTED] from 1988 to 1991 who was also a cook. [REDACTED] described the beneficiary's job duties. [REDACTED] verifies the address of the Xiaojie [REDACTED] as [REDACTED], Tianjin City, China, and its telephone number to be 28191011, that is the same address and number provided by [REDACTED] in his certificate dated September 28, 2000. [REDACTED] stated that the [REDACTED] was demolished in the first half of 2004.

The problem that arises in this case is the multiple inconsistencies in information provided by the beneficiary, and the three declarants mentioned above, and, the lack of independent, objective evidence of the existence of [REDACTED], at [REDACTED] Tianjin City, China and the beneficiary's employment there. For example, counsel and a declarant [REDACTED] state that the restaurant premises were torn down before August 2004, but the consular investigator located two businesses at the reputed address of the restaurant in November 2004, and spoke to one of the business informants. The petitioner has not attempted to rebut or explain with independent objective evidence the inconsistencies mentioned above.

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 independent, objective evidence establishes that the beneficiary has two years of experience as cook/Chinese, foreign specialty. The petitioner has submitted a certificate of attainment stating that the beneficiary had passed "the required technology examination" qualifying him to be a 2nd level cook, from Tianjin City, P.R. China dated April 30, 1993. There is no information regarding the beneficiary's training or education as a cook prior to his appearing in the record as a cook in 1988 at [REDACTED]. Based on the record and evidence submitted, the beneficiary worked as a cook for approximately five years prior to receiving any record of attainment in his chosen profession. Neither the certificate of employment made by [REDACTED] nor the declarations of [REDACTED] or [REDACTED] are notarized affidavits but un-sworn statements. There is no employer's or trainer's affidavit, document, business license, tax receipts, governmental letter, photograph, or pay statement contained in the record of proceeding that establishes that the beneficiary was employed for two years in an employment capacity with duties similar to the duties of the proffered position by the [REDACTED] at [REDACTED], Tianjin City, China.

As found in the record of proceedings, the investigation conducted by the United States Embassy revealed that the facts stated in the employment certificate of experience dated September 28, 2000 submitted with the I-140 were not verified. The investigator reported positive evidence that the telephone number given as the telephone number of [REDACTED] was a private residence by speaking to the occupant during the time period when the restaurant was reputed to exist, and that the street address given was occupied by two other unrelated businesses. Further the local telephone directory did not contain a number for the restaurant. There was no rebuttal evidence submitted by counsel to the consular investigator's report as set forth in the director's decision dated March 10, 2005. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner had not established by a preponderance of the evidence submitted that the beneficiary has the requisite experience as stated on the labor certification application. The petitioner has not met that burden.

ORDER: The appeal is dismissed.