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FILE: [REDACTED]
EAC 02 252 51317

Office: VERMONT SERVICE CENTER

Date: JUN 27 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[REDACTED]

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 immigrant visa petition was initially approved by the by the Director, Vermont Service Center. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. The director subsequently revoked approval of the petition. The petitioner moved to reopen and reconsider the revocation. The director determined that the grounds for revocation had not been overcome and affirmed the revocation decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision to revoke the approval will be withdrawn and the case will be returned to the director for further investigation and review.

The petitioner is an Indian restaurant. It sought to employ the beneficiary permanently in the United States as a cook (Indian specialty). As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor.

The beneficiary had previously applied for asylum. While she was under proceedings, the petitioner sponsored her for labor certification and subsequently filed an Immigrant Petition for Alien Worker (I-140) on July 25, 2002. It was initially approved on December 10, 2003.¹

On June 18, 2004, erroneously citing the regulation at 8 C.F.R. § 205.1(a)(3)(iii)(C), which provides for automatic revocations based upon written notice of withdrawal, the director concluded that the I-140 was approved in error based on contradictions relating to her work experience that she had claimed to have obtained in Bangladesh. The director revoked the approval of the I-140 on June 18, 2004. In a motion to reopen and reconsider, dated July 13, 2004, the petitioner, through counsel, submitted additional evidence and asserted that the revocation lacked justification and that the petition should remain approved. On August 2, 2005, the director found that the grounds of the denial had not been overcome and reaffirmed the denial of the petition. The director noted that counsel's letter was the only evidence submitted in opposition to the petition's revocation. On appeal, counsel asserts that his letter had been supported by six exhibits in support of the beneficiary's claimed work experience.

Section 205 of the Act, states: "[t]he 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."

As stated above, it is noted that the director's revocation should have proceeded pursuant to the regulation at 8 C.F.R. § 205.2(b), which provides for the issuance of a notice of intent to revoke.²

¹ The record indicates that following the initial approval of the I-140 by the director, the beneficiary's application of adjustment of status was approved by Immigration Judge, [REDACTED].

² It provides that "revocation of the approval of a petition of [or] self-petition under paragraph (a) of this section will be made only on notice to the petitioner or self-petitioner. The petitioner or self-petitioner must be given the opportunity to offer evidence in support of the petition or self-petition and his opposition to the grounds alleged for revocation of the approval."

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 regulation at 8 C.F.R. § 204.5(l)(3) further 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.

The petitioner must also show that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, Form ETA 750 was accepted for processing on April 4, 2001. The ETA 750A specifies that an applicant for the certified position must have two years of experience in the job offered of Indian specialty cook.. 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). The beneficiary signed the Form ETA 750B on March 22, 2001.

The beneficiary cited two jobs on the ETA 750-B, which requests the applicant to list her employment history for the past three years and to list any other jobs that are related to the position for which she is seeking certification. The beneficiary's first claim is that she has worked as a cashier since 1994 at "Dunkin Donuts" in Brooklyn, New York. The other claimed employment occurred in Dhaka, Bangladesh for the Sky Room Restaurant, Ltd., where the beneficiary states that she worked as a cook, 48 hours per week, from January 1, 1990 to February 1993. The beneficiary also stated "none" for the jobs held from 1993 to 1994.

No other qualifying employment is listed. The claimed experience working for the Sky Room Restaurant is the issue in dispute. In the director's June 18, 2004, decision, she concluded that the beneficiary's testimony offered during her removal proceedings on February 11, 2002, was inconsistent with her alleged employment at the Sky Room Restaurant because the beneficiary had testified that she stopped working in 1990 when she was married and her husband supported her. The director also states that the beneficiary "also stated that from June 1993 to the present time she has been unemployed. She claimed on the instant petition to have worked as a cook from January 1991 to February 1993, in contravention of her sworn statement in her asylum hearing."

It is noted that the transcript of the February 11, 2002, proceedings, reflects the following:

[Counsel] to [beneficiary]

Q. When did you graduate with your M.A.

A. 1986

Judge to [beneficiary]

Q. Had you ever, what do you use that degree for?

A. In Bangladesh I was, I was in the teaching line, but after having a Master's degree I could have, I could have gone, got a better job. I could have gone anywhere.

Q. What was your job in Bangladesh?

A. I was a teacher in the school.

Q. Soil science, is that related to agriculture somehow?

A. Yes, soil science is involved, very intricately involved with agriculture.

Q. And what did you teach?

A. I was a science teacher.

Q. Where?

A. Sandras Bekradit (phonetic sp.) and high school.

Q. And, well, when did you stop that job?

A. I joined, I joined the school after I completed my studies and I finished my job in 1990.

Q. 1990? And why did you quit that in 1990?

A. I quit [sic] the job because I got married and I had some political problems also.

Q. Well, how did you support yourself?

A. My husband supported me.

Q. And what did he do?

A. He was in the garment industry.

Q. Okay.

(Transcript, pp. 16-17).

Related to the claimed work experience, the record also contains two biographical questionnaires (Form G-325 A). The first one, signed by the beneficiary on August 25, 1993 and submitted in connection with her asylum application, asks for the employment for the last five years. The beneficiary claims no employment from June 1993 to the present time. Below this section, the questionnaire also asks for the last occupation abroad if not shown above and to include all information requested above. The beneficiary only lists "teacher."

The second Form G-325 was signed by the beneficiary on November 7, 1993 and submitted in connection with her application for permanent residency. On this form, the beneficiary lists her U.S. employment as commencing on July 2003 at "The Great India Restaurant" to the present time, as well as at Dunkin Donuts from January 1, 1994. The last occupation abroad is stated as having been a cook at the Skyroom Restaurant in Dhaka, Bangladesh from January 1991 to February 2003.

It is unclear how the beneficiary signed a form in November 1993 claiming employment that would not have begun until 1994. The AAO finds this G-325 to be not credible. It is further noted that the first G-325, signed in August 1993, omits employment allegedly beginning in July 1993 at "The Great India Restaurant."

Relevant to the beneficiary's claimed qualifying employment in Bangladesh at the Sky Room Restaurant, counsel provides in rebuttal: 1) an affidavit from the beneficiary; 2) a copy of a certificate issued to the beneficiary on January 7, 1991, signifying the completion of a domestic cooking class held from July 1990 to December 1990; 3) a notarized statement from a chartered accountant in Bangladesh stating that he audited the records of the Sky Room Restaurant at Kamal Atatuk Ave., ABC House (12th Floor), Banani, Dhaka 1213, Bangladesh, and that he found that the beneficiary had worked there full-time as a cook from January 10, 1991 to February 28, 1993 earning Taka 2,000 per week; and 4) a copy of a statement, dated June 28, 2004, from the Sky Room Restaurant's managing director, "Sabina Alam," confirming the beneficiary's employment as a cook, as well as stating that the beneficiary supervised six kitchen helpers. [REDACTED] adds that she interviewed the beneficiary personally and hired her, being "unaware that the [beneficiary] had been involved in any kind of political activity." The original of another statement from [REDACTED], dated August 22, 2005, was also submitted by counsel, appearing to contain the same statement as the 2004 statement, except omitting the sentence relating to personally interviewing the beneficiary.

The beneficiary's affidavit explains that she resigned her teaching job because of low wages and political difficulties. She states that she was offered the position at the Sky Room Restaurant in January 1991, which paid nearly \$50.00 (U.S. equivalent) per week, and that she stayed there for over two years. She adds that had she been asked about her subsequent employment, she would have mentioned it at the asylum hearing.

It is observed that while the beneficiary's two G-325s are questionable, as well as containing contradictions to her ETA 750B statements of dates and jobs held, the beneficiary's statements in answer to the questions posed at the asylum hearing do not clearly demonstrate that she never was subsequently employed. In view of the petitioner's subsequent submissions relating to her employment at the Skyroom Restaurant, including the notarized chartered accountant's letter and the letter from the managing director, the case will be remanded for further review and investigation. If the director's investigation shows that the beneficiary's claimed employment at the Skyroom Restaurant has been misrepresented, the director shall revoke the petition's approval upon notice as provided in 8 C.F.R. § 205.2 and invalidate the labor certification based on fraud or willful misrepresentation pursuant to his authority set forth in the regulation at 20 C.F.R. § 656.30(d).

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of section 203(b)(3)(A)(i) of the Act. Similarly, the petitioner may provide additional

evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.