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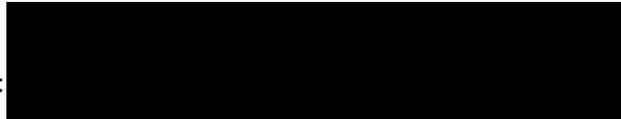


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FILE: EAC-01-076-50109 Office: VERMONT SERVICE CENTER

Date: NOV 17 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 employment-based preference visa petition was initially approved by the Director, Vermont Service Center. In connection with results of the beneficiary's consular interview, the consular officer in Islamabad, Pakistan made a recommendation to the director to revoke the petition's approval because inconsistent and/or contradictory information was obtained. 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 appeal will be dismissed. The petition will remain revoked.

The petitioner is a Continental restaurant. It seeks to employ the beneficiary permanently in the United States as a Continental Specialty 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 determined that the petitioner had not established that the beneficiary was qualified for the proffered position and revoked the petition accordingly. The AAO will evaluate whether or not the director correctly revoked the approved petition based on whether or not the beneficiary is qualified to perform the duties of the proffered position.

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 issue to be discussed in this case is whether or not the petitioner established the beneficiary's qualifications for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is October 4, 2000. 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, 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).

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 Continental specialty cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	Literate
	High School	Literate
	College	0
	College Degree Required	N/A
	Major Field of Study	N/A

The applicant must have two years of experience in order to perform the job duties listed in Item 13, which states the following: "Prepares, seasons and cooks soups, meats, vegetables and other food stuff according to recipe. Portions and granishes [sic] foods."

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 work experience, he indicated that he was a cook for the Iqbal Hotel and Sweet House located at Chowk Fowara, Attock City, Pakistan, from January 1988 through March 1991, where he "[p]repared, seasoned and cooked Pakistani and Continental specialty dishes, sauces and desserts."

With the initial petition, the petitioner submitted a letter on Iqbal Hotel & Sweet House letterhead certifying that the beneficiary worked in the hotel as a cook from January 1988 to March 1991. The letter was signed by the "Manager" in front of a notary and provided contact information.

The petition was approved on July 20, 2001. The beneficiary sought to enter the United States with the approved employment-based immigrant visa and was interviewed at the American consulate in Islamabad, Pakistan. An unclassified memorandum is in the record of proceeding from the Islamabad, Pakistan Consular Section of the Embassy of the United States of America dated July 25, 2002, to the director. The memorandum states the following:

The interviewing officer assessed during the interview that [the beneficiary] does not intend to work at the job he has been hired for. [The beneficiary] does not speak English and can barely read. It is an officer's observation it is difficult for someone to work in an English-speaking environment particularly when he is not familiar with the language. The interviewing officer also noticed that the beneficiary hasn't worked as a chef since the very early 90's. The officer also had doubt about the authenticity of the beneficiary's job letter that he provided to show his work experience. The office referred this case to Fraud Prevention Unit (FPU) to investigate the authenticity of job letter. The applicant revealed during the interview that he can only cook Pakistani cuisine, but the fact that he will work in a non-Pakistani restaurant gave reasons to the officer to be suspicious about his intentions to work for the job he has been hired.

A representative of the [FPU] visited the hotel where the beneficiary claimed to work. The representative met with [the owner's son] and inquired if [the beneficiary] ever worked . . . [The son] made a written statement in which he confirmed that the beneficiary never worked . . . and that he issued the fake job letter since the landowner of his hotel requested him to do so.

A signed narrative from the FPU officer and the owner of Iqbal Hotel and Sweet House's son, Muhammad Islam (Mr. Islam), is also in the record of proceeding. In that narrative, the FPU officer explained that he visited the Iqbal Hotel and Sweet House and presented a photograph of the beneficiary to shopkeepers near the hotel and to employees at the hotel itself. "All but one shopkeeper shook their heads" that they knew the beneficiary, and the one shopkeeper who knew the beneficiary stated that he was not an employee of the hotel but visited there sometimes. The hotel employees did not know the beneficiary but Mr. Islam did, who explained that his father, the owner, was

not present at that time. ██████ said the hotel employees were paid on a daily basis and there were no written personnel records. The FPU officer explained ██████ that he needed to find out the truth of the matter and that fraud cases were referred to "FIA, and that people who aided fraud cases sometimes found themselves in trouble with the FIA, too. ██████ first stated that the beneficiary worked for the hotel as a "learner" for several years and then changed his story and later said that the beneficiary *never* worked for the hotel but the hotel's landlord requested the letter as a favor for the beneficiary since they belonged to the same village.

Because of the adverse information resulting from the investigation, the director issued a notice of intent to revoke (NOIR) the petition on February 24, 2003. The director informed the petitioner about the results of the investigation and provided the petitioner 30 days to rebut the evidence. The director revoked the petition on August 12, 2003 stating that the petitioner failed to submit a timely response to its NOIR¹.

On appeal, counsel asserts that its response was timely and the director's decision was issued in error. The petitioner submits evidence that its response to the director's NOIR was received by CIS on time. Included in that response is a letter from counsel explaining that the FPU acted in an abusive and intimidating manner that made Mr. ██████, who was a child when the beneficiary worked for the hotel, say that the beneficiary never worked there when he did not really know. Counsel asserts that there is no requirement that the beneficiary be able to speak or read English because they learn through observation, and that the beneficiary's concession that he cannot cook non-Pakistani cuisine merely reflects his veracity and credibility and is not relevant of his qualifications to perform the duties of the proffered position. Counsel also asserts that it was improper for the FPU officer to obtain a statement from Mr. ██████ instead of the hotel's owner, ██████ father. The petitioner submitted a signed and notarized affidavit from ██████ owner and manager of the Iqbal Hotel & Sweet House, who stated that the beneficiary did work as a cook from January 1988 to March 1991 and does not need to speak or read fluently in any language because cooks learn through observation. Additionally ██████ stated that ██████ was a child at the time of the beneficiary's employment at the hotel and thus could not remember it, and stated that the FPU officer erred by not speaking to him and by coercing, threatening, and pressuring his son into signing an untrue statement. Finally, Mr. Iqbal stated that "[a]s my hotel is located in Pakistan, the dishes which [the beneficiary] prepared were Pakistani dishes."

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).

The AAO finds that the director had good and sufficient cause to revoke the approval of this petition. While the letter submitted initially with the petition meets most of the regulatory requirements at 8 C.F.R. § 204.5(1)(3)² on

¹ The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center director. See 8 C.F.R. § 103.5(a)(1)(ii). The director failed to adjudicate the petitioner's appeal as a motion to reopen or reconsider. Thus, the AAO has adjudicated the appeal on its merits instead of remanding to the director.

² The regulation at 8 C.F.R. § 204.5(1)(3) provides:

its face, the beneficiary rose suspicions concerning the authenticity of the factual assertions and supporting evidence at his consular interview. The director notified the petitioner with sufficient detail concerning the reasons for his intent to revoke the petition and provided copies of correspondence that provided many details from the consular officers' investigation of the beneficiary's qualifications to perform the duties of the proffered position.

The AAO concurs with the director's determination because by the beneficiary's concessions in a consular interview, [REDACTED] statement in his affidavit, and contrary to counsel's assertions, the beneficiary has not demonstrated that he could cook non-Pakistani dishes as the proffered position requires and in contravention of his represented employment experience at the Iqbal Hotel & Sweet House. As noted above, 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 requirements³. In response to the director's NOIR, counsel asserted that "the fact that [the beneficiary] only has experience preparing Pakistani dishes is irrelevant in determining his intention to work for the [p]etitioner as a Continental Specialty cook." However, a continental cook is, by definition, a cook who can cook dishes other than Pakistani dishes. "Continental" is defined as "relating to, or characteristic of a continent . . . of or relating to the continent of Europe excluding the British Isles . . . relating to, or being a cuisine derived from the classic dishes of Europe and esp. France." See *Merriam Webster's Collegiate Dictionary* 251 (10th Ed., 1994). The proffered position is for a charcoal beef house and states nothing about Pakistani cuisine. The successful applicant for this position must be able to cook continental cuisine⁴. The successful applicant for this position must be able to cook non-Pakistani cuisine. The beneficiary's own admission that he cannot cook anything but Pakistani cuisine renders him unqualified for the proffered position⁵. The proffered position, as delineated on the Form ETA 750A, requires two years of

(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.

³ See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. at 406. See also, *Mandany v. Smith*, 696 F.2d at 1008; *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d at 1.

⁴ Although the duties listed in part 13 of the Form ETA 750A would apply to any cook position, CIS cannot ignore the title of the proffered position.

⁵ If the petitioner were eliminating a substantial duty of the proffered position, namely from a continental cook position to a Pakistani cook position, then the Form ETA 750 states a different capacity than the one in which the

experience as a continental cook with job duties that are generic cooking responsibilities and do not mention Pakistani cooking skills, and the requirements clearly do not permit qualifying employment experience in a related cooking position. There is a separate box concerning experience requirements in related occupations for which the petitioner set forth "0" years of experience.

The AAO also notes that no other supporting documentation, such as paystubs, eyewitness accounts, pictures, tax records, personnel records, or any other type of evidence was provided to support the assertion that the beneficiary was employed as a cook for Iqbal Hotel and Sweet House. Mr. ██████ assertion that the FPU officer conducted himself in an abusive, threatening, and coercive manner cannot be verified from the evidence in the record of proceeding. The FPU officer explained to ██████ son the consequences of not telling the truth, which is typical in fraud investigations, ██████ then voluntarily offered testimony in the absence of Mr. ██████ his father. ██████ could have contacted the FPU officer if he had information and evidence to provide. The AAO is loath to overturn the results of an overseas investigation conducted in person and on site by a sworn officer of the U.S. Embassy from which a detailed report is provided.

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. 582, 591-592 (BIA 1988) 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."

Additionally, the AAO notes that there is no evidence that the beneficiary is literate as the proffered position requires. The beneficiary is unable to read or speak English, which counsel correctly notes is not a requirement of the proffered position; however, the beneficiary's ability to read or write in any language is required by the proffered position.

The AAO concurs with the director's decision and determines that the director had good and sufficient cause to revoke the petition based on the consular officer's report and insufficiency of other evidence contained in the record of proceeding concerning the beneficiary's qualifications for the proffered position.

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.

petitioner intends to employ the beneficiary. The petitioner would not then be in compliance with the terms of the Form ETA 750 and would not have established that the employment would be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966). On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. See *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

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ORDER: The appeal is dismissed. The petition remains revoked.