

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

PUBLIC COPY

BC



FILE:



Office: TEXAS SERVICE CENTER

Date: DEC 06 2006

SRC 04 040 50588

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, Texas Service Center, denied the employment-based visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 the 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). 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 Department of Labor. Here, the request for labor certification was accepted for processing on April 29, 2002. The labor certification states that the position requires training consisting of two years of apprenticeship and also requires two years of experience in the job offered.

The employer named on the Form ETA 750 is Main Garden Fayetteville Incorporated d/b/a Main Garden Super Buffet of Fayetteville, North Carolina. Both the Form I-140 petition and the Form ETA 750 state that the petitioner would employ the beneficiary in Fayetteville.

On the Form ETA 750, Part B the beneficiary stated that he had worked 40 hours per week as a Chinese specialty chef at the China Garden Restaurant in Cleveland, Ohio from April 1999 to June 2001. The beneficiary stated that he also worked 40 hours per week as a Chinese specialty chef from July 2001 until at least April 19, 2002, the date he signed that form, for the petitioner, Main Garden of Fayetteville, North Carolina.

With the petition counsel submitted a letter dated October 17, 2003 from [REDACTED] who represents herself to be the petitioner's owner. Counsel also provided the petitioner's 2000, 2001, and 2002 Form 1120, U.S. Corporation Income Tax Returns, all of which state that [REDACTED] then owned 100% of the petitioner.

The October 17, 2003 letter reiterated the beneficiary's claims of qualifying employment for China Garden in Cleveland and the petitioner, Main Garden, in Fayetteville. In addition the petitioner's owner stated that the beneficiary trained as a chef for two years at his uncle's restaurant in Hong Kong, and was promoted to the position of chef at the end of 1998.¹

Counsel also submitted a letter dated October 17, 2003 from Hing Mau Wong, who represents that he is the owner of the China Garden Restaurant in Cleveland, Ohio. That letter states that the beneficiary worked as a chef at China Garden from April 1999 to June of 2001.

In support of the claim of employment for the petitioner counsel submitted the beneficiary's 2001 and 2002 Individual Income Tax Returns including corresponding Form W-2 Wage and Tax Statements. Those statements show that the petitioner paid the beneficiary \$5,055 and \$14,400 during those years, respectively. The 2001 return shows that the beneficiary's occupation was cashier. The 2002 return does not indicate the beneficiary's occupation.

Because the evidence submitted did not demonstrate that the beneficiary has the requisite two years of training the Texas Service Center, on September 22, 2004, issued a Notice of Intent to Deny in this matter requesting evidence of the beneficiary's two years of qualifying training.

In response counsel submitted a letter dated September 29, 2004 from Hing Mau Wong that asserts that he is the owner of the First Wok Restaurant in Titusville, Florida. That letter states that the beneficiary worked for First Wok, in Titusville, as a chef's assistant beginning in February 1999. In March 1999 until he began training as a chef at that restaurant. He completed this training in February of 2001. That letter does not make clear whether he continued to work for First Wok after February of 2001.

Counsel also submitted a photocopy of a Florida Food Manager Certificate and a Florida Restaurant Association *SafeStaff* certificate endorsed in Chinese and an English translation. The Florida Food Manager Certificate shows that it was issued to the beneficiary on December 13, 2000 and was valid through December 13, 2005. The Florida Restaurant Association *SafeStaff* Certificate states that [REDACTED] trained the beneficiary at First Wok Restaurant in the *SafeStaff* food processing training course, and that the beneficiary completed the course on February 21, 2001.

¹ No evidence of the beneficiary's alleged apprenticeship with his uncle in Hong Kong, asserted by the petitioner's owner but not included on the Form ETA 750B, was ever submitted.

On October 29, 2004 the director issued a decision in this matter. The director noted that the beneficiary's claim of qualifying experience at China Garden Restaurant in Cleveland, Ohio and his claim of experience for First Wok Chinese Restaurant in Titusville, Florida apparently conflict as to the beneficiary's work location and job titles. The director also noted that the beneficiary's tax return asserts that he worked during 2001 as a cashier, rather than as a chef, as he and the petitioner now claim. The director denied the petition finding that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient training and that it did not demonstrate that the beneficiary has the requisite two years of experience in the job offered. The director noted that pursuant to *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988), discrepancies in the record must be resolved with independent objective evidence.

On appeal, counsel submits (1) a Bill of Sale and other documentation pertinent to the transfer of the China Garden restaurant, (2) a copy of the beneficiary's 2003 individual tax return, and (3) a brief.

The beneficiary's 2003 return contains a corresponding W-2 form showing that the petitioner paid the beneficiary \$14,400 during that year. That tax return does not indicate the beneficiary's occupation.

The Bill of Sale and other documentation pertinent to the sale show that [REDACTED] and [REDACTED] sold the China Garden Restaurant in Cleveland, Ohio on December 22, 2000.

In the brief counsel asserts that independent objective evidence in the record shows that the beneficiary worked as a chef at the China Garden Restaurant in Cleveland from April 1999 to June 2001 and since July 2001 for the petitioner in Fayetteville. Counsel further states that the beneficiary received two years of training as a chef during his employment with First Wok Chinese Restaurant in Titusville, Florida beginning in 1999.

Counsel attempted to reconcile the apparently conflicting claims that the beneficiary was employed at China Garden Restaurant in Cleveland, Ohio from April 1999 to June 2001 and at First Wok Chinese Restaurant in Titusville, Florida from February 1999 until at least February 2001. Counsel stated that [REDACTED] owned both restaurants and that the beneficiary's time was split between the Florida restaurant and the Ohio restaurant.² Counsel stated that the second letter was on the letterhead of First Wok because [REDACTED] had by then sold the China Garden in Cleveland.³

This office notes that neither the first nor the second letter from [REDACTED] asserts that the beneficiary's time was split between the two restaurants. The first letter stated that [REDACTED] Wong employed the beneficiary in Cleveland from April 1999 until June 2001. The second letter indicates that the beneficiary worked in Titusville, more than 1,000 miles distant.

² Counsel indicated that the beneficiary was transferred between the two Chinese restaurants as needed.

³ Counsel asserts that [REDACTED] issued the September 29, 2004 letter on the letterhead of First Wok of Titusville because on that date he no longer owned the China Garden in Cleveland. Counsel's explanation does not explain why, if [REDACTED] sold the China Garden Restaurant in Cleveland during December 2000 as the evidence suggests, he issued an employment verification letter to the beneficiary on that restaurant's letterhead on October 17, 2003. This raises an additional issue of credibility. Because that issue did not form any part of the basis of the decision of denial, however, this office will not rely on it in today's decision. If the petitioner attempts to overcome today's decision on motion, however, it should address this additional issue.

Further, counsel was on notice that the petitioner is obliged, pursuant to *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988), to demonstrate the veracity of his amended version of the beneficiary's employment history with independent objective evidence. Counsel provided a bill of sale showing that [REDACTED] sold the Cleveland restaurant during December 2000. However, counsel did not provide any evidence that [REDACTED] Wong owned the restaurant in Titusville, Florida during the same period. More importantly, no documentation was submitted on appeal, such as payroll records, W-2 forms, etc. to demonstrate that the beneficiary "transferred" between the restaurant in Ohio and the restaurant in Florida during 1999 through 2001 "as needed."

Further, no evidence was submitted to overcome the contradictory assertions in the record that the beneficiary began to work for [REDACTED] in February 1999 and that he began working for [REDACTED] during April 1999. Counsel did not provide evidence to reconcile the assertion on the Form ETA 750B that the beneficiary worked for [REDACTED] as a chef, thus satisfying the experience requirement; with the assertion in the September 29, 2004 letter from [REDACTED], stating that the beneficiary worked for [REDACTED] as a chef's assistant, thus satisfying the training/apprenticeship requirement. Moreover, counsel provided no independent objective evidence to reconcile the conflicting assertions in the record; that the beneficiary worked as a chef during 2001; and that he worked as a cashier during 2001; as stated on the beneficiary's 2001 tax return.

Counsel has failed to resolve the various discrepancies in the evidence. That evidence is therefore unreliable and insufficient to show that the beneficiary has the requisite training and experience for the proffered position as stated on the Form ETA 750. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position and the petition was correctly denied on that basis.

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.