U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 09 2007

LIN-02-250-52694

IN RE: Petitioner: [redacted]
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:

[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 preference visa petition was initially approved by the Director, Nebraska Service Center. Based on information obtained during the beneficiary's interview at the U.S. Consulate General in Guangzhou, China and an investigation afterwards, 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 approval of the petition will remain revoked.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook (Chinese 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's approval accordingly.

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 application's filing date, which is December 17, 2001. *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 Chinese specialty cook. In the instant case, item 14 describes the requirements of the proffered position are two (2) years experience in the job offered to perform the following duties as set forth in Item 13:

> Plan menus and cooks Chinese-style dishes pastries, deserts and other delicacies. Prepare food according to the recipes, and prior to cooking. Season and cook food according to prescribed methods. Portion and garnish food. Estimate food consumption and requisition supplies. Plan specialty dishes for holidays.

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 had been employed at [redacted] in China as a Chinese specialty cook from April 1991 to the present (the form was signed on October 31, 2001). He also indicated that he was unemployed from July 2001 to the present.

With the initial petition, the petitioner submitted a letter dated November 30, 2001 on [redacted] letterhead, with the hotel's seal and the name of the writer in Chinese, and its content verifying in English that the beneficiary worked as a cook of Chinese Specialty from April 1991 to the present.

The petition was approved on June 26, 2003. Upon receipt of the returned file with an interview report from the U.S. Consulate General in Guangzhou, the director issued a NOIR on November 2, 2005 giving the petitioner 15 days to submit evidence in opposition to the proposed revocation. The director revoked the approval of the petition on April 26, 2006 stating that the petitioner was granted 30 days to submit a rebuttal but it failed to submit a response.

On appeal, the petitioner asserts that the beneficiary possesses competent cooking skills and has many years of experience working in the kitchen, and in managing kitchen operations. The petitioner also argues that the beneficiary should qualify had it not been for a poorly shot videotape in which he demonstrated his cooking skills, and submits a new videotape to support his assertions.

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 consulate report reveals that the interviewing officer was not convinced of the beneficiary's qualifications for the proffered position at the immigrant visa interview: the beneficiary was only able to reach ten dishes by repeating several dishes when asked to list ten dishes that he knew how to make; when asked to describe how to make a few common Chinese dishes, his descriptions were simple and often incorrect. Therefore, the beneficiary was requested to prepare and submit a video of his preparing five dishes. The beneficiary returned with a video of his cooking, however, the video provided the consular officer with further evidence that the beneficiary did not qualify for an EB-3 skilled worker visa.

The record contains a letter of explanation from the beneficiary submitted in response to the director's NOIR. The letter was received by the director on December 5, 2005, however, it appears that the director did not consider this letter as evidence to rebut the proposed revocation of the approval of the petition. The AAO will review the letter and determine whether the letter of explanation should be considered as evidence and whether it can rebut the ground of revocation based on the consulate report.

In the letter, the beneficiary states that he listed ten dishes upon the officer's request at the interview, and that some of the dishes may look the same from the "western eye" but they are different from a "Chinese

view." With respect to the consul's assertion that he appeared to be unfamiliar and uncomfortable in handling the cleaver, the beneficiary says that it is impossible because he has been doing the same job for several years, that he felt shy and intimidated performing in front of a camera lens because he is just a normal person but not a professional actor or celebrity.

However, the letter of explanation from the beneficiary is not sworn or notarized. The declarations that have been provided 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 a motion or 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).

In addition, the new videotape the petitioner submits on appeal as new evidence to demonstrate the beneficiary's cooking skills is made with NTSC, a foreign video system, and thus cannot be viewed in the United States. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The burden of proof not only includes that when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989) also holds that the submitted evidence must be readable or visible. If the evidence contains foreign language, it must be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. *See* 8 C.F.R. § 103.2(b)(3); similarly, if the evidence contains a foreign video system, it must be converted into the United States compatible video system.

Therefore, the unsown statement of the beneficiary and unreviewable videotape cannot be given any evidentiary weight and the petitioner failed to rebut the ground of revoking the approval of the petition in the instant case. The AAO finds that the director had good and sufficient cause to revoke the approval of this petition.

Beyond the director's decision and the petitioner's assertions on appeal, the AAO has identified additional grounds of ineligibility and will discuss these issues. 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 first issue beyond the director's decision is whether or not the petitioner has established the beneficiary's qualifications with regulatory-prescribed evidence to demonstrate that the beneficiary possessed the requisite two years of experience prior to the priority date.

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

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.

In the instant case, the only evidence submitted in the record relating to the beneficiary's qualifying experience or training required under 8 C.F.R. § 204.5(g)(1) is a letter from a restaurant named [redacted] in China. While the letter submitted initially with the petition appears to meet most of the regulatory requirements on its face, the letter itself rose suspicions concerning the authenticity of the factual assertions and the issue whether the job offer was realistic as of the priority date and remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. First, the letter is on letterhead of [redacted] with the hotel's address, telephone number, company seal and name of the writer. However, those items are in Chinese, and the petitioner did not provide a certified English translation. 8 C.F.R. § 103.2(b)(3) requires that any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. The letter does not meet the requirements.

Second, 8 C.F.R. § 204.5(g)(1) requires an experience letter to include the name, address, and title of the writer. However, the letter from [redacted] does not include the writer's title. Without the writer's title, it is not clear whether or not the writer is authorized to use the hotel seal and issue a letter on behalf of the company, and thus it is not clear whether or not the letter is from the beneficiary's former or current employer as the regulation requires. Third, the letter provides inconsistent information with the Form ETA 750B. The letter was dated November 30, 2001 and states that the beneficiary was employed from April 1991 to the present, i.e. November 30, 2001, while the beneficiary indicated on the Form ETA 750B that he was unemployed from July 2001 to October 31, 2001 when the Form ETA 750B was signed. *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 record does not contain any independent objective evidence to resolve the inconsistency. Finally, the author and the beneficiary share the same last name[1] which is not common in China. That raises a doubt concerning the reliability of the letter. 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. *See Matter of Ho*, 19 I&N Dec. at 582, 591. Therefore, the letter from Yindu Hotel cannot be given significant weight as persuasive evidence to establish the beneficiary's qualifications in the instant case. The petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience as a Chinese specialty cook prior to the priority date with the letter even without considering the consular officer's report.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). The petitioner did not reveal that the owner of the petitioner is a close relative of the beneficiary until the consular office discovered it at the interview. The AAO notes that the beneficiary's wife shares the same last name [redacted]) with the owner of the petitioner and the petitioner filed five immigrant petitions for beneficiaries also named [redacted] and four immigrant petitions for [redacted] (the instant beneficiary's last name). Moreover, the signature of the beneficiary on the letter of explanation appears different from the one on the Form ETA 750B. However, the dating of the Form ETA 750A and the Form ETA 750B appears to come from the same person. The petitioner may have failed to reveal a possible relationship to the beneficiary during the labor certification process before DOL, which may invalidate a *bona fide* job offer, and further failed to establish that a *bona fide* job opportunity was available to U.S. workers.[2]

The second issue is whether or not the petitioner established its continuing ability to pay the proffered wage on the priority date.

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[1] The family name of both the author and the beneficiary is [redacted] Although the record does not contain the author's name in English, the record shows that their last name in Chinese is same.

[2] The regulation at 20 C.F.R. § 656.30(d) provides in pertinent part that: "After issuance labor certifications are subject to invalidation by the [CIS] or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application." *See also Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986) where because the beneficiary of a labor certification failed to reveal ownership interest, the labor certification was properly invalidated pursuant to 20 C.F.R. § 656.30(d).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on December 17, 2001. In the request for evidence (RFE) issued by the director on November 23, 2002, the director indicated that another immigrant petition with a same priority date as the instant petition was approved, and therefore, requested the petitioner to demonstrate its ability to pay all proffered wages. In response to the RFE, the petitioner did not submit any regulatory-prescribed evidence to show that the petitioner had extra net income or net current assets other than the net income of $43,000 reflected on its 2001 tax return, and thus did not demonstrate that the petitioner had the ability to pay the two proffered wages in 2001. CIS records show that the petitioner filed another immigrant petition[3] with the priority date of December 17, 2001. Therefore, the petitioner must demonstrate that it could pay at least two proffered wages in 2001. The approval of the instant petition on June 26, 2003 was in error. In addition, CIS records show that the petitioner filed 9 other I-140 immigrant petitions during the years from 2002 to 2006. The priority dates of these petitions varied from December 17, 2001 to November 3, 2003. Therefore, the petitioner must show that it had sufficient net income or net current assets to pay all the wages at the priority date. The review of the instant case reveals that the petitioner did not have the ability to pay all proffered wages in the relevant years.

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 insufficient evidence in factual assertions presented by the beneficiary concerning his qualifications for the proffered position and insufficient evidence in establishing the petitioner's continuing ability to pay all the proffered wages as of the priority date. There are also inconsistencies in the record of proceeding that could lead to invalidation of the labor certification.

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. The director's decision on April 26, 2006 is affirmed. The petition's approval remains revoked.

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[3] CIS receipt number: LIN-02-271-50775, which was filed on August 26, 2002 and approved on September 24, 2002.