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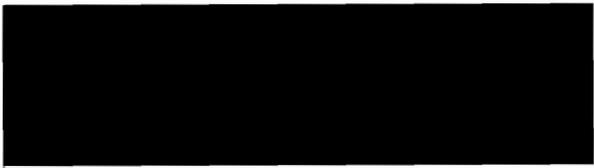
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: WAC 04 088 52512

Office: CALIFORNIA SERVICE CENTER

Date: JUL 26 2007

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, California Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO). The director's decision will be withdrawn and the matter remanded to the director.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. Based on an overseas investigation into the beneficiary's prior work experience in India prior to the adjudication of the petition, the director determined that the petitioner had not established that the beneficiary had the two years of relevant work experience as a chef of Indian food, as stipulated by the Form ETA 750. 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 has been discussed in these proceedings previously and 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 August 1, 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 in his decision that the proprietor of Hotel Bar & Restaurant, Jalandhar, Punjab, attested that the beneficiary was not employed by the entity and that the experience letter was not issued by the hotel and was a fake document.

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 August 29, 2002.

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 appeal². On appeal, counsel submits a brief and additional evidence. The additional evidence includes the following:

A copy of an unpublished AAO decision *Matter of* ___, WAC 01 122 550041, Jul. 31, 2003. This decision involved the remand of a decision because the Service Center director neglected to note the beneficiary's job description was missing a page describing the beneficiary's duties, and

² 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).

because the director had not noted the issue in his request for further evidence that led to the ultimate denial of the petition;

A copy of the original letter of work verification from the Manager [name indecipherable], Hotel International Bar and Restaurant, G.T. Road, Jalandhar, India, dated October 7, 1999 that states the beneficiary worked for the restaurant/hotel from June 5, 1992 to October 7, 1999, and that the beneficiary worked as a cook of vegetable and non vegetable dishes;

A copy of a letter dated August 23, 2005. Both [redacted] General Manager/Principal, IHMCCT, Hotel International Jalandhar and [redacted] Hotel International, G.T. Road, Jalandhar signed the letter³, although [redacted] appears to be the letter writer. [redacted] states that the hotel/restaurant had employed the beneficiary from June 5, 1992 to October 7, 1999 and then also employed the beneficiary from December 9, 2003 to the date the August 2005 letter was signed. The writer described the beneficiary's title as Tandoor and Indian cook. The writer then stated that an enquiry was made about the beneficiary's employment by the legacy INS in Delhi. [redacted] then states:

[R]egrettably, we made an error and informed the Delhi INS that [the beneficiary] was not employed by the hotel. We employed him but at the time of INS inquiry, he had taken a leave of absence from the hotel for medical reasons. This leave of absence was taken with general hotel manager. The General Hotel manager failed to communicate this information to me, the Managing Director, [redacted] of Hotel International, Jalandhar. When the INS contacted me, I informed them that the hotel no longer employed [the beneficiary]. In fact, [the beneficiary] was employed by the Hotel. Due to the miscommunication between the General manager and myself, I made the error of misinforming the INS that [the beneficiary] did not work for the hotel. In fact, [the beneficiary] is still working for the hotel W.E.F. 12-9-2003 to till date as Main Indian Tandoor Cook. Please accept my apology for the inconvenience this may cause.

A copy of a letter dated August 23, 2005, from [redacted] General Manager/Principal, IHMCCT, Hotel International. In this letter, [redacted] states that there was a failure of communication between himself and the managing director in reference to the beneficiary's employment. [redacted] asks CIS to reevaluate the case, as the fault for the failure in communication was his.

A copy of a letter addressed to CIS from the beneficiary. The beneficiary states that the hotel's managing director misinformed the legacy INS office in Delhi about the status of his employment. The beneficiary states that at the time of the INS inquiry, he had taken a leave of absence for medical reasons with the General Hotel Manager from July 7th to July 31, and that the managing director was unaware of his leave of absence. The beneficiary stated that at the time the CIS was informed that he was not employed by the hotel, he was employed by the hotel and that the beneficiary had an affidavit from the doctor⁴ who treated him during his leave of absence and an affidavit from staff persons working with him and from the hotel general manager.

³ [redacted] also identifies himself in his signature block as Managing Director, Hotel International, G.T. Road, Jalandhar.

⁴ The record does not reflect any such letter submitted to the record.

A copy of a Faxed Affidavit signed by four witnesses who are respectively identified as the Hotel International executive chef, captain, receptionist, and pantry chef. The affidavit states that the captain, receptionist and chef knew the beneficiary since 1992 and he had worked with them in the Indian and Tandoori kitchen. The executive chef, [REDACTED] states that he was employed at the hotel since 1985, and that the beneficiary worked under his supervision.

A Faxed affidavit from [REDACTED] the general manager, who stated he is from Jalandhar with a bachelor degree in hotel management. [REDACTED] states that he worked with the beneficiary at Hotel International and that his own employment at the Hotel was from August 20, 2003. [REDACTED] states that the beneficiary's work duties were to control all the workers; responsible for health and safety, and controlling parties and preparing new dishes.

The record also contains an office memorandum dated July 15, 2005 from [REDACTED] Acting Officer in Charge, USCIS/New Delhi, India to The director of the California Service Center. A detailed field verification report is attached to the memorandum. According to the field verification document, both the officer in charge and a Foreign Service National Immigration Specialist met with [REDACTED] the proprietor of Hotel International. The report states that after a careful review of the work verification letter, [REDACTED] stated that no [REDACTED] s/o (son of) [REDACTED] was employed by the hotel; that the letterhead of the hotel is different from the applicant's employment letter and that the work verification letter was a fake document and was not issued by him. The field report also indicates that a statement to the effect that [REDACTED] had not issued the employment letter was put on a copy of the work verification letter. A copy of the actual specimen letterhead of the Hotel International was also enclosed with the field report.

The record does not contain any further evidence as to the beneficiary's qualifications for the proffered position.⁵

On appeal, counsel states that the petitioner was never afforded an opportunity to respond to the director's investigation, was never provided with any copies or statements of the reply purportedly obtained from CIS in New Delhi and was not advised of any intention to deny the I-140 petition on this basis. Counsel notes that the director's request for further evidence is dated November 30, 2004, the same day that the director stated in his decision that he requested an overseas investigation of the beneficiary's claimed work experience. Counsel notes that the request for further evidence requested more evidence of the petitioner's ability to pay the proffered wage, and did not request any evidence regarding the beneficiary's claimed experience and/or training outside of the United States.

Counsel states that allegations of fraud are very serious and as such the director's decision to deny the petition without affording the petitioner and/or the beneficiary to respond to the allegations of fraud violates the petitioner's due process rights. Counsel cites to *Campos-Sanchez V. INS*, 164 F. 3d 448, 450 (9th Cir. 1999), as well as *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). Counsel requests that the AAO remand the decision to the director and that a copy of the field investigation be provided to the petitioner so that a proper response to the adverse information and allegations may be made. In the alternative, counsel requests that the AAO reverse the director's decision and grant the petition based upon the information and evidence submitted on appeal.

⁵ The AAO does note that the birth certificate for the beneficiary's son born in 1994 contained in the record notes that the beneficiary's profession is "farmer and cook;" however this documentation is not sufficient to establish the requisite two years of work employment at Hotel International or anywhere else, as it does not comply with the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A).

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

| | | |
|-----|-------------------------|----|
| 14. | Education | |
| | Grade School | 8 |
| | High School | 4 |
| | College | 0 |
| | College Degree Required | NA |
| | Major Field of Study | NA |

The applicant must also have 2 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 does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B. The Form ETA-750B does not have the beneficiary's signature and is annotated "Signature Unavailable, Outside of U.S." The Form ETA 750, Part B is dated August 12, 2002. On Part 15, eliciting information of the beneficiary's work experience, he represented that he had worked for Hotel International, G.T. Road, Jalandhar Punjab, India as a chef from June 1992 to October 1999. He does not provide any additional information concerning his employment background on that form.

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.

(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.

Counsel refers to a decision issued by the AAO concerning the remand of a decision to a director because the director did not raise the issue upon which he denied the petition in an earlier request for further evidence. Counsel does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). The AAO notes that this decision was also remanded because the director did not realize that the documentation submitted to establish the beneficiary's experience was missing a crucial page of information.

Upon review of the record, the AAO finds that both the director's conclusions and counsel's assertions on appeal carry weight in these proceedings. As noted by the director, the field investigation report states that the letterhead upon which the beneficiary's letter of work verification was submitted varies from the actual letterhead for the Hotel International. This discrepancy is material and needs to be addressed in any clarification of the previous letter of work verification. The record also does not indicate who wrote and submitted the prior letter of work verification nor apparently was ██████ asked this material question during the investigation. The AAO also notes that the statements made by ██████ at the meeting with the CIS personnel that the beneficiary did not work for the hotel are not dispositive of whether the beneficiary has the requisite two years of work experience as a cook of Indian food. The petitioner has to establish that the beneficiary has the requisite two years of work experience as a cook with the Hotel International, not that the beneficiary is presently employed by the Hotel International.

Conversely, an issue raised by the field investigation report needs to be addressed by the petitioner, namely, why the managing director of a hotel/restaurant would not remember an employee who allegedly worked for the hotel for seven years in the 1990s and at the time of the CIS field investigation in 2005, had allegedly worked for the same hotel for some two years. On appeal, the explanations provided by both ██████ and ██████ as to the beneficiary's leave of absence at the time of the CIS field investigation are equally not dispositive of whether the beneficiary has the requisite two years of work experience as a cook through his employment at the hotel during the 1990s. The fact that the beneficiary may work for the Hotel International carries no weight in these proceedings as the petitioner has to establish the beneficiary's requisite two years of work experience as a cook of Indian food prior to the 2001 priority date. Of more probative weight would be any documentary evidence, such as pay stubs, any correspondence on the beneficiary's claimed long-term employment in the 1990s, or other records that would establish his claimed employment.⁶

However, as noted by counsel, the petitioner has not been given the opportunity to review the CIS field verification report and the actual points contained in it. *See* 8 C.F.R. § 103.2(b)(16). As a result the materials submitted on appeal do not directly address the questions of variance in letterheads and why the managing director of a hotel would not remember a long-term employee from the 1990s. While the letter from Mr. ██████ states that he only began working with the hotel in 2003, the record is less clear as to whether Mr. ██████ was the proprietor of the hotel during the 1990s, and could have provided any letter of work verification at that time. ██████'s statement that he did not issue the letter of work verification thus is not dispositive of

⁶ Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

this matter, as the actual identity of the person who allegedly issued the first letter of work verification has not been established at any point in these proceedings.

The AAO also notes that while the director did not request any further evidence with regard to the beneficiary's qualifications in his request for further evidence dated November 30, 2004, the results of the CIS field investigation were not available to the director until July 2005. As such, the director had no need to address the issue in his RFE.

The AAO will withdraw the director's decision and remand the matter to the director to provide either an excerpt or a copy of the field investigation report with all attachments to the petitioner. The petitioner shall be provided with appropriate period of time to provide further documentation or evidence in the matter. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision dated August 1, 2005 is withdrawn. The matter is remanded to the director to provide the petitioner with a copy of the CIS field investigation report and all attachments, and to allow the petitioner sufficient time to provide any further documentation or evidence.