Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAY 22 2007

WAC 02 219 50866

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 Director, California Service Center, denied the instant employment-based visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

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 accompanied 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. The AAO affirmed the director's decision.

The record shows that the motion was properly and timely filed, makes a specific allegation of error in law or fact, and is accompanied by new evidence. The procedural history of this case is documented in 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 decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, "*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

The regulation at 8 C.F.R. § 103.5(a)(3) states:

> *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [CIS] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reopen because counsel provided new evidence. The instant motion qualifies as a motion to reconsider because, in the brief, counsel asserts that the director incorrectly applied the pertinent law.

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 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). 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 January 19, 1999. The labor certification states that the position requires three years of experience in the job offered.

To determine whether a beneficiary is eligible for a third preference immigrant visa, the Service must ascertain whether the alien is in fact qualified for the certified job. In evaluating the beneficiary's qualifications, the Service must look to the job offer portion of the labor certification to determine the required qualifications for the position. The Service 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 *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F2d 1 (1st Cir. 1981).

On the Form ETA 750, Part B the beneficiary, who signed that form on December 15, 1998, stated that he had worked from March 1992 to April 1996 as a chef for a Japanese restaurant in Tokyo, Japan. The beneficiary further stated that he had worked as a chef for the petitioner, [redacted] **on** [redacted] in Arcadia, California, from November 1996 to September 1998.

The instructions to the Form ETA 750B require that the beneficiary "List all jobs held during the past three (3) years [and] any other jobs related to the occupation for which the [beneficiary] is seeking certification . . . ." The beneficiary listed no other experience on that form.

In an addendum to the Form ETA 750B that the beneficiary signed November 27, 1999 he stated that he was unemployed from April 1996 to November 1996.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal and motion.[1]

---

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The record contains a December 8, 1998 letter in Japanese with an English translation. Those documents were submitted with, and in support of, the petition. The English translation of the letter states that it is from the Japanese restaurant at which the beneficiary claims to have been employed from March 1992 to April 1996. That letter reiterates the beneficiary's employment claim.

The record also contains a Form I-589 Application for Asylum, supporting materials, and a decision of denial in that matter. In conjunction with that application the beneficiary stated that he lived in Burma, then Myanmar, during the period when he now claims to have been employed in Tokyo. The beneficiary claimed to have graduated from the university at Rangoon in 1987. The beneficiary claimed to have started driving a taxicab in August of 1989. The basis of that asylum application was the beneficiary's claim that he was arrested for participating in prodemocracy demonstrations in September of 1988, and a second time in March of 1993. The beneficiary stated that he left Burma after a government announcement in May of 1996 caused him to anticipate another arrest.

Further, a G-325A Biographic Information form which the beneficiary signed on November 25, 2002 stated that he lived in Myanmar, now Burma, until July of 1999, then in Arcadia, California from July 1999 to October 2002, and finally in Azusa, California from October 2002 through the date he signed the G-325A. The following caption appears beneath the beneficiary's signature:

> PENALTIES: SEVERE PENALTIES ARE PROVIDED BY LAW FOR KNOWINGLY AND WILLFULLY FALSIFYING OR CONCEALING A MATERIAL FACT.

[Emphasis in the original.]

The decision in that matter did not dispute the beneficiary's version of events, but found that the beneficiary's treatment was insufficient to constitute persecution of a nature that would entitle him to asylum.

The director denied the instant employment-based visa petition on March 13, 2003, citing the contradictory evidence.

On appeal counsel provided (1) a letter dated April 8, 2003 from the personnel director of AFC Corporation in Rancho Dominguez, California, (2) a contract dated October 10, 1997 (3) a sushi menu, (4) 1997 and 1998 Form W-2 Wage and Tax Statements, (5) 1997 and 1998 Form 1099 Miscellaneous Income statements, (6) the beneficiary's 1997 and 1998 Form 1040 U.S. Individual Income Tax Returns, and (7) evidence documenting that the beneficiary lived in Burma during 1989 and 1990, in Japan during 1993 and 1994, and in the United States beginning no later than 1997. The petitioner's then counsel asserted that the beneficiary had worked for various sushi restaurants and referred to the documents provided as support for the beneficiary's employment history. Previous counsel did not then provide a summary of the beneficiary's employment history.

The 1997 W-2 form shows that [redacted] paid the beneficiary $2,074.50 during that year.

The 1997 Form 1099 shows that during 1997 AFC Corporation paid the beneficiary $17,968.06 in nonemployee compensation.

The beneficiary's 1997 tax return shows that he declared the wages paid by Todai Studio City. A corresponding Schedule C shows that the beneficiary declared the gross receipts paid by AFC Corporation and declared a net profit of $5,196 on his sushi bar business.

The 1998 W-2 forms show that during that year [redacted] of Arcadia, California paid the beneficiary wages of $12,706.91 and [redacted] of Los Angeles paid the beneficiary $3,062.14, for a total of $15,769.05.

The 1998 Form 1099 shows that during 1998 AFC Corporation paid the beneficiary $10,703.19 in nonemployee compensation.

The beneficiary's 1998 tax return shows that the beneficiary declared the income fro and [redacted] of Los Angeles. A corresponding Schedule C shows that the beneficiary declared the gross receipts paid by AFC Corporation and declared a net profit of $4,252 on his sushi business.

The October 10, 1997 contract is an agreement between AFC and the beneficiary that the beneficiary will operate a sushi bar. The April 8, 2003 letter from AFC Corporation states that the beneficiary worked for that company as a contractor managing a sushi par in West Fairbanks, Alaska from October 10, 1997 to September 9, 1998. The menu shows the sushi items served at an AFC franchise sushi bar.

The AAO found that then counsel had not reconciled the inconsistencies in the evidence and dismissed the appeal on May 24, 2005.

With the motion current counsel provided (1) a letter dated June 23, 2005 from the AFC Franchise Corporation in Rancho Dominguez, California, (2) a letter dated June 23, 2005 from the [redacted] restaurant in Studio City, California, (3) another letter dated June 23, 2005, and (4) a letter dated June 24, 2005 from the [redacted] e in Los Angeles, California.

The June 23, 2005 letter from [redacted] states that the beneficiary worked as a chef at that restaurant from October 5, 1996 to October 1, 1997. That letter is signed by the restaurant's manager.

The June 23, 2005 letter from AFC Franchise Corporation states that the beneficiary worked for that company as a contractor managing a sushi bar in West Fairbanks, Alaska from October 10, 1997 to January 9, 1998. This claim of employment contradicts the assertion made in AFC Corporation's April 8, 2003 letter, that the employment had continued until September 9 of that year.

The third June 23, 2005 letter reiterates the beneficiary's claim of employment at [redacted] Although the letter purports to have been signed by [redacted], his or her relationship to the restaurant, if any, and the basis for his or her claimed knowledge of the beneficiary's employment, if any, is not specified in the letter.

The June 24, 2005 letter from [redacted] states that the beneficiary worked at that restaurant as a full time chef from February 1, 1998 to May 1, 1998. That letter is signed by the restaurant's manager, who is the same person who signed the June 23, 2005 letter from [redacted]. The 1998 W-2 form shows that [redacted] paid the beneficiary $3,062.14 in wages durng that year.

On motion, counsel asserted, incorrectly, that the beneficiary's asylum claim was denied because it was found not to be credible. Counsel argued that, therefore, to use the beneficiary's statements made in support of the asylum application to discredit his contradictory statements in support of the instant petition, ". . . is a violation of the beneficiary's due process rights . . . ." Counsel stated that the evidence demonstrates that the beneficiary was living in Japan during the time when he claims to have been employed as a cook there and that no reason exists to doubt his employment claim.

Counsel further states,

> The beneficiary contends, and it is supported by documentary evidence, that from October 5, 1996 through October 1, 1997 he was employed at [redacted] which is a separate franchise from petitioner. From October 10, 1997 through January 9, 1998 he was employed as an independent contractor for A.F.C., operating a sushi take-out restaurant at Fred Meyer Supermarket in Fairbanks, Alaska. From February 1, 1998 through May 1, 1998 he was working at a different [redacted] restaurant named [redacted] located on [redacted] in Los Angeles, California. . . . . Thereafter he began his employment with [the petitioner].

In conjunction with the asylum application the beneficiary stated that he was in Burma until May of 1996 or shortly thereafter.

In support of the instant petition the beneficiary stated, on the Form ETA 750, that he worked in Tokyo from March 1992 to April 1996, that he was unemployed from April 1996 to November 1996, and that he worked for the petitioner from November 1996 to September 1998.

In support of the instant motion counsel stated that the beneficiary worked for [redacted] from October 1996 to October 1997, rather than for the instant petitioner. Counsel further stated that the beneficiary worked from October 1997 to January 1998 in Fairbanks, Alaska, rather than for the petitioner. Finally, counsel stated that the beneficiary worked from February 1998 to May 1998 at a restaurant in Los Angeles, California, rather than for the petitioner. Counsel provided various documents in support of those assertions, including employment verification letters, a W-2 form, and a contract pertinent to the beneficiary's asserted employment in Alaska.

No part of the revised employment history proposed by counsel was mentioned on the Form ETA 750B, notwithstanding that the form required the beneficiary to, "List all jobs held during the past three (3) years [and] any other jobs related to the occupation for which the [beneficiary] is seeking certification . . . ."
The beneficiary signed that form on December 15, 1998, directly below a warning pertinent to the penalties for perjury. That form was certified by DOL.

A petitioner raises serious questions of credibility when asserting a new claim to eligibility on appeal or motion. The petitioner, the beneficiary, and counsel offer no explanation for the beneficiary's failure to advance his claim of qualifying employment, on the Form ETA Application for Labor Certification, with the initial petition, in response to the request for evidence,[2] or on appeal.

The regulation 8 CFR § 204.5(l)(3)(ii) does not encourage petitioners to hold evidence in abeyance and submit it on appeal or on post-appeal motion. Rather, it clearly states that evidence of the beneficiary's experience **must accompany** the petition. Further, the instructions on the ETA 750B made clear that the beneficiary must list all relevant work experience in addition to all employment within three years of signing that form.

On motion, counsel claimed that the beneficiary had worked for three additional employers during the three years prior to his signing the ETA 750B, and that this other previous employment, never before mentioned in conjunction with this petition, was qualifying employment. Counsel did not explain why that employment was not claimed on the Form ETA 750B, as it is required to be.

The beneficiary's history as stated on the asylum application directly contradicts the beneficiary's claim of employment in Tokyo, which was the basis of the beneficiary's claim of qualifying employment experience as stated on the Form ETA 750B. At least one of those claims was falsely submitted to CIS in an attempt to obtain an immigration benefit.

The beneficiary's claim of persecution in Burma was not, as counsel asserted, discredited. Further, the beneficiary has never repudiated his previous claim of persecution in Burma or explained how, if it is incorrect, he came, intentionally or otherwise, to mistate that claim. Even if counsel were correct that the asylum petition had been denied because the beneficiary's claim was found incredible, rather than insufficient, counsel's cites no authority and presents no argument in support of his assertion that considering previously discredited testimony is a due process violation.

Further, the beneficiary's claim of employment for the petitioner from November 1996 to September 1998 directly contradicts the claim now proposed by counsel, that the beneficiary worked for three different employers, two in California and one in Alaska, during that period, but did not work for the petitioner. Again, at least one of those claims is false and was submitted to CIS in another fraudulent attempt to obtain an immigration benefit.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

In the instant case the beneficiary appears to have demonstrated that he lived in Japan, California, and Alaska at times consistent with his most recent claim of qualifying employment. In view of his willingness to falsify information in submissions to CIS, however, this office must consider the remaining evidence more carefully.

---

[2] On October 10, 2002 the service center requested additional evidence that the beneficiary has the requisite qualifying employment.

In the most recent incarnation of his employment history, the version counsel now relies upon, the beneficiary claims to have worked full-time for Todai Studio City from October 1996 to to October 1997. Initially, this office notes that this employment claim conflicts somewhat with the beneficiary's assertion, made on November 27, 1999, that he was unemployed from April 1996 to November 1996. It also conflicts with the beneficiary's statement, made on the G-325A Biographic Information form, that he remained in Burma through July of 1999. Yet further it conflicts with the beneficiary's statement, made on the Form ETA 750B, that he worked for the petitioner, in Arcadia, California, from November 1996 through September 1998.

Further still, the 1997 W-2 form that [redacted] issued to the beneficiary should have covered the employment from January 1997 to October 1997. That W-2 form, however, shows that [redacted] paid the beneficiary only $2,074.50 during that year, an amount inconsistent with approximately ten months of full-time employment.

Counsel submitted a 1998 W-2 showing that during that year [redacted] of Arcadia, **California paid the beneficiary wages of $12,706.91.** Counsel's asserted history of the beneficiary's employment, however, does not indicate that the beneficiary worked for that company during 1998, which casts additional doubt on the history asserted by counsel. Further, that employment claim is contradicted by the beneficiary's statement, made on the Form G-325, that he remained in Burma until July 1999.

Counsel asserted that [redacted] of Los Angeles employed the beneficiary as a full-time chef from February 1998 to May 1998. The 1998 W-2 form Todai Sushi-Shabu issued to the beneficiary, however, indicates that it paid the beneficiary only $3,062.14 during that year. That amount is inconsistent with full-time employment from February to May. Further, this claim is directly contradicted by the beneficiary's statement, on the G-325, that he remained in Burma through July 1999 and by his statement, made on the Form ETA 750B, that he worked for the petitioner, in Arcadia, California, from November 1996 through September 1998.

The remaining claim is for employment as a chef in Alaska from October 1997 to January 1998. That employment claim is contradicted by the beneficiary's assertion, on the G-325, that he remained in Burma until July 1999. It is also contradicted by his assertion, made on the Form ETA 750B, that he worked for the petitioner in Arcadia, California, thoughout that period.

In view of the myriad contradictions in the claims and evidence submitted, this office finds that the beneficiary has not credibly demonstrated that he ever worked as a cook, full-time or otherwise, in the United States or elsewhere. Because the evidence submitted does not demonstrate credibly that the beneficiary has the requisite three years of experience the petitioner has not established that the beneficiary is eligible for the proffered position. The petition was correctly denied on this ground, which ground has not been overcome on appeal.

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 motion is granted. The AAO's decision of May 24, 2005 is affirmed. The petition is denied.