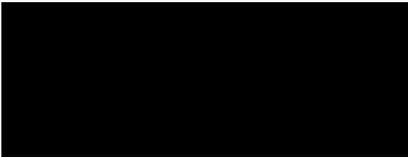




U.S. Citizenship  
and Immigration  
Services

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

**PUBLIC COPY**



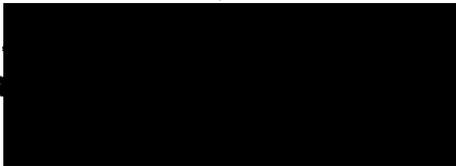
BG

FILE: EAC 98 190 50528 Office: VERMONT SERVICE CENTER Date: FEB 10 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

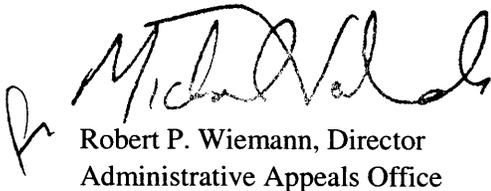
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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 Director, Vermont Service Center, initially approved the employment-based preference visa petition. On the basis of new information received and on further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director 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 rejected.

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 petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is an Indian restaurant. It seeks to employ the beneficiary as a cook, specialty foreign foods. As required by statute, the petition was accompanied by certification from the Department of Labor.

The regulation at 8 C.F.R. § 205.2(d) indicates that revocations of approvals must be appealed within 15 days after the service of the notice of revocation. The appeal was filed on April 3, 2003, 20 days after the decision was rendered. Thus, the appeal was not timely filed.

It is noted that the director erroneously allowed the petitioner 30 days to file the appeal (33 days if by mail). The director's error does not, and cannot, supersede the regulation regarding the time allotted to appeal a revocation.

8 C.F.R. § 103.3(a)(2)(v)(B)(1) states that an appeal which is not filed within the time allowed must be rejected as improperly filed. In such a case, any filing fee CIS has accepted will not be refunded. However, in the interest of due process and fairness, the merits of the case will be discussed below.

The petition was initially approved on August 11, 1999. During a consulate interview, conducted on May 31, 2002, the interviewing officer determined that “Mr. [REDACTED] had little, if any, experience in a kitchen. Mr. [REDACTED] lacks basic culinary skills and does not know the recipes and techniques that he claims. Mr. [REDACTED] is unable to perform the duties of a ‘Head Cook.’”

The director issued a NOIR on October 25, 2002, and on March 14, 2003, he revoked the approval of the petition, noting that the petitioner failed to respond to the NOIR.

On appeal, counsel states that the petitioner did respond to the NOIR and it was received in the Vermont Service Center office on November 22, 2002. Counsel did not, however, provide any evidence to corroborate his contention. Had counsel submitted corroborative evidence of the petitioner's response, the director should have conducted a service motion to reopen and denied the petition on its merits.

With the appeal, counsel submits an affidavit from the beneficiary relating the events during the consular interview and states:

It is our contention that it was improper for the Consul to ask the beneficiary to perform the test in question without providing the necessary equipment and under which the test could have been performed properly, for example, asking a cook to prepare Tandoor dishes without a Tandoor oven.

Furthermore, as indicated in the beneficiary's statement, the test was conducted in a hostile atmosphere and the duties were asked to be performed within an unreasonable time frame and without appropriate kitchen staff. This is totally unrealistic and contrary to the real life world of a restaurant kitchen.

The beneficiary's affidavit states that the consular staff mistreated him and his family and that he was not provided with the appropriate materials, staff, or oven necessary to prepare the requested dishes during the interview. The beneficiary also stated, however, that upon explaining to the consular officer that he could not prepare the dishes requested without the appropriate materials, the officer replied that "we are not in need of a test, we have only to see that you can prepare this item or not."

The consular investigation report states the following:

On May 31, 2002, Mr. [REDACTED] was given a skills test in the Consulate's kitchen to see if he was capable of fulfilling any of the duties listed in his job description or work experience letter. A Consular Officer, a member of Mumbai's Fraud Prevention Unit, and members of the Consulate's kitchen staff supervised the test. It became immediately apparent that Mr. [REDACTED] was unfamiliar with basic cooking techniques and was unable to prepare the dishes he claimed to be proficient in.

Within five minutes of starting his test, Mr. Saini cut his finger with a knife. Instead of trying to bandage the wound, Mr. [REDACTED] continued to cook, bleeding into the food he was preparing. He made no attempt to stop the bleeding and did not clean the contaminated food.

Mr. [REDACTED] then tried to prepare several simple Indian dishes. Mr. [REDACTED] burned the first dish, Chicken Tikka. The second dish, Green Chutney, was tasted by several members of the Consulate's kitchen staff, and determined to be inedible. Finally, Mr. [REDACTED] tried to prepare Nan, a traditional Indian bread and was unable to do so.

If the Consulate mistreated the beneficiary and his family, it is unfortunate. However, if, as the beneficiary stated in his affidavit, that the consular officer merely wanted to see if the beneficiary could prepare the dishes requested, then the beneficiary's affidavit does not overcome the report issued by the Consulate. The evidence provided in the report indicates that the beneficiary's handling of the food was inappropriate and while he may not have had a Tandoor oven, he did have kitchen staff and apparently, did have the ingredients needed to prepare the dishes requested. *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.

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.

EAC 98 190 50528

Page 4

The evidence in this proceeding (the consular report) does not indicate that the beneficiary met the requirements of a cook as stated on the ETA 750. However, since the appeal was filed after the mandatory fifteen days, the appeal will be rejected.

**ORDER:** The appeal is rejected.