



U.S. Citizenship
and Immigration
Services

Department of Homeland Security
Immigration and Naturalization Service
BOSTON OFFICE

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[Redacted]

JUN 15 2005

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC 03 022 50172

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:
[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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an operator of ICDF/DD licensed facilities. It seeks to employ the beneficiary permanently in the United States as an institution and café 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 met the experience requirements as stated on the Form ETA 750.

On appeal, the petitioner submits a brief and previously submitted evidence.

Section 203(b)(3)(A)(i) of 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 not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

(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 occupational designation. The minimum requirements for this classification are at least two years of training or experience.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is February 13, 2001.

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 contained the only information appearing in these sections. This information appears as follows:

Education

College Degree Required

Experience Job Offered
2 Yrs

Related Occupation
2 Yrs.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of institution and café cook must have two years of experience as a cook.

Counsel initially submitted a copy of a letter from [REDACTED] dated November 5, 2000 and signed by [REDACTED] Department Supervisor, stating that the hotel employed the beneficiary from October 2, 1990 through December 31, 1994. Counsel also submitted a copy of a letter from [REDACTED] dated March 15, 2000 and signed by [REDACTED] Department Head, stating that the hotel employed the beneficiary from January 16, 1995 through February 29, 2000. The director determined the documentation to be insufficient to establish that the beneficiary met the requirements of the labor certification, and on February 11, 2003, he requested additional evidence pertinent to the beneficiary's qualifications. The director specifically requested that the petitioner provide letters, contracts, and pay statements to verify the beneficiary worked for [REDACTED] and [REDACTED]. The director also requested that the petitioner provide a name, address, and telephone number at which CIS or other U.S. Government agency could contact all current and former employers. The petitioner was informed that the evidence of prior experience should be submitted in letterform on the previous employer's letterhead showing the name and title of the person verifying the information and that the information should state the duties, beneficiary's title, and dates of employment/experience and number of hours worked per week. The director further requested a copy of the petitioner's current, valid business license for the listed city or county.

In response, counsel submitted a copy of the petitioner's business license and fictitious business name statement. Counsel also submitted the originals of the prior letters from [REDACTED] and [REDACTED]. In addition, counsel submitted employment certificates from the two hotels describing the beneficiary's duties during his employment.

On June 30, 2003, the director informed the petitioner and counsel that an in-depth review of the evidence and/or an advisory opinion from another agency or organization would be required before the petition could be properly adjudicated. On that same date, the director requested the U.S. Consulate in Manila, Philippines to conduct an employment investigation of the beneficiary.

The subsequent investigation report, dated September 25, 2003, revealed:

Alleged former employment of Subject as CHIEF COOK has been verified with [REDACTED] (presently [REDACTED] and [REDACTED] with negative results in both alleged employers. [REDACTED] presently named [REDACTED] denied any such employment of Subject and further stated that there is no such position as CHIEF COOK, besides the Kitchen Area must be specified. Dates of employment were verified but records were not found and alleged Dept. Head; [REDACTED] is unknown per information from the Human Resources Office. Finally, only the Personnel

Manager, Director of Human Resources and/or the Executive Assistant Manager are the duly authorized signatories for employment certifications. Attached letter of response dated 15 September 2003, from the Manila Pavilion is submitted herewith, signed by [REDACTED] HR Director. Similar responses was [sic] obtained from verifications conducted with the Resident Manager [REDACTED] Executive Housekeeper, [REDACTED] and Admin. Office Secreta [REDACTED] all of [REDACTED] [REDACTED] both [REDACTED] signatory to employment certificate and Subject are unknown to the Personnel Office and only the Personnel Manager and Resident Manager are authorized to issue and sign employment certificates for [REDACTED]. Alleged employment certificates submitted were disclaimed and identified as bogus by both Hotel Institutions.

On October 9, 2003, the director issued an intent to deny (ITD) the petition emphasizing the adverse information in the investigation report and granting the petitioner thirty days to submit additional information, evidence, or arguments to support the petition.

In response to the ITD, counsel submitted an affidavit from [REDACTED] owner of [REDACTED] [REDACTED] an affidavit from Evangeline D. Espiritu, daughter of the owner of Cora's Restaurant, an affidavit from Florefe Torreliza-Chua, assistant cook at Cora's Restaurant, a certificate of attendance at a Food Operator's and Food Handler's Class for the beneficiary for August 25, 1985, a mayor's permit, certificate of registration, and sanitary permit for [REDACTED] a license clearance and sanitary permit to Florefe Torreliza for operations after leaving Cora's Restaurant, and a copy of *Castaneda-Gonzalez v. INS*, 564 F2d 417 (D.C. Cir. 1977). Counsel states:

The beneficiary can prove upon clear and convincing evidence that he was a Head Cook at [REDACTED] located at [REDACTED] Philippines, from February of 1984 to September of 1988. Extensive documentary proof including sworn affidavits from the prior employers, co-workers, and secondary evidence of this experience is now submitted. The beneficiary was unable to secure the evidence of such paid work experience during the LIFE Act panic of early 2001, due to the fact that [REDACTED] [REDACTED] had closed operations when its owner, Gaudencio Espiritu was elected mayor of San Jose, Occidental Mindora, in the year 2000.

Pursuant to *Castaneda-Gonzalez v. INS*, 564 F2d 417 (D.C. Cir. 1977), inaccurate documentation of an alien's prior paid work experience submitted in support of an application for permanent alien labor certification and for immigrant visa benefits is not material to either the validity of the labor certification or admissibility as a skilled worker, if the alien did IN FACT possess the minimum requirements of experience for the ETA 750A job as approved by the Secretary of Labor.

As such, the permanent alien labor certification secured by [REDACTED] remains valid and is not subject to invalidation at this time. See *Castaneda-Gonzalez v. INS*, 183 U.S. App. D.C. at 26. In order for the agency to invalidate a labor certification,

and render the beneficiary therein subject to removal as a skilled worker excludable for want of an approved labor certification from the Secretary of Labor, the agency must prove that the labor certification was approved upon evidence that was both willful and material representation.

If an alien claimed to be a graduate of USC, when in fact the same alien was a graduate of UCLA, the difference would not be material to the outcome of a visa proceeding. Materiality requires that the matter could not have been approved with the correct evidence submitted of record. As in the example presented above, if the true facts and evidence had been known to the Secretary of Labor, the same outcome of approval of the labor certification would have followed. Hence, the difference in the matters presented or represented is not material.

The beneficiary has established upon clear, convincing and unequivocal evidence that he was a Head Cook at [REDACTED] located at [REDACTED] Occidental Mindoro, Philippines, from February of 1984 to September of 1988. Since this evidence establishes that he has now and at all times herein possessed, the minimum qualifications of two (2) years of paid work experience for the position offered, the evidence regarding later work experience is immaterial to the outcome in this matter. The labor certification remains valid, and the skilled worker I-140 immigrant petition should be approved upon this record.

The director determined that the evidence submitted in response to the ITD was insufficient to establish that the beneficiary met the experience requirements of the labor certification and denied the petition on November 20, 2003, accordingly.

On appeal, counsel submits a brief and previously submitted documentation. Counsel states:

The Director cannot disregard uncontested evidence that the beneficiary has the minimum experience required per form ETA 750A; the fact that the beneficiary has presented proof of prior full-time work experience not requested or included in form ETA 750B does not impeach that evidence or permit the Director to ignore and disregard [sic] it. The beneficiary's election to not respond to the allegations in regards to subsequent documentation of work experience neither admits nor denies the claims made by the Director at this time; evidence of other paid work experience can be presented to satisfy the minimum requirements per ETA 750A of two years of work experience as a head cook; the Director has confused a determination on other applications with a determination solely of facts and law applied to form I-140, the petition for alien worker. Pursuant to Castaneda-Gonzalez v. INS, 564 F2d 417 (D.C. Cir. 1977), an alien may tender other evidence of paid work experience to meet the minimum requirements needed to satisfy eligibility under an approved labor certification; submission of such alternative evidence renders other evidence in question to be no longer material to eligibility for labor certification and the employment based immigrant petition per the above precedent.

The preference petition should be granted.

The AAO does not concur with counsel.

The regulation at 20 C.F.R. § 656.30(a) states, "Except as provided in paragraph (d) of this section, a labor certification is valid indefinitely."

The regulation at 20 C.F.R. § 656.30(d) states:

After issuance labor certifications are subject to invalidation by the INS (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.

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 Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the present case, the labor certification requires two years experience in the job offered or two years in the related field of Chief Cook. Absent fraud or willful misrepresentation the Department of Labor's decision as to the contents of a labor certification are not subject to CIS review. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983). However, the evidence in the record clearly shows that the initial evidence provided by the beneficiary to establish his two years of experience was manufactured and unreliable. While counsel claims that the ETA 750B only requires the beneficiary to submit evidence of all jobs held within the last three years, that same ETA 750B also states, "Also, list any other jobs related to the occupation for which the alien is seeking certification as indicated in Item 9." The beneficiary only listed the additional work experience with Cora's Restaurant after the ITD. Since, the initial evidence was found to be "bogus," doubt is cast on the additional evidence to establish that the beneficiary met the experience requirements of the labor certification.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

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.

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.

In the instant case, neither counsel, the petitioner, nor the beneficiary has provided any evidence to refute the investigative report that the initial evidence was fraudulent. In addition, it is obvious that the beneficiary knowingly¹, willfully², and intentionally provided the false documentation in an attempt to gain employment in the United States as the beneficiary's employment history is set forth in the ETA 750-B, signed by the beneficiary under penalty of perjury. While it is possible to imagine circumstances under which an individual could unknowingly use a fraudulent work history, no such scenarios arise as reasonable inferences from the undisputed facts here. If there are facts from which inferences more favorable to the beneficiary could reasonably be drawn, the beneficiary and petitioner have failed to set them forth. There is no factual predicate here upon which to draw an inference that the conduct of the beneficiary was the result of a mistake or accident, or that it occurred for some other innocent reason.

Counsel points to *Castaneda-Gonzalez v. INS, supra.*, a deportation case, claiming that inaccurate documentation of an alien's prior paid work experience submitted in support of an application for permanent alien labor certification and for immigrant visa benefits is not material to either the validity of the labor certification or admissibility as a skilled worker, if the alien did in fact possess the minimum requirements of experience for the ETA 750A job as approved by the Secretary of Labor. However, neither the director nor the AAO has determined this case to be a deportation case. If it were, the beneficiary's admissibility would be at issue, and the court, not the AAO, would have to make a determination as to whether or not the beneficiary is inadmissible under section 212(a)(6)(C) of the Immigration and Nationality Act. Rather, the AAO and the director are merely trying to determine if the beneficiary met the requirements of the labor certification. Further, the AAO draws a distinction between "inaccurate" documentation and documentation that has been determined to be fraudulent. As discussed above (*see Matter of Ho, supra*), the submission of false information into the record will lead to the reevaluation of all other evidence into the record. Given that the documentation previously submitted by the petitioner contained fraudulent claims, the AAO will now review the petitioner's other claims.

The regulation at 8 C.F.R. § 204.5(g)(1) requires that evidence relevant to qualifying experience or training must be submitted in the form of letters from current or former employers or trainers and must include the name, address, and title of the writer and a specific description of the alien's duties. If this evidence is unavailable, other documentation will be considered.

The regulation at 8 C.F.R. § 103.2 also provides guidance in evidentiary matters. It states in pertinent part:

(b) Evidence and processing—

- (1) *General.* An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as

¹ "Knowingly" is defined as doing something "[w]ith knowledge; consciously; intelligently; willfully; intentionally." Black's Law Dictionary 603 (Abridged 6th ed. 1991).

² Willfulness has been found where such actions are intentional, knowing, or voluntary.

applicable and filed with any initial evidence required by regulation or by the instructions on the form. Any evidence submitted is considered part of the relating application or petition.

(2) *Submitting secondary evidence and affidavits—*

(i) *General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

If primary evidence such as an employer letter is not available, then the petitioner should demonstrate its unavailability and submit relevant secondary evidence. If secondary evidence, such as pay stubs or tax documents verifying the alien's employment, is unavailable, the petitioner must demonstrate the unavailability of such evidence and then may submit affidavits pursuant to the requirements of 8 C.F.R. § 103.2(b)(2). It is noted that two or more affidavits from individuals who are not parties to the petition and who have direct personal knowledge of an event are only acceptable after the petitioner demonstrates the unavailability of the required primary and relevant secondary evidence.

In response to the ITD and on appeal, counsel asserts that the evidence shows that the beneficiary has the required two years of experience. In this case, as noted above, no credible employer letter was submitted for the beneficiary's work experience at Cora's Restaurant. The only explanation given as to why it was unavailable is a statement from counsel that the restaurant was closed when the owner was elected mayor. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It is unclear why the owner still could not have given a credible letter just because he was elected mayor and there is no evidence to indicate that the owner was unreachable. No relevant secondary evidence such as payroll records or tax information was offered as the owner now states that those documents were destroyed after five years. The only affidavit attempting to corroborate the beneficiary's work experience at [REDACTED] was not submitted until after the intent to deny was issued. Again, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. See 8 C.F.R. § 103.2(b)(2)(i).

Counsel has provided several affidavits in support of the beneficiary's work experience at [REDACTED] however, since the initial evidence provided to establish the beneficiary's work experience was deemed to be fraudulent, the AAO finds these affidavits to be unacceptable. Again, *see Matter of Ho, supra*. In addition, it is unrealistic to expect CIS to further investigate the beneficiary's claims when those claims have already shown to be unreliable. Furthermore, if CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel states, "if the true facts and evidence had been known to the Secretary of Labor, the same outcome of approval of the labor certification would have followed." It may be conceivable that had the Secretary of Labor only known that the beneficiary was employed by Cora's Restaurant during the time claimed and if that employment claim was determined to be true and accurate, she would have indeed approved the labor certification. However, that is not the issue here. The AAO does not find it remotely feasible that the Secretary of Labor would approve a labor certification knowing that initial evidence provided to establish the beneficiary's eligibility was deemed to be fraudulent and knowing that the beneficiary knowingly and willingly attempted to gain employment or immigration benefits based on that fraudulent information.

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.