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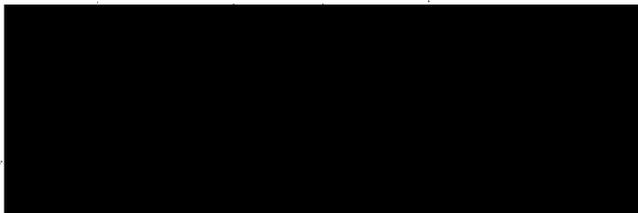
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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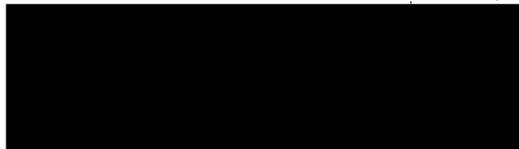
Office: TEXAS SERVICE CENTER Date: DEC 06 2006

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, Texas Service Center, revoked approval of the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

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 (DOL) accompanied the petition. The director determined that the petitioner had failed, when requested, to demonstrate that a valid employment relationship exists between the petitioner and the beneficiary and that a *bona fide* job opportunity was made available to U.S. workers. The director invalidated the labor certification and revoked the petition.

On appeal, counsel submitted a brief.

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 granting 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.

On the Form ETA 750, Part B the beneficiary stated that he worked for the Shin Kong Restaurant in Paramaribo, Suriname as an assistant cook from 1993 to 1995 and as a cook for that same restaurant from 1995 until the date he signed that form. Although the date he signed that form is not specified it was likely shortly before the Form ETA 750 was filed with the DOL on February 22, 2001.

In support of that asserted employment history the beneficiary provided an employment verification letter dated January 17, 2001 from the owner of the Shin Kong restaurant. That letter purports to confirm the beneficiary's claim of employment, stating that the employment was continuing on the date of that letter.

The petition in this matter was approved on June 4, 2003.

A report of an interview conducted on February 4, 2004, by the American Embassy in Paramaribo, Suriname is in the record and states that at his interview the beneficiary was unable to state the address of the Shin Kong Restaurant, was unable to name the fish used in a dish the restaurant is famous for preparing, was unable to name or describe the preparation of 20 Chinese dishes, and when asked to name five Chinese desserts, he could not name any. Further, the beneficiary stated that he no longer worked for Shin Kong, but worked for another restaurant. When asked to name his then current employer he was unable to do so.

The Director, Texas Service Center, on January 18, 2005, issued a Notice of Intent to Revoke in this matter. The director related the findings of the investigation described above. The petitioner was accorded 30 days to respond.¹

¹ In the Notice of Intent to Revoke as well as in the Revocation which followed, the director made reference to another employment verification letter completed by the owner of Shin Kong Restaurant. The instant petitioner had submitted that letter in support of a different petition. In that petition the beneficiary was the instant beneficiary's brother. The director indicated that in that case, the Shin Kong Restaurant employment letter was found to be fraudulent. In decision the instant case, this office does not rely, even in part, on that

In response counsel submitted (1) an affidavit dated February 6, 2005 from the petitioner's owner, (2) an affidavit dated February 7, 2005 from the beneficiary, (3) another affidavit dated February 9, 2005 from the restaurant at which the beneficiary claimed to have been employed previously, and (4) a letter dated February 11, 2004 from counsel.

In his February 7, 2005 affidavit the petitioner's owner admitted that the beneficiary is his brother-in-law but stated that the beneficiary owns no interest in and does not control the petitioning restaurant. The petitioner's owner stated that his restaurant has a legitimate need for cooks and that he has personal knowledge that the beneficiary worked as a cook as indicated in the employment verification documents.

In his February 7, 2005 affidavit the beneficiary stated that he worked for [REDACTED] from August 1993 to August 2002 as a cook and that he is able to cook all of the dishes on [REDACTED] menu. The beneficiary also asserted that he believes that he was disadvantaged by a language barrier at his interview with the U.S. consular officer and that he owns no interest in the petitioning restaurant and does not in any way control the operations of that restaurant.

The February 9, 2005 affidavit from the beneficiary's alleged previous employer, the owner of [REDACTED] reiterates the beneficiary's employment claim and states that the beneficiary is able to prepare all of the dishes shown on his menu, a copy of which he provided. That menu includes 141 different dishes.

In his own letter counsel stated that the petitioner has a genuine need for additional cooks, had duly searched for but had been unable to locate a qualified U.S. worker, that the beneficiary is an experienced cook, and that a *bona fide* job offer exists in this case.

Counsel also noted that the beneficiary had been questioned about his relationship to the petitioner's owner. Counsel noted, citing *Matter of Paris Bakery Corporation*, 88-INC-337 (Jan. 4, 1990) (en banc), and *Matter of Altobeli's Fina Italian Cuisine*, 90-INA-130 (October 16, 1991), that BALCA has ruled that the existence of a familial relationship does not warrant the automatic denial of a labor certification; rather, it is only one factor to be considered when examining the validity of a labor certification and whether a *bona fide* offer was made to U.S. workers.

The director revoked approval of the instant petition on April 1, 2005. In the revocation, the director again noted that on February 4, 2004 when the beneficiary was interviewed by a U.S. consular officer he gave testimony that indicated that he had no experience as a Chinese cook. This testimony contradicted statements made on the petition and on documents submitted in support of the petition. The director informed the petitioner of this in the Notice of Intent to Revoke (NOIR). Yet the petitioner did not present evidence to overcome these discrepancies when responding to the NOIR.

The director also noted in the revocation that the record contains no evidence that the relationship between the petitioner's owner and the beneficiary was revealed to the DOL. The director found that if that fact had been presented to DOL it might have scrutinized the labor certification petition more closely.

finding of fraud.

The director found, based on the totality of the circumstances in this case, that the proffered position was not made available to all qualified applicants in the United States and the labor certification application would not have been approved if all the facts of the case had been presented. The director invalidated the labor certification and revoked approval of the instant visa petition as it was not then supported by a valid labor certification.

On appeal counsel stated that the familial relationship between the petitioner's owner and the beneficiary does not bar approval of the instant petition and that the petitioner did not misrepresent or omit any material fact in this case. Counsel did not dispute that the petitioner failed to disclose the relationship of the beneficiary to the petitioner's owner in seeking the labor certification. Counsel states, however, that the familial relationship is not a material fact in the case.

Counsel again cited BALCA cases for the proposition that the familial relationship does not bar approval. Counsel notes that the factors to be considered in cases with a familial relationship are (1) whether there is an actual need for an employee with the alien's qualifications, (2) whether the employer made a good faith effort to recruit U.S. workers, (3) whether the U.S. applicants were rejected for lawful, job-related reasons, and (4) whether the alien had any role in the recruitment or selection process. None of the cases cited by counsel states that those factors are the only factors to be considered in cases with a familial relationship.

Initially this office notes that BALCA cases are not binding on this office. 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, BALCA decisions are not similarly binding. Counsel is permitted, however, to argue that the reasoning of a BALCA case is compelling and to urge its extension.

The BALCA cases cited stand, in sum, for the proposition that a familial relationship between the beneficiary and the petitioner's owner is not cause for automatic dismissal.² Although not bound by those cases this office accepts that proposition.

The relationship of the beneficiary to the petitioner's owner is, however, a factor to be considered. A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by blood, by marriage, through friendship, or where the two have a financial relationship. See *Matter of Summart*, 374, 00-INA-93 (BALCA May 15, 2000).

In a familial relationship case the four factors listed by counsel are all called into question. That the petitioner's owner and the beneficiary are related raises the implication that the petitioner may be employing his relative in preference to a U.S. worker. Also laid open to question are whether the petitioner actually needs to fill the proffered position, whether the employer attempted to locate a suitable U.S. worker, and whether U.S. workers were rejected merely out of preference for the family member.

Under these circumstances, any evidence that the job offer may not be *bona fide*, that the employer may not truly have attempted to locate a U.S. worker for the position, that evidence may have been falsified, or that

² In *Paris Bakery*, 88-INA-337 for instance, the petition was ultimately approved notwithstanding that the prospective employee was the petitioner's owner's brother.

the beneficiary may not actually be qualified pursuant to the terms of the approved labor certification, when considered with the familial relationship, may be sufficient to deny the petition. This is especially so where DOL was not made aware of the familial relationship when ruling on the labor certification application.

In the instant case the petitioner does not appear to have revealed the familial relationship between the beneficiary and the petitioner's owner initially. Counsel argues that the familial relationship was not material. This office disagrees. *Paris Bakery*, 88-INA-337 cited by counsel, indicates that familial relationship is a factor to be considered. It is relevant to material issues such as whether the petitioner made a *bona fide* search for qualified U.S. workers, whether the beneficiary has the requisite qualifications for the proffered position, etc. The argument that the familial relationship is immaterial cannot prevail.

This office notes, however, that the record contains no evidence that the petitioner denied the familial relationship or withheld it in response to a pertinent question. Under these circumstances, the failure to disclose the familial relationship may not be fairly characterized as a material misrepresentation or material omission.

In addition to the familial relationship, an investigation conducted by a U.S. consular officer revealed that the beneficiary (1) was unable to state the address of the Shin Kong Restaurant, (2) was unable to name the fish the restaurant is famous for preparing, (3) was unable to name or describe the preparation of 20 Chinese dishes, (4) could not name any five Chinese dessert, and (5) was unable to provide the name of his then current employer.

On appeal the beneficiary asserts that the findings of U.S. consulate's investigation were not accurate, but were instead the result of faulty translation work. The report of the investigation contains no indication that any barrier to communication existed between the beneficiary and the U.S. consular officer. This office does not find credible that a language barrier, either between the interviewer and the interpreter, or between the interpreter and the beneficiary, could be so flagrant as to result in the the interviewer completely misinterpreting the responses to all five of the questions listed above, and yet not be detected by the interviewer. This office does not find the beneficiary's explanation credible and instead finds that the beneficiary was unable to provide knowledgeable responses to basic questions regarding his claimed experience as a cook that were put to him at the interview.

The beneficiary's inability to provide knowledgeable responses to those basic questions undermines his assertion that he has worked as a cook at Shin Kong Restaurant for years or even that he has worked for a cook at all, in any Chinese restaurant. It also calls into question the authenticity of the employment verification documentation submitted with the petition. As such, the petitioner's claim that the beneficiary has the requisite experience for the proffered position as defined by the Form ETA 750 is found not credible. This, in turn, raises the possibility that rather than seeking a worker to fill a shortage occupation the petitioner's owner may in fact simply be seeking an immigration benefit for a family member.

The beneficiary's failure to provide knowledgeable responses to the interviewer's basic questions, coupled with the familial relationship between the beneficiary and the petitioner's owner and the fact that the relationship was not initially reported to the DOL, constituted sufficient reason to invalidate the labor

certification and to revoke approval of the Form I-140 visa petition because it was no longer supported by a valid labor certification.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.