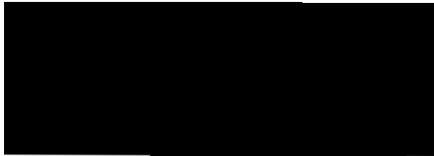




U.S. Citizenship
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Services

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Office: VERMONT SERVICE CENTER

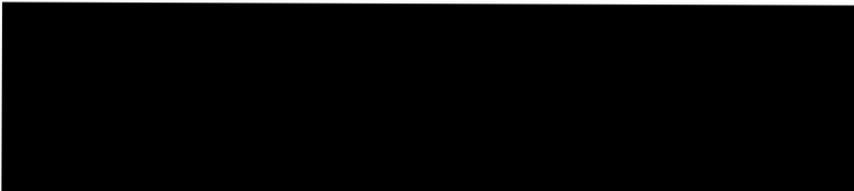
Date:

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, Vermont Service Center, revoked approval of the instant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded for further consideration and action.

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 decided that the beneficiary is not qualified for the proffered position and revoked approval of the visa petition accordingly. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified for the proffered position.

The record shows that the appeal was properly and timely filed, makes a specific allegation of error in law or fact, and is accompanied by additional 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.

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.

The Form ETA 750 states that the proffered position requires two years in the job offered or two years as a cook's helper. The petitioner submitted evidence showing that the petitioner worked as a cook for five years in a restaurant in Rasht, Iran. The service center approved the petition on November 24, 2003¹.

¹ The June 16, 2004 memorandum from the embassy in Ankara states that the petition was approved on April 11, 2001. The Notice of Intent to Revoke stated that the petition was approved on November 22, 2003. CIS computer records, however, show that the petition was approved and the notice of approval was sent on November 24, 2003.

On the Form I-140 petition the petitioner did not state the date it was established, its gross annual income, its net annual income, or the number of workers it employs in the spaces provided for those figures. The petitioner indicated "See Attached" in each of those spaces.²

The record contains a memorandum dated June 16, 2004 from the United States Embassy in Ankara, Turkey. That memorandum states the results of an interview, conducted in Ankara, of the beneficiary and the petitioner's owner. The memorandum states that the petitioner's owner, who is the beneficiary's brother-in-law, accompanied the beneficiary to that interview, and that both were questioned.

The report states that the beneficiary does not speak English and was interviewed in Farsi.³ The memorandum states that although speaking English is not a requirement to work in the United States, the beneficiary would therefore be unable communicate with her supervisor. The memorandum also states that the beneficiary claimed to prepare various Italian dishes but was unfamiliar with most sauces, including clam sauce.

The memorandum states that the petitioner's owner stated that he employs approximately 35 cooks⁴, but notes that the petitioner paid only \$374,923 in salaries and wages and \$113,542⁵ in compensation of officers during 2001.⁶

That memorandum also notes that the petitioner's owner is related to the beneficiary and states that the job offer appears to be offered to the beneficiary to assist her in obtaining permanent resident status in the United States.

The service center issued a Notice of Intent to Revoke on April 12, 2005 and included a copy of the memorandum from Ankara. The service center accorded the petitioner 30 days to respond. While the record reflects that the petitioner submitted a response to the Notice of Intent to Revoke the response was not considered by the director. Based on the content of the Ankara memorandum the director revoked approval of the visa petition on August 30, 2005.

² In the space reserved for the petitioner to report the number of workers it employs the petitioner entered the abbreviation, "See attach."

³ The interviewers basis for that asserted knowledge is not made explicit.

⁴ As this office is unable to find that figure in the record it presumes that the petitioner's owner must have stated, at the interview, that he employs 35 cooks.

⁵ If the petitioner's salary and wage expense were divided among 35 workers they earned an average of \$10,712.09 in that year. If the petitioner's compensation of officers were included with its salaries and wages the average would be \$13,956.14 per worker during that year.

⁶ The petitioner listed no Schedule A, Line 3, Cost of Labor during that year.

With the response to the Notice of Revocation counsel submitted a sworn statement, dated May 2, 2005, from the petitioner's owner. The petitioner's owner asserted (1) that he employs about 44 workers, of whom approximately 14 are cooks and other kitchen staff, 3 managers, and 28 hostesses, waiters, and busboys, (2) that his salary and wage expense is low because he is required to pay waiters and waitresses only \$2.38 per hour, (3) that the beneficiary's experience exceeds the requirements of the labor certification, (4) that the proffered position requires experience as a cook, but not necessarily a cook of Italian foods, (5) that he hires cooks without specific experience with Italian foods, (6) that he hires cooks who do not speak English, (7) that the beneficiary speaks English but requested an interview in Farsi because she is more comfortable in that language, (8) that he and his current chef both speak Farsi, (9) that the beneficiary was unfamiliar with clam sauce because clams are not eaten in Iran, and (10) that he is hiring his sister-in-law, the beneficiary, because she is an experienced cook, and not because of their relationship by marriage.

On appeal, counsel reiterated the assertions of the petitioner's owner. Counsel asserted (1) that the evidence pertinent to the beneficiary's cooking knowledge is insufficient to show that she is unqualified for the proffered position, and (2) that the beneficiary's limited English is also insufficient reason to revoke approval of the visa petition.

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).

Notwithstanding the cases cited above, if the beneficiary were somehow manifestly unable to perform in the proffered position, then this might demonstrate that no bona fide job offer exists, even though the beneficiary was qualified in terms of education and/or experience. This office need not reach that issue, however, as the petitioner's owner has sworn, perfectly credibly, that the beneficiary speaks some English and that, in any event, speaking English is not required to hold the proffered position.

This office does not find convincing the asserted lack of knowledge of Italian food cited in the memorandum from Ankara. The only example the memorandum cites of the beneficiary's lack of knowledge is clam sauce. As the petitioner's owner points out, clams are not typically eaten in Iran, which is an overwhelmingly Islamic country. Although this office accepts as true that the beneficiary does not know how to prepare "most other [Italian] sauces" that is not a qualification shown on the Form ETA 750 and not one that may be fairly construed from it. The petitioner has overcome the evidence adverse to the beneficiary's qualification for the proffered position.

The petition may not be approved at this time, however, because the record suggests additional issues that were not sufficiently addressed in the decision of denial.

The 2001 tax return submitted shows that the petitioner had taxable income before net operating loss deductions and special deductions of \$96,341 during that year. That amount is sufficient to pay the wage proffered in the instant case. The record appears to indicate, however, that the petitioner has multiple

petitions either pending or recently approved. The petitioner is obliged to demonstrate the ability to pay the wage proffered to beneficiaries of all of its visa petitions that are either recently approved or currently pending. As the director did not consider these issues the petition will be remanded for the director to issue a new Notice of Intent to Revoke the petition on grounds that the record does not establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date and that the job opportunity is *bona fide*. The director may request evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date including years for which evidence was not previously available. The director may request evidence to demonstrate the *bona fides* of the job opportunity in light of the family relationship between the petitioner and the beneficiary.

The record demonstrates that the beneficiary is the petitioner's owner's sister-in-law. Pursuant to 20 C.F.R. §656.20(c) (8) the petitioner has the burden when asked to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). 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, 2000-INA-93 (May 15, 2000). The director could have denied the petition on this basis, but did not.

The memorandum from Ankara states that the petitioner's owner then claimed to employ "around 35" cooks. In his sworn statement of May 2, 2005 the petitioner's owner stated that he employs approximately 44 workers, of whom approximately 14 are cooks and other kitchen staff, 3 managers, and 28 hostesses, waiters, and busboys. The petitioner's owner explains the low salaries and wages by stating that the wages restaurants must pay to waitresses is low because they receive most of their compensation from tips. As the petitioner's 2006 tax return was unavailable when the appeal was submitted it is not in the record and, in any event, as the petitioner's owner notes, salaries and wages shown on the tax return would not include tips, as they are not an expense to the petitioner.

Restaurants and other employers are, however, required to report tips paid to its employees on Form W-2 Wage and Tax Statements and Form W-3 transmittals. If the director believes that the number of employees the petitioner employs and the compensation each received is relevant to any material issue in this case, the director is free to request those forms for any or all of the salient years. The number of W-2 forms the petitioner issued during a given year would demonstrate the number of employees it had during those years and those forms, together with the W-3 transmittals, would demonstrate the remuneration they received.

The matter will be remanded for further consideration and action. On remand the director should issue a new Notice of Intent to Revoke approval of the petition considering the issues noted above or any other issues material to the approvability of the petition. The director may also request evidence salient to any relevant issues. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

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 director's decision is withdrawn. The matter is remanded for further consideration and action and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.