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U.S. Citizenship
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Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

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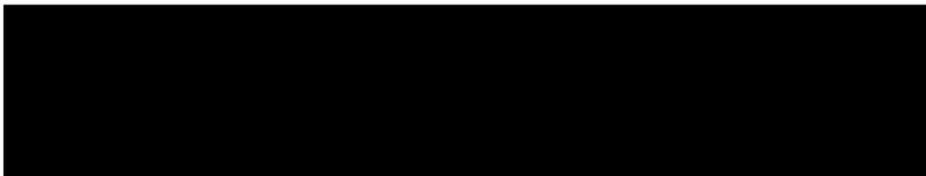
Petitioner:

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, California Service Center, denied the employment-based 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 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 has the requisite experience as stated on the labor certification petition. The director also found that approval of the labor certification application was obtained by fraud or misrepresentation of a material fact and invalidated the labor certification. The director denied the petition both because it was not supported by a valid labor certification and because the petitioner has not demonstrated that the beneficiary is qualified for the proffered position.

On appeal, counsel submitted a brief.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. 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 acting director's decision of denial the issues in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified for the proffered position pursuant to the terms of the approved labor certification and whether invalidation of the labor certification was proper.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).¹

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.

Section 212(a)(6) of the Act 8 U.S.C. § 1182(a)(6)(C), states, in pertinent part:

(c) *Misrepresentation.* -- (i) In general. -- Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

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 regulation at 20 C.F.R. § 656.30(d) states, in pertinent part:

. . . [A]fter issuance, a labor certification is subject to invalidation by the DHS . . . upon a determination . . . of fraud or willful misrepresentation of a material fact involving the labor certification application.

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 August 21, 2001. The labor certification states that the position requires two years of experience in the job offered.

To determine whether a beneficiary is eligible for a third preference immigrant visa, Citizenship and Immigration Services (CIS) must ascertain whether the alien is in fact qualified for the certified job. 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 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 August 13, 2001, stated that he had worked as a cook for [REDACTED] in Ciudad Lazaro Cardenas, Michoacan, Mexico from March 1993 to June 1995. The beneficiary stated that the duties of his position as,

Prepar(ing) and cook(ing) various Italian dishes such as Cheese Ravioli, Filete, Salmon, Ossobuco, Gnocchi, Linguine, Frutti di Mare, Rigatoni Siciliana, Linguine Luciana, Penne Arraviata, Pappardele, (and) Filet Mignon.

Although the instructions to the Form ETA 750 B request that the beneficiary list all of his employment during the previous three years and all of his previous employment related to the proffered position, the beneficiary listed no other previous employment.

With the petition counsel submitted a letter in Spanish dated April 24, 2001 from [REDACTED] and an English translation. That letter states that the beneficiary worked from 1993 to 1995 as a cook, specializing in Italian food, at [REDACTED] position at that restaurant was not specified. That the beneficiary worked from some unstated date during 1993 to some unstated date during 1995 does not demonstrate that he worked two full years.

Because the evidence submitted did not demonstrate that the beneficiary had the requisite two years work experience, the California Service Center, on December 20, 2003, requested, *inter alia*, evidence pertinent to that issue. The service center noted that the beneficiary's employment verification letter did not state the specific dates of his employment, the number of hours he worked per week, the duties of the job, or [REDACTED] position at the restaurant.

Consistent with the requirements of 8 C.F.R. § 204.5(l)(3)(ii), the Service Center requested that evidence of the beneficiary's experience be in the form of 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. The service center also requested a copy of the menu of [REDACTED]

In response, counsel submitted another employment verification letter and what purport to be two copies of the menu of [REDACTED]

The additional employment verification letter is dated January 31, 2004. It purports to be from [REDACTED] and to be signed by J [REDACTED] as did the first employment verification letter. It states that the beneficiary worked at that restaurant from 2:00 p.m. until 10:00 p.m. from January 17, 1993 to December 31, 1995 as a cook specializing in "Italian Cuisine and Sea Food." [REDACTED] does not state her position at the restaurant, but refers to it as "my restaurant."

One of the menus sent is in English and the other is in Spanish. They list various Italian appetizers, salads, and entrees.

On March 19, 2004 the California Service Center issued another request for evidence in this matter. The service center noted the discrepancy between the beneficiary's claim of qualifying employment as stated on the Form ETA 750B and the claim of employment as stated in the employment verification letter. The service center requested that the petitioner provide pay statements, tax documents, social security records, etc. to verify the dates of the beneficiary's employment for El Tejado. The service center accorded the petitioner until June 11, 2004 to respond.

In response counsel provided his own letter, dated May 27, 2004, and a third employment verification letter and translation from [REDACTED]. That translation states that the employment dates to which Ms. [REDACTED] originally attested were incorrect, and that the misstatement was the result of an error by her secretary. That letter further states that the dates provided by the beneficiary were correct.

The petitioner provided no pay statements, tax documents, social security records or other independent objective evidence as requested in the March 19, 2004 request for evidence. In his May 27, 2004 letter counsel stated that no such evidence is available because the beneficiary was paid in cash.

On March 30, 2005 the California Service Center issued a notice of intent to deny in this matter. The service center observed that the history of the beneficiary's alleged employment for [REDACTED] as stated on the Form ETA 750B is inconsistent with the history of that employment as related on the first employment verification letter.

The service center cited *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988) for the propositions that 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, that the petitioner must resolve any inconsistencies in the record by independent objective evidence, and that attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. The service center observed that the inconsistency had not been resolved with any such evidence.

Further, the notice of intent to deny revealed that an investigation of the beneficiary's employment claim had been performed by the Officer in Charge (OIC) at the United States Embassy in Mexico City. The OIC spoke directly to [REDACTED] owner of El Tejado, and found that the cuisine served by that restaurant is Mexican rather than Italian and that the beneficiary had worked there for only one year.

The service center found that the evidence of record did not support the beneficiary's claim of two years of qualifying employment. It accorded the petitioner until April 29, 2005 to submit additional evidence.

In response counsel submitted two affidavits in Spanish and English translations, and a letter dated April 26, 2005. The affidavits provided, both dated April 22, 2005, are from [REDACTED] and her mother, [REDACTED]

The affidavit of [REDACTED] states that she was busy when questioned and unable to answer the investigator's questions correctly. She further states that during the period when the beneficiary was employed at El Tejado her mother, [REDACTED] owned and operated the restaurant. Yet further, she states that subsequent to the investigative interview her mother told her that the cuisine at El Tejado was Italian during the time when the beneficiary worked there, but upon his leaving the cuisine was changed to Mexican.

The translation of the affidavit of [REDACTED] states that the beneficiary worked at El Tejado, which she then owned, from March 17, 1993 to June 31, 1995.² The translation further states that the period of the beneficiary's employment,

. . . was a very good period for my restaurant due to the fact that thanks to the culinary knowledge of [the beneficiary] I [the restaurant's then owner] had the opportunity to place in

² This office notes that June has only 30 days.

the menu Italian dishes such as: pastas, spaghetti, carbonara, salmon, filet, cheese raviolis, pollo a la parmigiana, special dishes, etc.

The restaurant's previous owner states, thereby, that the beneficiary's pre-existing expertise in preparing Italian food enabled El Tejado to become an Italian restaurant.

In his April 26, 2005 letter counsel states that the additional employment verification letters "prove beyond doubt that the Beneficiary's employment [claim] is genuine."

On May 24, 2005, the director denied the petition, finding that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient work experience.

On appeal, counsel submits a brief but no additional evidence. Counsel asserts that,

The beneficiary acquired his experience in Mexico over 10 years ago at El Tejado, [which] was then an Italian restaurant.

Counsel attributes the adverse information in the investigative report to the fact that,

[redacted] was not the owner of El Tejado when [the beneficiary] worked there, and therefore, could not answer questions about his employment with complete certainty.

Counsel states that the evidence of record "clearly verif(ies) the veracity of the beneficiary's claim [of qualifying] experience."

The various versions of the beneficiary's employment history submitted in this case are ripe with discrepancies.

The Form ETA 750 states that the beneficiary worked for El Tejado from March 1993 to June 1995. The first employment letter stated merely that he worked there from 1993 to 1995. Asked for clarification, [redacted] stated that the beneficiary worked at El Tejado from January 17, 1993 to December 31, 1995, providing those exact dates. Faced with the discrepancy, [redacted] provided a letter stating that the dates provided in her letter were the result of a clerical error and that the dates given by the beneficiary were correct. Later still, [redacted], El Tejado's previous owner, stated that [redacted] her daughter, lacked sufficient knowledge of the beneficiary's employment at El Tejado to attest to his employment history. Throughout the presentation of those various contradictory assertions the petitioner has submitted no competent objective evidence to reconcile the inconsistencies as required by *Matter of Ho, supra*.

[redacted], the current owner of El Tejado, first stated that the beneficiary specialized in preparing Italian food and provided a menu showing that the restaurant served Italian food. Questioned in person, she admitted that the cuisine served at her restaurant is Mexican. Later still she stated that she had just learned from her mother that the cuisine of the restaurant was previously Italian, a fact of which she had

been previously unaware. The various versions of the truth provided by [REDACTED] are not readily reconcilable.

Counsel asserts, on appeal, that the beneficiary acquired his experience in preparing Italian foods at El Tejado. This is consistent with the employment history shown on the Form ETA 750B, in which the beneficiary listed no experience in preparing Italian food, or any other food, prior to his employment at El Tejado. It is not; however, consistent with the statement of the previous owner of El Tejado, [REDACTED], that the beneficiary's vast pre-existing knowledge of preparing Italian food enabled her to convert her business to an Italian restaurant.

As was previously noted inconsistencies in the record must be resolved by independent objective evidence. The request for evidence issued on March 19, 2004 requested such evidence and listed pay statements, tax documents, and social security records as examples of such independent evidence. The petitioner has provided no such evidence, but merely additional employment verification letters attempting to reconcile the various inconsistent assertions in this case by disavowing some of those assertions. As per *Matter of Ho, supra*, "attempts to explain or reconcile . . . inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice."

In this instance the additional evidence submitted merely rejects some of the previous information given and attempts thereby to present a feasible version of the beneficiary's employment history. This does not "prove beyond doubt that the Beneficiary's employment [claim] is genuine" as counsel stated in his April 26, 2005 letter. The evidence does not "clearly verify the veracity of the beneficiary's claim [of qualifying] experience" as counsel stated in the appeal brief. Given the striking contradictions in this case and the evidence gained through investigation, strident argument is no substitute for reliable evidence.

The evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position and the visa petition may not be approved.

The evidence does demonstrate, clearly and convincingly, that approval of the labor certification application was obtained by fraud or willful misrepresentation of a material fact, and its invalidation was therefore proper. As the visa petition is no longer supported by a valid labor certification it may not be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.