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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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FILE: [REDACTED]
SRC-07-234-53973

Office: TEXAS SERVICE CENTER

Date: **MAR 16 2010**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 concerning your case must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty foreign food cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary had the requisite experience as stated on the labor certification application. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 2, 2008 denial, the primary issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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 nature, for which qualified workers are not available in the United States.

The petitioner must demonstrate 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). Here, the Form ETA 750 was accepted on April 8, 2004.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal counsel submits an affidavit of [REDACTED] who certifies that the two different translations describe the same original Chinese employment verification. Relevant evidence in the record includes two employment verification letters with English translations. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the letters from the beneficiary's former employer establish that the beneficiary possessed the requisite two years of experience for the proffered position prior to the

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

priority date. Counsel asserts that there is no discrepancy in the beneficiary's employment record because the different names and addresses of the restaurant where the beneficiary worked are the result of different ways to translate Chinese into English. Specifically, counsel claims that one translation was in Cantonese and the other in Mandarin.

To determine whether a beneficiary is eligible for an employment based immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of specialty foreign food cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|--------------------|---------|
| 14. | Experience | |
| | Job Offered | 2 years |
| | Related Occupation | 0 |

The duties delineated at Item 13 of the Form ETA 750A are a public record, and thus need not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth her credentials on Form ETA-750B and signed her name on March 5, 2004, under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, she represents that she worked as a cook at [REDACTED] from May 1996 to September 2001. The beneficiary did not provide the employer's name or any additional information concerning her employment prior to May 1996 or after September 2001 on that form.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

The record of proceeding contains two employment verification letters with English translations to evidence the beneficiary's qualifications. Counsel argues that these two letters with English

translations established the beneficiary's requisite experience prior to the priority date under the requirement set forth at 8 C.F.R. § 204.5(g)(1).

The regulation requires that such evidence be in the form of letter from a current or former employer or trainer and include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. The first experience verification letter, dated September 30, 2000, is written by the owner of the restaurant and contains seals of the restaurant and the owner. This letter states that the beneficiary worked for the restaurant as a cook from May 1996 to the present, i.e., September 30, 2000 the date the letter was issued. However, this letter does not include the address of the writer or a specific description of the duties performed by the beneficiary as required by the regulation. Therefore, this employment verification letter cannot be accepted as primary regulatory-prescribed evidence to establish the beneficiary's qualifications in the instant case. In addition, without a specific description of the duties, the AAO cannot determine whether the beneficiary's purported four years of experience with that restaurant in Taipei qualifies her to perform the duties of the proffered position set forth in Item 13 of the Form ETA 750A.

The second employment verification letter is dated the same day as the first letter (September 30, 2000). It contains the name and address of the business, and a brief description of the duties performed by the beneficiary. This letter verifies that the beneficiary was employed as a cook at [REDACTED] from May 1996 to August 2000. The petitioner provides no explanation for the beneficiary's former employer issuing two employment verification letters on the same day, for the same beneficiary but in different formats. This office notes that the two letters provide inconsistent information about the beneficiary's employment. The first verification indicates that the beneficiary worked for the restaurant until the date of the letter, September 30, 2000, and the second letter claims that the beneficiary worked to the end of August 2000. Neither statement is supported by the beneficiary's representation on the Form 750B that she completed her employment in September 2001. The record does not contain any documentary evidence to resolve the inconsistency except counsel's claim on appeal that they are the result of different translation from Chinese into English. *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. The petitioner failed to resolve the inconsistency in the record by independent objective evidence, and therefore, failed to establish the beneficiary's requisite two years of experience as a cook prior to the priority date.

The record contains two employment verification letters issued by the same employer on the same day with different statements of fact. However, the letterhead and format of the second letter appears to be computer-created. The record does not contain an original version of either letter. Without any documentary supporting evidence such as corporate documents, payroll records of the business and the beneficiary's personal tax or income information, a photocopy of a computer-created format in the instant case casts doubt on the authenticity of the employment verification letters. 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.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988). Therefore, the AAO cannot give full evidentiary weight to the verification letters in the record of proceeding.

The record of proceeding does not contain any other evidence to support the beneficiary's qualifications. Therefore, the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience in the job offered for the proffered position as required by the ETA 750 with the employment verification letters.

In addition, section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182, provides that "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible." By providing a false document to evidence the requisite experience for the proffered position, the beneficiary sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. The beneficiary also signed Form ETA 750, which contained similar misrepresentations of material fact, under penalty of perjury. The AAO will dismiss the appeal and enter a formal finding of fraud into the record. This finding of fraud will be considered in any future proceeding where admissibility is an issue.

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 with a finding of fraud and willful misrepresentation of a material fact.

FURTHER ORDER: The AAO finds that the beneficiary knowingly misrepresented her past employment as a cook and submitted false documents concerning her experience to mislead the DOL, USCIS and the AAO on elements material to her eligibility for a benefit sought under the immigration laws of the United States.