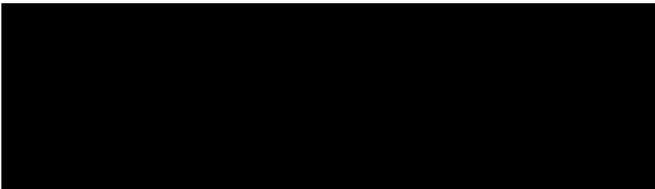


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U.S. Citizenship  
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Services

PUBLIC DOMAIN



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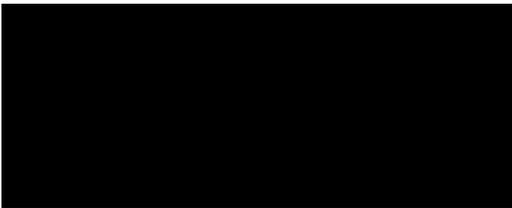
IN RE: Petitioner:



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, Director  
Administrative Appeals Office

**DISCUSSION:** The immigrant visa petition was denied by the Director, Vermont Service Center. The petitioner appealed the decision. The Administrative Appeals Office (AAO) affirmed the director's decision and dismissed the appeal. The petitioner filed a motion to reopen. The AAO granted the motion, and then, it affirmed the previous decisions of the Director and the AAO. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed. The petition will remain denied.

The petitioner is a Chinese restaurant. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and, it seeks to employ the beneficiary permanently in the United States as a Chinese cook. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition and denied the petition accordingly.

On motion to reconsider, counsel submits a letter to the Director and no additional evidence.

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 27 2001. The proffered wage as stated on the Form ETA 750 is \$23,000.00 per year. The certified Form ETA 750 states that the position requires two years experience.

The regulation at 8 C.F.R. § 103.5(A)(3) states:

*Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or ... [Citizenship and Immigration Services (CIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The motion qualifies as a motion to reconsider because counsel asserts that the AAO erroneously determined that evidence submitted with her prior motion lacked credibility

The employer, who is the petitioner here, has prepared the above ETA 750 A as an essential part of the labor certification process used to support preference visa petitions that are employment based. An employer who desires to employ an alien in the United States must undertake a multiple step process as directed by the United States Department of Labor (USDOL) which, once approved, certifies the Alien Employment Application for the occupation based upon the above criteria specified by the employer although the USDOL may cause the employer to modify the Form ETA 750 as submitted to bring the application into compliance with its regulations as a condition to certification. Here according to counsel, USDOL required that the occupation's criteria include two years of experience as a Chinese cook. 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14, sets forth the minimum education, training, and experience that an applicant must have for the position of a Chinese [Szechuan/Hunan recipes] cook.

In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	Form Heading
	Grade School	Blank
	High School	Blank
	College	Blank
	College Degree Required	Blank
	Major Field of Study	Blank
	Training	Form Heading
	Experience	Form Heading
	Job Offered	Form Heading
	Years/Mos.	<u>2</u>
	Related Occupation	Form Heading
	Years/Mos.	Blank

The beneficiary set forth his work experience on Form ETA-750B, and, dated and signed the form on April 26, 2001. He listed his experience as a "Chinese Cook" at Sesame Inn Chinese Restaurant, Pittsburgh, Pennsylvania from April 2000 to present (i.e. the date of the preparation of the Form ETA 750 Part B which was dated April 26, 2001). The "Sesame Inn" is the name of the applicant sponsor of the same Form ETA 750.<sup>1</sup> Other than the above experience, there is no other "Chinese Cook" prior "jobs" listed by the beneficiary on the Form 750 part B. Therefore, based upon a plain reading of the certified Alien Employment Application, the beneficiary has stated that he was employed as a "Chinese Cook" for approximately one year, and other than that, he was also a waiter and self employed manager in two other positions both involving restaurants, one Chinese food service, the other Japanese, in and around the Pittsburgh, Pennsylvania area.

The I-140 petition was dated August 7, 2001, and filed in October of that year with the Service Center without any documentation concerning the beneficiary's qualifications as required by regulation. 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.

8 CFR § 204.5(I)(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

<sup>1</sup> It is questionable whether the beneficiary can represent as job experience prior employment in the same occupation by the same employer who is now sponsoring the beneficiary for the position of Chinese cook. However, this question is beyond the scope of this discussion or CIS jurisdiction in this matter.

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 director issued a request for evidence. Consistent with the requirements of 8 C.F.R. 204.5 § (I)(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 specific description of the training received or the experience of the alien. The director provided an alternative to the above request in the event the evidence was unavailable. It requested and advised that "... other documentation relating to the alien's experience will be considered."

Despite the above request in the alternative, the petitioner failed to comply with regulation and the director's request for evidence in the matter. No documentation concerning the beneficiary's qualifications was received.<sup>2</sup>

The petitioner appealed, after the petition was denied by the Director, on March 18, 2002 for lack of evidence of the required experience as a Chinese cook. Upon appeal, counsel stated that according to counsel's records the required evidence of experience as a Chinese cook was submitted with the I-140 petition.

A review of the record of proceedings evidencing the filing of the I-140 petition and its exhibit attachments shows that no documentation concerning the qualifications of the beneficiary as a Chinese cook was submitted with Form I-140 other than the Form ETA 750, Part B discussed above.

Counsel upon appeal asserted that the "job" identified by beneficiary as ██████████ in Form ETA 750, Part B item "c" includes the duties of "... preparation of authentic Szechuan/Hunan recipes and dishes" for Hong Kong Chinese Express (self employed) a restaurant in Monroeville, Pennsylvania. Counsel then submitted articles of incorporation and a business license of Hong Kong Chinese Express "in support of the Beneficiary's qualifications." It is clear from the evidence presented that the beneficiary was the incorporator of the company and that the business did have a mercantile license in Monroeville, Pennsylvania from 1994 through 1997, and one expiring in April 1999,<sup>3</sup> and that a menu submitted showed that the business served Chinese food, but there is nothing submitted to prove that the beneficiary was a Chinese cook in the establishment other than counsel's assertions. Counsel states, "The evidence of the existence of the business [Hong Kong Chinese Express] and beneficiary's ownership interest is all the evidence that exists." 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).

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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<sup>2</sup> Counsel did provide financial information concerning the petitioner's ability to pay the proffered wage in response to a request from the director.

<sup>3</sup> There is no explanation submitted by petitioner why there would be a business license expiring in 1999 for the Hong Kong Express restaurant reputedly owned, managed and operated by beneficiary when according to Form ETA 750 Part B, item "C" the beneficiary's job experience as manager ended in 1997.

On motion to reopen,<sup>4</sup> counsel submitted an employment verification letter stating previously undisclosed employment with a Chinese restaurant from April 1989 through May 1993 to show the requisite job experience. Counsel asserts that the letter had not been secured to support the I-140 petition because the beneficiary could not locate the owner of that Chinese restaurant. The letter submitted does not have the address of that owner but is on the stationery of the former business at its former Monroeville, Pennsylvania location. No pay stubs, W-2 statements, or other verification of employment were submitted. There is no explanation of the present whereabouts or address of that owner, or how he was found or why he was unavailable. The letter is not an affidavit, notarized or otherwise verified. It was submitted some time after the petition, request for evidence, and appeal were decided. The letter has little probative value in this matter.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the above letter submitted on motion.

On the present motion to reconsider, counsel submits no additional evidence. Counsel asserted that the case was commenced by petitioner with the evidence then available because of time constraints. She said that the nature of the restaurant business has many business closures and personnel turn-over. Further, she suggests that the beneficiary's ownership of the Hong Kong Chinese Express in and of itself proves that the beneficiary has the required experience, and, the beneficiary lost contact with his employees who could verify that he was a cook there. Counsel suggests the same "scenario" for the beneficiary's employment at the other Pennsylvania restaurant. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Without documentary evidence to support the claim of experience as a Chinese cook for two years, the assertions of counsel will not satisfy the regulations nor will they will not satisfy the petitioner's burden of proof. The petitioner has not come forward with credible substantive evidence that has probative value on the issue of whether or not 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.

The evidence submitted as found in the record of proceedings does not demonstrate that the beneficiary has the requisite two years of experience as a Chinese cook. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

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.

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<sup>4</sup> The first motion submitted that was adjudicated.

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**ORDER:** The motion is granted. The AAC's prior decision dated December 16, 2003, is affirmed. The petition remains denied.