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U.S. Citizenship
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FILE:

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Office: CALIFORNIA 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. Wiemana, Chief
Administrative Appeals Office

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

The petitioner is a party planner. It seeks to employ the beneficiary permanently in the United States as a foreign specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with three years of qualifying employment experience. 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 February 15, 2005 denial, the single 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. The director noted inconsistencies in information pertaining to the beneficiary's employment experience.

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 DOL 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 June 16, 1999.

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 a letter dated March 14, 2005 from the petitioner indicating that the beneficiary has been employed with the petitioner since January 1997, letters from colleagues of the beneficiary attesting to his character, a previously submitted letter dated January 17, 2005 from [REDACTED] stating that she worked with the beneficiary at [REDACTED] from 1990 to 1993, a previously submitted letter dated January 17, 2005 from [REDACTED] indicating that the beneficiary worked at La [REDACTED] from 1990 to 1993, a Mexican National Register Card for [REDACTED] a Mexican Application for a Tax Identification Number for [REDACTED] Moreno, and a death certificate for [REDACTED]. Other relevant evidence in the record includes a recommendation letter dated October 20, 2002 from [REDACTED] of Colegio de Bachilleres and a letter dated October 20, 2002 from [REDACTED] stating that the beneficiary worked for [REDACTED] from 1990 to 1993

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).

and specialized in Mexican food. The record does not contain any other evidence relevant to the beneficiary's qualifications.

In his decision, the director noted the following inconsistencies in the evidence submitted by the petitioner with the petition and in response to the director's request for evidence (RFE) dated April 8, 2003: La Colmena is located at Atempan, Puebla, Mexico, not Teziutlan as indicated in the employment letter dated October 20, 2002 from [REDACTED] of La Colmena; the owner of La Colmena is [REDACTED] not [REDACTED]; the signature on the recommendation letter dated October 20, 2002 from [REDACTED] of Colegio de Bachilleres is not the one used by Mr [REDACTED] and the beneficiary claims to have been employed at La Colmena at the same time he claims to have worked at Colegio de Bachilleres.

The director also noted the following issues regarding the petitioner's response to the director's Notice of Intent to Deny (NOID) dated January 3, 2005: Counsel's claims that the location listed for La Colmena on the employment letter was a mistake and that [REDACTED] was a supervisor and not the owner of La Colmena add to the inconsistencies in the record; Counsel has provided no evidence to substantiate that Pilar [REDACTED] was an employee at La Colmena; counsel provided no evidence to establish that the purported current owner of La Colmena, [REDACTED], or a purported employee, [REDACTED] were or are employed by La Colmena; and counsel's claim that the beneficiary volunteered at Colegio de Bachilleres and attended school there did not address the issue of the fraudulent signature on the letter dated October 20, 2002 from [REDACTED] of Colegio de Bachilleres.

On appeal, counsel asserts that the beneficiary's former employer, La Colmena, is located in the City of Atempan, in the County of Teziutlan, in Puebla, Mexico. Counsel states that the owner of La Colmena, Sofia [REDACTED] has died. He cites a letter from the purported current owner of La Colmena, [REDACTED] indicating that the beneficiary worked at La Colmena from 1990 to 1993. Further, counsel states that the beneficiary volunteered at El Colegio de Bachilleres and that the director's finding that the recommendation letter from El Colegio de Bachilleres is fraudulent is erroneous.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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).

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 foreign specialty cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	6
	High School	6
	College	0
	College Degree Required	none
	Major Field of Study	none

The applicant must also have three years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA 750B and signed his name 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, he represented that he worked full-time as a Mexican food cook at Colegio De Bachilleres del Estado de Puebla in Mexico from July 1990 to August 1993, that he worked full-time as a shipping and receiving clerk at Magic Plastics in California from January 1995 to January 1997 and that he worked full-time for the petitioner as a Mexican food cook from January 1997 to the date he signed the Form ETA 750B on May 25, 1999. He does not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(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.

On Form ETA 750B, the beneficiary represented that he worked full-time as a Mexican food cook at Colegio De Bachilleres del Estado de Puebla in Mexico from July 1990 to August 1993. With the petition, the petitioner submitted a recommendation letter dated October 20, 2002 from [REDACTED] of Colegio de Bachilleres stating that the beneficiary maintained 40 hours per week and that he was capable to do any job given to him.² The letter does not describe the experience received by the beneficiary as required by 8 C.F.R. § 204.5(l)(3). Therefore, the letter does not establish that the beneficiary acquired three years of experience as a foreign specialty cook. In his decision, the director noted that the signature on the letter from [REDACTED] is not the one used by Mr. [REDACTED]. 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). Further, the director noted that the beneficiary claims to have been employed at La Colmena at the same time he claims to have worked at Colegio de Bachilleres. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective

² This office notes that while the letter does not state that the beneficiary was employed by Colegio de Bachilleres, the beneficiary indicated that Colegio de Bachilleres was his former employer on Form ETA 750B.

³ As noted by the director in his decision, an investigation to verify the beneficiary's previous employment was conducted by the American Embassy, Mexico City, Mexico, Bureau of Immigration and Customs Enforcement.

evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In response to the director's NOID, counsel claimed that the beneficiary volunteered at Colegio de Bachilleres and that he attended school there. However, counsel did not address the issue of the fraudulent signature on the letter from [REDACTED]. Further, counsel did not indicate how the beneficiary could have attended school, volunteered his time at the school and work full-time at La Colmena from July 1990 to August 1993.⁴ On appeal, counsel again asserts that the beneficiary volunteered at El Colegio de Bachilleres and states that the director's finding of fraud is erroneous. However, counsel provides no evidence in support of this assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *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)).

Further, in response to the director's RFE, the petitioner submitted a letter dated October 20, 2002 from [REDACTED] [REDACTED] z in his capacity as owner of La Colmena stating that the beneficiary worked for La Colmena in Teziutlan, Puebla, Mexico from 1990 to 1993 and specialized in Mexican food. In his decision, the director noted that La Colmena is located at Atempan, Puebla, Mexico, not Teziutlan as indicated in the employment letter from [REDACTED]. The director also noted that the owner of La Colmena is [REDACTED], not [REDACTED] as indicated in the employment letter. In response to the director's NOID, counsel claims that the location listed for La Colmena on the employment letter was a mistake and that [REDACTED] was a supervisor and not the owner of La Colmena. The director noted that counsel's argument adds to the inconsistencies in the record, that counsel has provided no evidence to substantiate that [REDACTED] was an employee at La Colmena, and that counsel has provided no evidence to establish that the purported current owner of La Colmena, [REDACTED], or a purported employee, [REDACTED] were or are employed by La Colmena. On appeal, counsel asserts that the beneficiary's former employer, La Colmena, is located in the City of Atempan, in the County of Teziutlan, in Puebla, Mexico.⁵ Counsel also states that the former owner of La Colmena, [REDACTED] has died.⁶ He cites a letter from the purported current owner of La Colmena, [REDACTED] indicating that the beneficiary worked at La Colmena from 1990 to 1993.⁷ The evidence does not establish that the beneficiary acquired three years of full-time experience as a foreign specialty cook.

⁴ This office notes that although counsel states that the beneficiary attended school at Colegio de Bachilleres, the beneficiary did not list Colegio de Bachilleres at Part 11 of the ETA 750B requiring information regarding schools, colleges and universities attended by the beneficiary. Further, the record contains no objective evidence of the beneficiary's attendance at Colegio de Bachilleres, such as transcripts or registration documentation.

⁵ This office notes that contrary to counsel's assertion, Teziutlan is a municipality in the state of Puebla, Mexico. Atempan is a separate municipality in the state of Puebla, Mexico.

⁶ On appeal, counsel provides a death certificate for [REDACTED] as evidence that the owner of La Colmena, [REDACTED] has died. However, counsel has provided no evidence to establish that Sofia [REDACTED] and [REDACTED] are the same person.

⁷ On appeal, counsel submitted a Mexican National Register Card for [REDACTED] and a Mexican Application for a Tax Identification Number for [REDACTED]. These documents do not reference La Colmena and do not establish that [REDACTED] is the current owner of La Colmena.

Finally, on Form ETA-750B, the beneficiary claims to have worked full-time for the petitioner as a Mexican food cook from January 1997 to the date he signed the Form ETA 750B on May 25, 1999. On appeal, counsel submits a letter dated March 14, 2005 from the petitioner indicating that the beneficiary has been employed with the petitioner since January 1997.⁸ However, the letter does not indicate whether the beneficiary was employed in a full-time or part-time capacity. Further, although the letter states that the beneficiary's responsibilities included preparing a daily catering menu, making soups, sauces, salads, purchasing and inventory control, the letter does not indicate that the beneficiary gained experience as a foreign specialty cook. Therefore, the letter from the petitioner does not establish that the beneficiary acquired three years of full-time experience as a foreign specialty cook.

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired three years of experience in the job offered from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of 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.

ORDER: The appeal is dismissed.

⁸ This office notes that the priority date is June 16, 1999. The petitioner must demonstrate that, on the priority date, the beneficiary had acquired three years of experience as a foreign food cook. Therefore, even if the beneficiary worked full-time for the petitioner as a foreign food cook beginning in January 1997, he could not have acquired three years of experience with the petitioner as of the priority date.