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FILE:

EAC 02 166 53071

Office: VERMONT SERVICE CENTER

Date: JUL 31 2007

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 preference visa petition was denied by the Director, Vermont Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a restaurant business. It seeks to employ the beneficiary permanently in the United States as a specialty 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. The director determined that petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

On appeal, counsel submitted additional evidence.

The record showed that the appeal was properly filed and timely and made 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 denial dated October 15, 2003, 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 and found it doubtful that the beneficiary was employed as a head chef in the kitchen of the Grand Hotel Loja in Loja, Ecuador from September 1985 to September 1988.

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 March 21, 2001. The proffered wage as stated on the Form ETA 750 is \$ 24,190.40 per year (\$11.63 per hour). The Form ETA 750 states that the position requires two years experience.

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<sup>1</sup>.

The regulation 8 C.F.R § 204.5(l)(3)(ii) states in pertinent part:

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<sup>1</sup> 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).

(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.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, and, a copy of petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1999, 2000<sup>2</sup> and 2001.

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

14.	Education .....	
	Grade School	<u>6</u>
	High School	Blank
	College	Blank
	College Degree Required	Blank
	Major Field of Study	Blank

According to the application, the applicant must also have two years of experience in the job offered (or two years of job experience "in any cooking environment"), 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 relating to "Other special requirements" is blank. There is no evidence in the record of proceeding that the beneficiary has attained six years of grade school education.

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 has been employed by the petitioner as a specialty

<sup>2</sup> Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date.

cook/chef from April 1992 to present. Prior to that employment the beneficiary stated that he was head chef at the Grand Hotel Loja, Loja, Ecuador, from September 1985 to March 1988. He does not provide any additional information concerning his employment or training background on that Form. According to the petition, the beneficiary then arrived in the United States in August of 1990.

Because the Director determined the evidence submitted was insufficient to show that the beneficiary had the requisite two years work experience, the director on August 14, 2002, and, June 22, 2003, requested evidence pertinent to that issue.

Consistent with the requirements of the regulation at 8 C.F.R. § 204.5 (l)(3)(ii), the director specifically requested, *inter alia*, the following:

Submit additional documentation that the beneficiary qualifies for the job offer specified in your Application for Labor Certification (Form ETA 750A). This documentation should show the beneficiary has the required experience, training, education and/or special requirements as of the time of the filing the Labor Certification Agreement. ... If eligibility is based on experience or training, letter(s) from current or former employers(s) or trainer(s) should be submitted. The letter(s) shall include the name, address, title of the writer, and a specific description of the duties performed by the beneficiary or of the training received. If such evidence is shown to be unavailable, other documentation relating to the beneficiary's experience will be considered.

Counsel submitted a letter dated September 12, 2002 from [REDACTED], manager of the Grand Hotel Loja, in Loja, Ecuador attesting to the beneficiary's employment there as Head Chef. [REDACTED] stated in pertinent part:

"That ... [the beneficiary] worked in our establishment in the Kitchen as Head Chef, for the period from September 1985 to September 1988, proven honesty, distinguished by a responsible and efficient person, and always demonstrated a high spirited contribution, and a profound respect for others .... "

The letter did not have a description of the duties performed by the beneficiary as Head Chef or a description of the training the beneficiary may have received at the Grand Hotel Loja. There is no evidence or information in the record of proceeding concerning how the beneficiary attained the training and/or job experience to become Head Chef. There are no statements in the record of the beneficiary's prior employment experience as a specialty cook or training until the Grand Hotel Loja work experience.

The director denied the petition on October 15, 2003, finding that the evidence submitted did not demonstrate that the beneficiary had the claimed work experience. Specifically, the director in his decision cited inconsistencies found in the record of proceeding related to claims made by the beneficiary on a prior application for immigration benefits, namely that the beneficiary was in the United States working during part of the period that he claimed to be working in Ecuador.

On appeal of the director's decision, counsel asserted:

The evidence submitted by the beneficiary reflecting his employment as a chef at the Grand Hotel Loja in Ecuador from September 1985 to September 1988 is true and correct. The beneficiary therefore has the qualifying employment experience for the ETA 750 and I-140 petition. The information listed in the SAW [Special Agricultural Workers] application

reflecting employment by USA Holdings Inc. of Lighthouse Point, FL is incorrect. The beneficiary did not supply it nor was it included in that application with his knowledge or consent. When he became aware of the misinformation he withdrew from and abandoned that application for temporary resident status. The beneficiary will provide evidence to support above.

The beneficiary or petitioner did not provide evidence to support the above assertions. 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).

Therefore, the AAO on June 14, 2005, found that the evidence found in the record of proceeding did not demonstrate credibly that the beneficiary had the requisite two years of employment experience, and that therefore, the petitioner had not established that the beneficiary was eligible for the proffered position.

On July 15, 2005, counsel filed a motion dated June 14, 2005 to reopen and reconsider the AAO decision. Counsel submitted five documents and a partial copy of a property record as additional evidence.

#### The beneficiary's qualifications

According to an affidavit attested by the beneficiary on July 13, 2005, he has secured statements from co-workers,<sup>3</sup> a police major and an attorney "who knew me professionally and represented me in Ecuador during the 1985-88 periods and could attest to my presence ...." According to the affidavit, the beneficiary stated he was employed as a cook during the period recited on the ETA 750, Part B.

On the first statement submitted [REDACTED] on a faxed photocopy of Grand Hotel Loja stationery, identified herself as a "cook." The document is entitled "Certifica." She stated on the un-notarized statement<sup>4</sup> dated July 4, 2005, that the beneficiary was the Main Chef in the restaurant of the Grand Hotel Loja from September 1985 to September 1988 and in that period the beneficiary "taught me the culinary art." Since the certificate is not notarized, the signature of [REDACTED] is illegible, there is no personal address or Ecuadorian identification number given for [REDACTED], she is neither an

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<sup>3</sup> Since individuals made the statements 22 years after the reputed commencement of the beneficiary's employment at the Grand Hotel Loja, proof is demanded that their respective employment was contemporaneous with the beneficiary's employment.

<sup>4</sup> The declarations that have been provided on motion are not affidavits as they were not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of a motion are not evidence and thus, as is the case with the arguments of counsel, 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).

employer or trainer, and there is no specific description of the duties<sup>5</sup> performed by the beneficiary or of the training he received in the restaurant of the Grand Hotel Loja, this certificate has no probative value under the regulation at 8 C.F.R. § 204.5 (1)(3)(ii).

On the second statement submitted, [REDACTED], (no personal address or Ecuadorian identification number was given for him), on a faxed photocopy of Grand Hotel Loja stationary is identified as a “manager administrator of the Grand Hotel Loja.” He stated on the un-notarized statement dated July 4, 2005, that the beneficiary was the Main Chef in the restaurant of the Grand Hotel Loja from September 1985 to September 1988 and in that period the beneficiary “taught me the culinary art.”<sup>6</sup> Since the certificate is not notarized, the signature of [REDACTED] is illegible, there is no personal address or Ecuadorian identification given for [REDACTED], he is neither an employer<sup>7</sup> or trainer, and there is no specific description of the duties performed by the beneficiary or of the training he received in the restaurant of the Grand Hotel Loja, this certificate has no probative value under the regulation at 8 C.F.R. § 204.5 (1)(3)(ii).

On the next statement submitted, [REDACTED] stated on a faxed photocopy made July 1, 2005, that the beneficiary is residing in the “USA” since 1988 and attests to the beneficiary’s honesty. Since the certificate is not notarized, the signature of [REDACTED] is illegible, there is no personal address or Ecuadorian identification given for him, he is neither an employer or trainer, and there is no specific description of the duties performed by the beneficiary or of the training he received in the restaurant of the Grand Hotel Loja, this certificate has no probative value under the regulation at 8 C.F.R. § 204.5 (1)(3)(ii). No explanation was given to explain the probative value of this statement as the issue is the beneficiary’s presence and employment in Ecuador between September 1985 to September 1988, not afterwards.

On the next exhibit submitted, [REDACTED] stated on a faxed photocopy of an un-notarized, undated statement that he knew the beneficiary since 1985 to 1988 when the beneficiary then traveled to the United States and attests to the beneficiary’s honesty. [REDACTED] stated that the beneficiary worked as main chef of the Grand Hotel Loja. Since the certificate is not notarized, the signature of [REDACTED] is illegible, he is neither an employer or trainer, and there is no specific description of the duties performed by the beneficiary or of the training he received in the restaurant of the Grand Hotel Loja, this certificate has no probative value under the regulation at 8 C.F.R. § 204.5 (1)(3)(ii).

[REDACTED] stated (on a faxed photocopy of an un-notarized, undated statement) that he knew the beneficiary since 1985 to 1988 when the beneficiary traveled to the United States and attests to the beneficiary’s honesty [REDACTED] stated that the beneficiary worked as main chef of the Grand Hotel Loja.

<sup>5</sup> This and the other faxed statements mentioned in this discussion stated that the beneficiary specialized in “Typical, National and International food” without specificity to what those terms delineate. No menu was submitted from the Zarzas restaurant of the Grand Hotel Loja describing its meal offerings to describe what, for example, “typical food” means to describe.

<sup>6</sup> According to [REDACTED], as Main Chef the beneficiary was in charge of four people, two cooks and two “posilleros.” If the beneficiary was a chef supervisor and not a cook in the restaurant of the Grand Hotel Loja, then the certificate of Senor Jaramillo Celi is not evidence of the beneficiary’s experience as a specialty cook but as a supervising chef whose duties are to supervise individuals who cook and run the kitchen.

<sup>7</sup> Since the beneficiary commenced working at the hotel restaurant over 22 years ago proof is demanded that [REDACTED] was the beneficiary’s “employer.”

Since the certificate is not notarized, the signature of [REDACTED] is illegible, he is neither an employer or trainer, and there is no specific description of the duties performed by the beneficiary or of the training he received in the restaurant of the Grand Hotel Loja, this certificate has no probative value under the regulation at 8 C.F.R. § 204.5 (I)(3)(ii).

Counsel provides a partial faxed copy of what appears to be the second page of a legal instrument copied from the "Registry of Property" of an unidentified municipality or jurisdiction with illegible notary signatures. One of the signers of the instrument was the beneficiary. There is no date given when the instrument was made on the incomplete copy but ratification dates are given. Since the notarizations are obscured, (the notary signatures are illegible) and the document is not a writing from an employer or trainer, and there is no specific description of the duties performed by the beneficiary or of the training he received in the restaurant of the Grand Hotel Loja, this certificate has no probative value under the regulation at 8 C.F.R. § 204.5 (I)(3)(ii).

As stated in the pertinent regulation, 8 CFR § 204.5(I)(3)(ii), "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." Each of the above mentioned statements are deficient for the reasons stated above. The petitioner did not submit probative trainers or employer's affidavits, documents, letters, or pay stubs that would be independent, objective evidence of the beneficiary's experience. Instead, the petitioner produced repetitive and vague anecdotal statements that only recited the job title of main chef that the food prepared was typical, national or international, and each person, although 22 years had passed, knew to the month and year when the beneficiary started his job at the hotel and terminated it. The statements are not credible.

Further, there is no evidence of prior education or training before the Grand Hotel Loja work experience that would prepare the beneficiary to be the head or main chef of a hotel restaurant supervising other cooks and kitchen staff. The beneficiary's statements are not credible.

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 by the director, 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 Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it 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 evidence submitted on appeal.

#### Prior inconsistencies

According to the petition, the beneficiary arrived in the United States in August of 1990. In the labor certification the beneficiary represented that he has been employed by the petitioner as a specialty cook/chef from April 1992 to present. However, according to CIS records the petitioner under an assumed name and using a forged passport, not his own, attempted entry into the United States on July 19, 1996. He was detected by inspection officers and returned to Ecuador. There is no explanation given by petitioner or the beneficiary for this discrepancy in exit and entry dates or how he could be in Ecuador in 1996 and yet be also employed in the United States by the petitioner at the same time. Although requested the petitioner has not provided W-2 statements to verify the beneficiary's employment during this period.

There are many inconsistent statements in this case relating to the beneficiary's whereabouts on specific dates and the dates of his employment in the United States and in Ecuador. The evidence would indicate that the

beneficiary has made several un-inspected entrances and exits into and from the United States. What the beneficiary stated was his employment and occupations during the years do not coincide with substantiated evidence in the record of proceeding as mentioned above. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective 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). 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).

The evidence submitted does not demonstrate credibly that the beneficiary had the requisite two years of experience. 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.

**ORDER:** The motion to reopen is granted and the decision of the AAO dated June 14, 2005 is affirmed. The petition is denied.