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FILE: WAC-05-026-51175 Office: CALIFORNIA SERVICE CENTER Date: **MAR 15 2007**

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 must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition<sup>1</sup> 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 **The appeal will be dismissed.** The director's decision will be affirmed in part and withdrawn in part.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant cook (Mexican 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 beneficiary would not be employed in a permanent, full-time position, that the petitioner submitted a photocopy of the DOL certification, and that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two 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 May 16, 2005 denial, the issues in this case are whether or not the petitioner has demonstrated that the beneficiary will be employed in a permanent, full-time position and 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 regulation at 20 C.F.R. § 656.3 defines employment as permanent full-time work by an employee for an employer other than oneself.

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 2, 2001.

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>2</sup>. The relevant evidence in the record includes a letter from the petitioner dated June 10, 2005, an experience letter dated November 1, 2004 from Chin Chin, and copies of the beneficiary's paystubs for 1996 through 2000. The

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<sup>1</sup> This is the second immigrant petition the instant petitioner filed on behalf of the instant beneficiary. The previous petition (WAC-03-229-52731) was filed on August 6, 2003 and denied on May 13, 2004 by the California Service Center.

<sup>2</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).

record does not contain any other evidence relevant to the beneficiary's permanent, full-time position and qualifications.

The Form I-140 Immigrant Petition in the record answers "No" to both the questions "Is this a full-time position?" and "Is this a permanent position?" in Part 6. Basic information about the proposed employment. The record does not contain any evidence showing that the position offered to the beneficiary in the instant case is a permanent, full-time position. On appeal, counsel claims that this is a typographic error because her legal secretary inadvertently checked the wrong box. The approved labor certification indicates that the job offered is a full time position working 40 hours per week.<sup>3</sup> The petitioner also offered a full time wage on the Form I-140.<sup>4</sup> Therefore, it is established that the beneficiary will be employed in a permanent, full-time position. This portion of the director's decision will be withdrawn.

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 restaurant cook. In the instant case, item 14 describes the requirements of the proffered position as two 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 has been working for the petitioner as a Mexican cook since April 2000<sup>5</sup> and he worked forty hours a week as a cook for ██████████ in Brandwood, California from March 1996 to April 2000. He does not provide any additional information concerning his employment background 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) of 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.

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<sup>3</sup> See the Form ETA 750A, Item 10.

<sup>4</sup> In Part 6 of the Form I-140 the petitioner offered the beneficiary a wage of \$386.00 per week based on working 40 hours at the level of \$9.67 per hour.

<sup>5</sup> The beneficiary did not indicate how many hours per week he has been working for the petitioner on the Form ETA 750B. Therefore, it is not clear whether or not the beneficiary works as a full-time employee for the petitioner although the petitioner asserts in his letter dated June 10, 2005 that the beneficiary works as a full-time employee (40 hours a week).

With the petition, the petitioner submitted a letter from [REDACTED] General Manager of [REDACTED] "certify[ing] employment for [the beneficiary] during the years 1996 through 2000 (40 hours weekly), five days a week as a Mexican and American Cook." The record of proceeding also contains copies of the beneficiary's paystubs from [REDACTED] for 1996 through 2000. The paystubs may verify that the beneficiary worked as a full-time employee from 1996 to 2000 for [REDACTED], however, they cannot be accepted as primary evidence that the beneficiary had the requisite two years of experience as a restaurant cook or Mexican cook. The experience letter is on computer created letterhead of [REDACTED] instead of [REDACTED] and is vague in nature. The record does not contain any evidence showing that [REDACTED] are the same entity, or that [REDACTED] is the trade name or a part of [REDACTED]. On appeal counsel asserts that "due to a change of ownership the beneficiary couldn't obtain a written verification of to[sic] confirm his employment with the restaurant but instead submitted copies of his pay stubs to prove that he worked there during the years 1996 through 2000." Counsel does not explain when the change of ownership occurred, why the change of ownership made it impossible to obtain the verification of employment with that employer, and how the beneficiary obtained the experience letter submitted in the record.

*Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "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. at 591-592 also 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 has not submitted any independent objective evidence to resolve the inconsistencies on appeal. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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)).

Counsel's assertions on appeal cannot overcome grounds of the director's denial. The AAO thus affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience based on 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.

Beyond the director's decision and counsel's assertions on appeal, the AAO will discuss an issue whether or not the petitioner has demonstrated that it had the continuing ability to pay the proffered wage from the priority date. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *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 regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence

that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also 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 2, 2001. The proffered wage as stated on the Form ETA 750 is \$9.67 per hour (\$20,113.60 per year). On the Form ETA 750B signed on March 19, 2001, the beneficiary claimed to have worked for the petitioner since April 2000.

In the instant case, the petitioner did not submit any evidence to show that the petitioner paid the beneficiary any amount of compensation in the relevant years. Thus, the petitioner failed to establish its ability to pay the proffered wage through wages paid to the beneficiary from 2001 onwards.

The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2000 through 2002. According to the tax returns in the record, the petitioner is structured as an S corporation, and its fiscal year is based on a calendar year. Since the priority date in the instant is April 2, 2001, the 2000 tax return is not necessarily dispositive. The petitioner's tax returns for 2001 and 2002 demonstrate that the petitioner had a net income<sup>6</sup> of \$14,586 in 2001 and \$37,332 in 2002. Therefore, for the year 2001, the petitioner did not have sufficient net income to pay the proffered wage that year, but the petitioner's net income in 2002 could establish its ability to pay the proffered wage that year. The tax returns also demonstrate that the petitioner's net current assets<sup>7</sup> were \$38,028 during 2001 and \$75,674 during 2002.

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<sup>6</sup> Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on line 23 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

<sup>7</sup> Net current assets are the difference between the petitioner's current assets and current liabilities. According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-

Therefore, the petitioner had sufficient net current assets to pay the beneficiary the proffered wage in 2001 and 2002.

However, the record indicates that the instant petition was filed on November 5, 2004, and therefore, the record before the director closed on November 5, 2004 with the receipt by the director of the petitioner's submission with the initial filing. The record of proceeding contains the petitioner's tax returns for 2001 and 2002. When the record closed before the director, the petitioner's federal tax return for 2003 should have been available. However, the petitioner did not submit its 2003 tax return, nor did counsel explain why the 2003 tax return was not submitted. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner did not submit its 2003 tax return or any explanation for not submitting. Therefore, the petitioner failed to establish its ability to pay the proffered wage in 2003, and further failed to meet the requirements that "the petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence" as set forth by the regulation at 8 C.F.R. § 204.5(g)(2).

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.

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term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18.