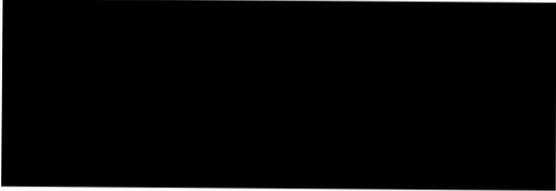




U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 01 081 51839 Office: VERMONT SERVICE CENTER Date: **NOV 29 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 Director, Vermont Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reopen. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is a country club. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. 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.

The record shows that the instant motion was properly and timely filed and is accompanied by new evidence. The procedural history of this case is documented in 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 decision of denial the sole issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified pursuant to the terms of the approved Form ETA 750 labor certification.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, "*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." The instant motion qualifies as a motion to reopen because counsel provided new evidence.

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 8 C.F.R. § 204.5(l)(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 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 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.<sup>1</sup> *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on August 23, 2000. The Form ETA 750 states that the position requires two years of experience in the job offered.

The Form I-140 petition in this matter was submitted on January 16, 2001. On the petition, the petitioner stated that it was established during January of 1998. In the space reserved for the petitioner to report the number of workers it employs "N/A" was entered.<sup>2</sup> Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Chevy Chase, Maryland.

On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner 40 hours per week as a cook since June 2000 and continuing until July 7, 2000, the day he signed that form. The beneficiary also claimed to have been employed 40 hours per week as a cook for the Saveur Restaurant in Washington, D.C. from December 1998 to June 2000.

The Form ETA 750B instructs the beneficiary to,

List all jobs held during the last three (3) years [and] any other jobs related to the occupation for which the alien is seeking certification . . . .

The beneficiary, however, listed no other employment.

The AAO maintains plenary power to review each appeal and motion on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal or in a motion.<sup>3</sup>

With the petition counsel submitted a notarized form employment verification letter dated January 8, 2001. That letter states that the beneficiary worked as a cook at the Saveur Restaurant in Washington, D.C. from

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<sup>1</sup> To determine whether a beneficiary is eligible for a third preference immigrant visa, Citizenship and Immigration Services (CIS) must ascertain whether the alien is in fact qualified for the certified job. 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 Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

<sup>2</sup> Why this information was deemed unavailable or inapplicable is unknown to this office.

<sup>3</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

December 1998 to June 2000 for \$10 per hour. The name of the person verifying the beneficiary's employment is not printed on that form and the signature is illegible. The letter states that the affiant is able to verify the beneficiary's employment experience, "Because he worked for me." The letter does not otherwise identify the affiant's position at Saveur.

On August 2, 2001 the service center issued a request for evidence in this matter. That request notes that the January 8, 2001 employment verification letter establishes only 19 months of experience as a cook. The petitioner was instructed to provide evidence to demonstrate that the beneficiary had the requisite two years of qualifying employment experience before the August 23, 2000 priority date.

In response, counsel submitted two additional notarized form employment verification letters.

One of those additional notarized form employment verification letters is dated August 13, 2001. This employment verification letter is essentially identical to the January 8, 2001 employment verification letter, verifying the beneficiary's employment for the Saveur Restaurant, except that it has a different signature. Again, the job title of the affiant is not stated, the affiant's name is not printed on the form, and the signature is illegible. That letter confirms that the beneficiary was paid \$10 per hour.

The other additional notarized form employment verification letter is dated August 14, 2001. On this form the affiant stated that the beneficiary worked from May 11, 2000 to "Present" as a cook at the Columbia Country Club. The letter states that the affiant is able to verify the beneficiary's employment experience, "Because he worked for me." The letter does not otherwise identify the affiant's position at the Columbia Country Club. Although the affiant's name is not printed on the form and his signature is illegible, reference to a Form G-28 Notice of Entry of Appearance in the record appears to show that the signature is that of [REDACTED] [REDACTED] position at the Columbia Country Club is unknown to this office.

The director denied the petition on November 14, 2001. In his decision the director noted that the evidence submitted does not show that the beneficiary had the requisite two years of experience in the job offered before the priority date as required by the approved labor certification.

On appeal, counsel submitted a third notarized form employment verification letter verifying the beneficiary's employment with the Saveur Restaurant. This third letter is dated November 26, 2001 and appears to be attested to by the same person, unidentified by name or position at Saveur, who signed the August 13, 2001 employment verification letter. However, the letter differs from the other two Saveur employment verification letters in some important respects.

Whereas the first two sworn letters stated that the beneficiary was paid \$10 per hour, this third version says that he was paid \$10.50 per hour. More importantly, the first two Saveur employment verification letters, purportedly sworn before a notary, stated that the beneficiary worked for Saveur from December 1998 to June 2000. As was noted above, on the Form ETA 750B the beneficiary stated, also under penalty of perjury, that he worked for Saveur from December 1998 to June 2000 and then began working for the petitioner full-time.

The third Saveur employment verification letter, also purportedly attested to under oath, states that he worked for Saveur from December 1998 to December 2000. This sworn statement directly contradicts the other three sworn statements. Counsel submitted no explanation of this glaring discrepancy.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

This office dismissed the appeal on July 30, 2002, noting that the evidence, even if found credible, does not demonstrate that the beneficiary has the requisite two years of experience in the job offered before the August 23, 2000 priority date.<sup>4</sup> This office did not then comment on the contradictions between various employment verification letters proffered.

With the instant motion counsel provided yet another employment verification letter. This employment verification letter, produced on the same form as all of the previous employment verification letters, states that the beneficiary worked as a cook for Laredo Grill Restaurant in Gaithersburg, Maryland from October 10, 1996 to November 1998. Once again, the job title of the affiant is not stated, the affiant's name is not printed on the form, and the signature is illegible. The letter states that the affiant is able to verify the beneficiary's employment experience, "Because he worked for me."

The various versions of the beneficiary's employment history that have been presented in support of this petition suggest that, rather than faithfully reporting his employment history, the beneficiary has been successively revising it in an attempt to qualify for the proffered position. The contradictions in the evidence render all of the beneficiary's employment verification letters unreliable, and they cannot reliably show that the beneficiary is qualified for the proffered position.

A petitioner raises serious questions of credibility when asserting a new claim to eligibility on appeal or in a motion to reopen. The petitioner provided no explanation for his failure to advance his claim of two full years of employment for Saveur on the Form ETA Application for Labor Certification, in the evidence submitted with the initial petition, or in response to the request for evidence. Further, the claim of having worked for Saveur from December 1998 to December 2000 apparently conflicts with his assertion, on the Form ETA 750B, and supported by the employment verification letter from the petitioner, that he began working full-time for the petitioner during June of 2000.

Further, the petitioner provided no explanation for his failure to advance his claim of employment for the Laredo Grill Restaurant on the Form ETA Application for Labor Certification, in the evidence submitted with the initial petition, in response to the request for evidence, or on appeal.

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<sup>4</sup> That is, the original version of the beneficiary's claim of employment with Saveur encompasses 18 months before the priority date, and his claim of qualifying employment for the petitioner encompasses only three months and a few days, for a total of less than 22 months before the priority date, an amount insufficient to qualify the beneficiary for the proffered position.

The beneficiary's revised claim of employment for Saveur encompasses 24 months, but approximately four of those months are after the priority date and therefore non-qualifying. The difference of somewhat less than 20 months, combined with the three months and a few days he allegedly worked for the petitioner prior to the priority date, equals, again, less than the requisite 24 months of qualifying experience.

The regulation at 8 CFR § 204.5(1)(3)(ii) does not encourage petitioners to hold evidence in abeyance and submit it on appeal or on post-appeal motion. Rather, it clearly states that evidence of the beneficiary's experience **must accompany** the petition.

In this case, the experience claimed when the petition was submitted does not qualify the beneficiary for the proffered position. In response to that finding, counsel has submitted evidence of other, previous employment, never before mentioned in conjunction with this application. That new evidence is unreliable.

Further, even if the employment verification letter from [REDACTED] and all of the other employment verification letters in the record, including the mutually contradictory ones, could somehow be accorded credibility, they do not satisfy the regulatory requirements relevant to employment verification letters. As was noted above, 8 C.F.R. § 204.5(1)(3)(ii)(A) requires that employment verification letters submitted in support of a beneficiary's employment history identify the affiant by both name and job title. None of the employment verification letters provided in this case identify the affiants by either name or job title. For this additional reason the employment verification letters submitted may not be used to demonstrate the beneficiary's qualification for the proffered position.

The petitioner has not demonstrated that the beneficiary is qualified for the proffered position pursuant to the terms of the approved Form ETA 750 labor certification. The petition was correctly denied on that basis, which basis the petitioner has not overcome on appeal or on motion. 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 and the petition may not be approved.

**ORDER:** The motion is granted. The AAO's decision of July 30, 2002 is affirmed. The petition is denied.